

Stewart v City of Mount Vernon

2022 NY Slip Op 34817(U)

June 7, 2022

Supreme Court, Westchester County

Docket Number: Index No. 55183/2022

Judge: David S. Zuckerman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

DISPO Seq # 1 and # 2 Motions and Case

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
TIFFANY STEWART,

Plaintiff,

-against -

CITY OF MOUNT VERNON,

Defendant.

-----X
ZUCKERMAN, J.

DECISION/ORDER

Index No.
55183/2022

Motion Date:
05/11/2022

The following papers numbered 1 to 27 in NYSCEF were considered in connection with Defendant's motion to dismiss for Plaintiff's failure to timely file a Notice of Claim and failure to state a cause of action. Plaintiff cross-moves to have her Notice of Claim deemed timely filed.

FACTS

As set forth in the Amended Complaint, on April 21, 2018, Plaintiff passed the written exam for the position of City of Mount Vernon firefighter. Plaintiff, a woman, alleges that she, and other women similarly situated, were passed over for the

firefighter positions which were given to men "as a result of their gender."

On January 7, 2022, Plaintiff commenced the action by filing a Summons and Complaint. On April 26, 2022, Plaintiff filed an Amended Complaint. In it, Plaintiff sets forth causes of action for violation of New York State Executive Law Sections 291 and 296. She seeks various forms of relief. On April 27, 2022, Plaintiff filed a Notice of Claim.

CONTENTIONS OF THE PARTIES

Defendant moves pre-Answer for an Order, pursuant to CPLR 3211(a)(7), dismissing the action. Defendant asserts that the Complaint must be dismissed because Plaintiff failed to timely serve a Notice of Claim on the City of Mount Vernon. In the alternative, Defendant argues that the Complaint fails to state a cause of action because it does not give "fair notice" of the nature of Plaintiff's claims.

Plaintiff responds that she was not required to file a Notice of Claim because her action seeks to vindicate a public interest. She further argues that Defendant was aware of her claim and suffered no prejudice from her failure to timely file the Notice. In the alternative, Plaintiff requests that the court deem her

Notice of Claim timely. Finally, Plaintiff asserts that, as a result of her subsequently filing an Amended Complaint, Defendant's motion to dismiss for failure to state a cause of action is moot.

In Reply, Defendant asserts that it was unaware of Plaintiff's claim and did not acquire actual knowledge of the essential facts until the action was commenced. Thus, the Amended Complaint must be dismissed for Plaintiff's failure to timely serve a Notice of Claim. Defendant adds that Plaintiff's Amended Complaint should not be considered because it was filed without leave of the court and, in any event, must be dismissed because it was not preceded by service of a Notice of Claim.

DISCUSSION

General Municipal Law §50-e(1) provides

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

Further, Mount Vernon City Charter §265 provides

The City shall not be liable in a civil action for damages or injuries to person or property...arising at law or equity, alleged to have been caused or sustained in whole or in part, by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on th part of the city or any of its agents, officers, or employees, unless a written notice of claim shall have been made and served in compliance with Section 50-e of the General Municipal Law.

While General Municipal Law §50-e(1) addresses tort actions in general, Mount Vernon City Charter §265 is much broader. It requires service of a notice of claim in any "civil action for damages or injuries to person or property...arising at law or equity." Pursuant to *Boyle v Kelly*, 42 NY2d 88 (1977), a specific statute may impose a higher notice of claim requirement than General Municipal Law §50-e(1). Thus, the broader Notice of Claim requirements in Mount Vernon City Charter §265 apply to this action. Since Plaintiff seeks both monetary and equitable relief, the clear wording of Mount Vernon City Charter §265 mandates that, as a prerequisite to commencing this action, Plaintiff must serve a Notice of Claim on Defendant.

Defendant correctly argues that the Mount Vernon Charter provides that service of a Notice of Claim is a condition precedent. Thus, this court simply has no discretion to consider the Amended Complaint if Plaintiff did not serve a Notice of Claim prior to commencing the action. *Seifullah v City of New York*, 161

AD3d 1206 (2nd Dept. 2018); *Shahid v City of New York*, 50 AD3d 770 (2nd Dept 2008); *Rodriguez v City of New York*, 193 AD3d 603 (1st Dept 2021); *Farrell v City of Kingston*, 156 AD3d 1269 (3rd Dept 2017); *Mills v Monroe County*, 89 AD2d 776 (4th Dept 1982), *aff'd* 59 NY2d 307 (1983).

Plaintiff does not contest that she failed to timely serve a Notice of Claim. Rather, she argues that, despite the clear statutory mandate, a Notice of Claim is not required here. More specifically, Plaintiff asserts that, even under the Mount Vernon Charter, "a notice of claim may (sic) is not required where the claims are to vindicate a public wrong" (Plaintiff's Affirmation in Opposition, p. 8). In support, she cites two cases, both of which are inapposite: *Robertson v Town of Carmel*, 276 AD2d 543 [2d Dept 2000] and *Stanton v Town of Southold*, 266 AD2d 277 [2d Dept 1999]. Both decisions address the applicability of General Municipal Law §50-e(1). Since Plaintiff's action triggers Mount Vernon City Charter §265, *Robertson* and *Stanton* are inapplicable. Specifically on point is *Picciano v Nassau County Civil Service Com'n.*, 290 AD2d 164 [2d Dept 2001]. In *Picciano*, the Second Department held that, in similar circumstances, the plaintiff was not seeking to vindicate a public interest. Thus, the plaintiff was required to serve a notice of claim. Also applicable is *McGovern v Mount Pleasant Central School District*, 114 AD3d 795 [2d Dept 2014],

aff'd 25 NY3d 1051 [2015]. In *McGovern*, the Court of Appeals affirmed the Second Department's dismissal of an action due to the petitioner's failure to serve a notice of claim. The Second Department pointedly held that, while notice of claim requirements might not apply in cases where only equitable relief was sought, where (as here) petitioner sought equitable and monetary relief, the notice must be served. As here, the broader requirements of the local Notice of Claim statute applied to actions which might be exempted under General Municipal Law §50-e(1) (*Matter of Fotopoulos v Board of Fire Commrs. Of Hicksville Fire Dist.*, 161 AD3d 733 [2d Dept 2018]). Thus, Plaintiff was required to serve a Notice of Claim.

Plaintiff next argues that she was not required to serve a Notice of Claim because Defendant was aware of the facts of the claim and was not prejudiced by the delay. She posits that, between January and February, 2022, Defendant learned of the claim from "Plaintiff's EEOC right-sue-letter" (sic) (Plaintiff's Affirmation in Opposition, p. 8). That document, entitled U.S. Equal Employment Opportunity Commission Dismissal and Notice of Rights, indicates that "the EEOC is unable to conclude that the information obtained establishes violations of the statutes." Thus, on its face, the document did not provide Defendant with actual notice of the claim. In addition, Plaintiff provides no

proof that Defendant ever received that document. In stark contrast, Defendant, in its Affirmation in Support, specifically denies receipt. Plaintiff does not contest this assertion.

Plaintiff also asserts that Defendant was aware of her claim based upon a July 2, 2019, U.S. Equal Employment Opportunity Commission Determination regarding a different "charging party." Defendant counters that this document could not have made it aware of the instant claim because it did not involve Plaintiff at all. "What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (*Matter of Sica v Bd. of Educ. of City of New York*, 226 AD2d 542, 543, 640 [2d Dept 1996]). The cited document, referencing an altogether different claimant, did not provide Defendant with actual knowledge of Plaintiff's claim.

In sum, pursuant to Mount Vernon City Charter §265, Plaintiff was required to serve a Notice of Claim prior to commencing this action. Plaintiff acknowledges failing to do. Moreover, Plaintiff "failed to submit evidence that (Defendant) had actual knowledge of the claim..." (*Id.*). Thus, Plaintiff's failure to serve Defendant with a Notice of Claim prior to commencing this action cannot be

excused.

In the alternative, Plaintiff seeks an Order deeming her Notice of Claim timely. "In a proceeding for leave to serve and file a late notice of claim, the (movant) must establish (1) that the municipality acquired actual knowledge of the essential facts of the claim within the statutory 90-day period or a reasonable time thereafter, (2) a reasonable excuse for the delay, and (3) that the municipality's defense on the merits was not substantially prejudiced by the delay (*Turner v Town of Oyster Bay*, 268 AD2d 526, 527 [2d Dept 2000]). As discussed above, Plaintiff has not established that Defendant acquired actual knowledge of the essential facts of the claim prior to commencing the action. She does not offer any excuse for the delay. Her unsupported assertion that "the Covid pandemic" prevented her from filing a Notice of Claim is without merit. She certainly was able to file her Summons and Complaint during the same pandemic. In fact, Plaintiff did not file a Notice of Claim until Defendant moved to dismiss the action on that ground. Plaintiff next cites her "serious financial and emotional injuries, for which she has not recovered" (Affirmation in Opposition, p. 10). Plaintiff does not, however, provide any support for this assertion. Rather Plaintiff makes this unsupported assertion in her attorney's affirmation. Thus, it is insufficient to establish a reasonable excuse for the delay.

Moreover, even though Plaintiff alleges inability to file a Notice of Claim because "she has not recovered," she clearly was able to file a Summons and Compliant prior to recovery. Finally, Plaintiff asserts that she "is not an infant or mentally challenged, but the defendants (sic) suffer no substantial prejudice as they both (sic) received her EEOC claim in January 2020" (*Id.*, at 11). Assuming Plaintiff is referencing "Plaintiff's EEOC right-sue-letter" (*Id.*, at 8), as discussed above, this document provides that "the EEOC is unable to conclude that the information obtained establishes violations of the statutes." It did not provide Defendant with actual notice of Plaintiff's claim. In any event, Plaintiff provides no proof that Defendant ever received that document. Defendant, in its Affirmation in Support, specifically denies receipt and Plaintiff does not counter this assertion. In sum, Plaintiff has not established any of the factors required to merit an Order deeming her Notice of Claim timely served. Therefore, Plaintiff's cross-motion to deem her Notice of Claim timely must be denied.

Based on the foregoing, it is hereby

ORDERED, that Defendant's motion to dismiss the Complaint for Plaintiff's failure to timely serve a Notice of Claim is granted, and it is further


ORDERED, that Plaintiff's cross-motion to have her Notice of Claim deemed timely is denied, and it is further

ORDERED, that Defendant's motion to dismiss the Complaint for failure to state a cause of action is denied as moot, and it is further

ORDERED, that the Amended Complaint is dismissed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 7, 2022



HON. DAVID S. ZUCKERMAN, A.J.S.C.

TO: All parties via NYSCEF