

ARAMARK Corp., <i>et al.</i>	*	IN THE
Plaintiffs	*	CIRCUIT COURT
vs.	*	FOR
CSX Transportation, Inc., <i>et al.</i>	*	BALTIMORE CITY
Defendants	*	Case No.: 24-C-04-005368
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Lee Harper	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
CSX Transportation, Inc., <i>et al.</i>	*	BALTIMORE CITY
Defendants	*	Case No.: 24-C-04-005751
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**MEMORANDUM OPINION**

These are two of several lawsuits that arise out of the derailment of CSX Train L41216 on July 18, 2001, in Baltimore City. ARAMARK and Vertis, Inc. filed its Complaint on July 2, 2004 and Leri Harper (“Harper”) filed her Complaint on July 21, 2004. In both cases the defendants are CSX and the Mayor & City of Baltimore. On August 19, 2004, the Mayor & City Council of Baltimore (“the City”) filed a Motion to Dismiss the Complaint of ARAMARK arguing that ARAMARK failed to give timely notice of their claims as required by the Local Government Tort Claims Act. On September 3, 2004, ARAMARK filed a Motion for Waiver of Notice Requirement and the City filed an Opposition. On September 1, 2004, the City filed a Motion to Dismiss Harper’s Complaint arguing that she, as did ARAMARK, failed to give timely notice. The City argues that she failed to give timely

notice as required by the Local Government Tort Claims Act, and on the additional grounds that her claim was not filed within the applicable statute of limitations. A hearing was held on both motions on November 1, 2004.

For the reasons discussed below, the Court will grant the City's Motions to Dismiss and deny ARAMARK's Motion for Waiver.

### **DISCUSSION**

The Local Government Tort Claims Act ("the Act") provides "Except as provided in subsection (c) of this section, an action for unliquidated damages *may not* be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury." Md. Code. Ann., Cts. & Jud. Proc., § 5-304(a)<sup>1</sup> (emphasis added). The City argues that these plaintiffs' claims against the City must be dismissed because they (1) failed to give notice required by the statute; (2) failed to substantially comply with notice requirement and (3) failed to show good cause for non-compliance.

Notice must be made in person or by certified mail directed to the City Solicitor or the corporate authorities for the City. *Id.* at § 5-304(b)(1). The Act requires that notice be in writing and state the time, place, and cause of the injury. *Id.* at § 5-304(b)(3). "The notice requirements are intended to apprise a local government of its possible liability at a time when it could conduct its own investigation...sufficient to ascertain the character and extent of the injury and its responsibility in connection with it." *Luy v. Baltimore Police Dept.*, 326 F.Supp.2d 682, 693 (D. Md. July 16, 2004)(quoting *Faulk v. Ewing*, 371 Md. 284

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<sup>1</sup> All statutory references are to the MD Code Annotated, Courts & Judicial Proceedings unless otherwise indicated.

(2002))(internal quotations omitted). Timely filing of the notice of a claim against a local government is a “condition precedent” to bringing suit against a local government. *See Ennis v. Crenca*, 322 Md. 285, 292 (1991). Along with a timely filing of notice, compliance with the Act should be pled as a substantive element of the cause of action. *See Madore v. Baltimore County*, 34 Md. App. 340, 342 (1976); *see also Luy*, 326 F.Supp.2d at 693 (The Court stated that “the filing of this notice is a condition precedent to the plaintiff’s underlying action for damages, and should be alleged as a substantive element in the complaint in order to state a claim under Maryland law.”).

*Failure to Give Notice.* ARAMARK and Vertis collectively filed a complaint on July 2, 2004, which was almost three years, and substantially more than 180 days after the alleged injury. Not surprisingly the complaint does not allege that ARAMARK or Vertis had given any *prior notice* of its negligence claim to the City or any agent of the City. Harper filed her complaint on July 21, 2004, which was likewise three years and more than 180 days after the alleged injury. Like ARAMARK she does not allege that she had given any *prior notice* of her negligence claim to the City or any agent of the City. Therefore, it is clear from the face of the complaints that neither ARAMARK, Vertis, or Harper gave the City notice as required by the Act.

*Substantial Compliance.* Both ARAMARK and Harper failed to provide any notice at all. Vertis provided notice which was filed 18 days after the 180-day time period proscribed by the Act. Thus the Court must consider if Vertis substantially complied with the notice requirement. Substantial compliance requires proof of “some effort to provide the requisite notice,” and notice must “in fact, . . . be *provided*, albeit not in strict compliance with the statutory provision.” *Moore v. Norouzi*, 371 Md. 154, 171 (2002)(citing *Loewinger*

*v. Prince George's County*, 266 Md. 316, 318 (1972))(emphasis added). See also *Blundon v. Taylor*, 364 MD. 1, 22 (2001)(An outright failure to comply is not substantial compliance). “Substantial compliance is such communication that provides the State *requisite and timely notice* of facts and circumstances giving rise to the claim.” *Id.* at 172 (citing *Condon v. State of Maryland- University of Maryland*, 332 Md. 481, 496 (1993)(quoting *Conaway v. State*, 90 Md.App. 234, 246)(internal quotations omitted))(emphasis added). In *Norouzi*, the Court found a claimant’s notice to the county’s third-party administrator substantially complied with the Act. Vertis’ notice 18 days after the 180 day time period had passed was not timely, and therefore not substantial compliance. See *Nationwide Mutual Fire Insurance Co., v Washington Suburban Sanitary Commission*, 170 F. Supp. 2d 570, 572 (D. Md. 2001)(plaintiff did not substantially comply by giving notice 14 days after the time had passed)

*Good Cause for Non-Compliance.* Even if a party has not complied with the notice requirement, the action must not be dismissed if the party can show good cause for failing to comply.

(c) Notwithstanding the other provisions of this section, unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given.

§ 5-304(c). ARAMARK and Vertis state in their complaint, “[i]n the event that Baltimore raises any issue of notice, Plaintiffs hereby move for waiver of notice requirements for good cause under Section 5-304(c) as Baltimore cannot affirmatively show that its defense has been prejudiced.” However, before the court considers if the defendant was prejudiced by failure to give notice, the plaintiffs must demonstrate “to the trial court good cause for their

failure to abide by the notice requirement.” *Hargrove v. Mayor and City Council of Baltimore*, 146 Md. App. 457, 462 (2002).

“The question of whether good cause for waiver exists is clearly within the discretion of the trial judge.” *Heron v. Strader*, 361 Md. 258, 270 (2000). “The test for whether good cause exists . . . is ‘whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.’” *Id.* at 271 (quoting *Westfarm Assoc. v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 676-66 (4<sup>th</sup> Cir. 1995))(internal citations omitted). In *Heron* the Court held that it was not an abuse of discretion for the trial court to find that the pendency of a criminal case *was not* good cause for the late filing of the civil case pursuant to the Act. 361 Md. at 271. In sum, the court’s discretion is broad and will not be disturbed absent a showing of abuse. *Id.* (citing *Westfarm Assoc.*, 66 F.3d at 676).

ARAMARK and Vertis argue that it was prudent for them to wait until the completion of the state and federal investigations to file suit. This argument fails. First, as noted earlier Vertis attempted to provide notice almost two and a half years ago. Second, other claimants gave the City notice within the required time periods. Third, there is nothing to indicate the state and federal investigations were concluded before these plaintiffs filed the complaint within the time required by the statute of limitations. This Court finds that not to be a good cause for the untimely filing of notice pursuant to the Act. This Court concludes that ARAMARK and Vertis have not shown good cause for their failure to comply with the notice requirement.

Harper argues that because she is not a Maryland resident and “is unschooled in litigation matters,” she did not “realize” that she could bring suit until after the 180-day time

period when she finally realized that she was injured. That argument is unpersuasive. Harper had six months after the train derailment to consult with physicians and attorneys and “realize” that she may be able to bring suit in Maryland. There are no allegations in the Complaint that show why it would have taken Harper three years to “realize” that she had a claim against the City. Ignorance of the law is no excuse for failing to comply with the Act. *Heron*, 361 Md. at 272 n.13 (“The Court of Special Appeals has specifically rejected ignorance of the law requiring notice as constituting good cause.”). Therefore, this Court concludes that Harper has not shown good cause for waiver of the notice requirement.

#### *Statute of Limitations*

The City also argues that Harper’s claim is barred by the statute of limitations. §5-101 provides that “[a] civil action at law shall be filed within three years from the date it accrues...” The train derailment occurred on July 18, 2001, thus Harper had until July 18, 2004, to bring suit. Harper argues that she had a longer time period to file suit because she did not realize that she was injured until after July 18, 2001, and that the City may not raise the issue of statute of limitations in a motion to dismiss.

Her arguments fail. First, there is no prohibition from raising the statute of limitations in a motion to dismiss. Rule 2-322(b) makes clear that the grounds for a motion to dismiss include “failure to state a claim upon which relief can be granted.” Thus if the facts pleaded in the complaint show that the claim is barred by the statute of limitations, the issue may be raised in a motion to dismiss. Plaintiff alleges in her complaint that the fire occurred “on or about July 18, 2001.” Second, although plaintiff is correct that Maryland follows the discovery rule, there are no allegations in plaintiff’s complaint which explain why plaintiff did not know of the alleged facts to support her claim at the time of the fire. *Lumsden v.*

*Design Tech Builders, Inc.*, 358 Md. 435, 445 (2000), provides

A claimant reasonably should know of a wrong if the claimant has "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued."

*Id.* at 445 (citations omitted). Because the Complaint against the City is barred by failure to give notice as required by the Act, there is no reason to give Harper an opportunity to amend her complaint to allege facts that may show that the discovery rule should apply.

### **Conclusion**

For the foregoing reasons, the Court will grant the City's Motions to Dismiss and deny ARAMARK and Vertis' Motion for Waiver of Notice Under the Local Government Tort Claims Act.

Date November 12, 2004

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JUDGE EVELYN OMEGA CANNON

cc: David Skeen, Attorney for Plaintiff  
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Richard Magid, Attorney for Defendant

CityMotiontoDismiss.Aramark and Harper.Final.wpd