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18-P-565

Appeals Court

DANEIL SARROUF & another¹ vs. CITY OF BOSTON & another.²

No. 18-P-565. January 24, 2019.

Notice, Action alleging injury caused by defect in public way, Timeliness. Way, Public: defect. Gas Company. Due Process of Law, Public utilities. Public Utilities, Negligence. Negligence, Public utilities. Practice, Civil, Directed verdict.

While walking on a public way in Boston, plaintiff Daneil Sarrouf stepped into an uneven depression in the road and suffered serious injury to her left foot. Sarrouf³ notified the city of Boston (city) of her claim within thirty days, as required by G. L. c. 84, §§ 15 & 18, the defective way statute. Approximately eleven weeks later, the city sent a letter to Sarrouf denying liability and implicating the Boston Gas Company (Boston Gas)⁴ as the responsible party. The following day Sarrouf sent notice to Boston Gas, and she later filed a complaint in the Superior Court against both the city and Boston Gas. Boston Gas moved to dismiss for untimely presentment of notice, the motion was denied, and the case later proceeded to

¹ Thomas K. Sarrouf.

² Boston Gas Company, doing business as National Grid USA.

³ We refer to the injured plaintiff as "Sarrouf" and to the "plaintiffs" collectively, when relevant.

⁴ The city's letter named "National Grid" as the responsible party, and the original complaint named National Grid USA as the defendant. The docket was later amended to reflect Boston Gas as the true party in interest.

trial. At the close of the plaintiffs' case, Boston Gas moved for a directed verdict based on late notice. Finding it undisputed that Sarrouf did not notify Boston Gas of her injuries within thirty days, and that the plaintiffs' evidence showed that Boston Gas's identity as a responsible party was readily ascertainable, the trial judge allowed the motion.⁵ We affirm, but on the ground that the statute does not excuse late notice in these circumstances. See Foley v. Lowell Sun Publ. Co., 404 Mass. 9, 10-11 (1989).

The defective way statute provides the exclusive remedy for personal injuries arising from defects in public ways, whether caused by the Commonwealth, its subdivisions, or any "person by law obliged to repair" the way. G. L. c. 84, § 15. See Ram v. Charlton, 409 Mass. 481, 485, cert. denied, 502 U.S. 822 (1991); Filepp v. Boston Gas Co., 85 Mass. App. Ct. 901, 901-902 (2014). The injured party bears the burden of notifying the responsible party within thirty days of the injury. See G. L. c. 84, § 18; Filepp, supra at 902. The notice period applies strictly, and timely notice is both a "condition precedent" to bringing suit and "an essential ingredient indispensable to the existence of the cause of action." Paddock v. Brookline, 347 Mass. 230, 231-232 (1964).

On appeal, the plaintiffs do not dispute that Sarrouf failed to notify Boston Gas within thirty days. Rather, they argue that she should be excused from the thirty-day notice requirement because it was "virtually impossible" for her to ascertain that Boston Gas was the responsible party. The plaintiffs contend that an exception to the thirty-day notice requirement arises as a matter of due process because it is unfair to require her to give notice to an entity that she cannot readily identify. The motion judge denied Boston Gas's motion to dismiss for late notice on this very ground. Based on the pleadings, the motion judge concluded that the plaintiffs "engaged in a diligent, but unsuccessful search of city records" and were unable to identify Boston Gas as a potentially liable party within thirty days of the injury. Noting that "[o]ur cases hold that due process 'does not demand the impossible,'" Matter of Jones, 379 Mass. 826, 836 (1980), quoting Young v. Tudor, 323 Mass. 508, 514 (1948), the motion judge excused the plaintiffs' failure to give Boston Gas timely notice. However, at the close of the plaintiffs' evidence, the trial judge

⁵ The jury subsequently reached a verdict in favor of the city. The plaintiff does not challenge the jury's verdict on appeal.

allowed Boston Gas's motion for a directed verdict, concluding that the evidence demonstrated that Boston Gas's identity as a responsible party was readily ascertainable.

On appeal, as did the motion judge, the plaintiffs rely on a line of cases concerning the notice that persons with potential interests in property must be given before a judge may dispose of that property in the settlement of a trust or an estate. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-318 (1950); Matter of Jones, supra at 835-836; Young, supra. Specifically, these cases concern the constitutional adequacy of notice by publication. They generally hold that notice by publication is insufficient when the person's name and whereabouts are known or easily determined, but that "[d]ue process permits notice by publication for '[t]hose beneficiaries . . . whose interests or whereabouts could not with due diligence be ascertained.'" Matter of Jones, supra at 836, quoting Mullane, supra at 317. These cases do not stand for the proposition that the plaintiffs' due process rights are infringed by requiring them to serve timely notice on defendants who are not readily identifiable. The cases thus are inapplicable in the context of the statutory notice requirement. See Ram, 409 Mass. at 490 (thirty-day notice requirement does not deprive plaintiff of property without due process of law).

We decline to read into the statute an exception to timely notice when the responsible party is not reasonably ascertainable. The statute excuses late notice only if "by reason of physical or mental incapacity it is impossible for the person injured to give the notice within the time required." G. L. c. 84, § 19. The inclusion of one exception implies that the Legislature intentionally refrained from creating additional exceptions. See Harborview Residents' Comm., Inc. v. Quincy Hous. Auth., 368 Mass. 425, 432 (1975) ("a statutory expression of one thing is an implied exclusion of other things omitted from the statute").

Because the evidence at trial undisputedly established that Sarrouf did not provide timely notice to Boston Gas, she failed to prove an essential element of her cause of action. See Paddock, 347 Mass. at 231-232; DiNitto v. Pepperell, 77 Mass. App. Ct. 247, 252 (2010). A directed verdict for Boston Gas was required. We recognize that our strict interpretation of the statute may lead to harsh results, but "if there are practical reasons why the time should be made longer the appropriate body

to consider and weigh them is the Legislature." Filepp, 85
Mass. App. Ct. at 902.

Judgment affirmed.

Camille F. Sarrouf, Jr. (Alexander O. Rovzar also present)
for the plaintiffs.

Lynette Paczkowski for Boston Gas Company.

Nieve Anjomi, Assistant Corporation Counsel, for city of
Boston.