

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25278  
O/kmg

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Submitted - November 4, 2009

STEVEN W. FISHER, J.P.  
FRED T. SANTUCCI  
THOMAS A. DICKERSON  
CHERYL E. CHAMBERS  
PLUMMER E. LOTT, JJ.

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2009-00111

DECISION & ORDER

In the Matter of Bradford Hill, respondent,  
v New York City Transit Authority, appellant.

(Index No. 4054/08)

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Wallace D. Gossett, Brooklyn, N.Y. (Anita Isola of counsel), for appellant.

Ronald J. Katter (Michael I. Josephs, Forest Hills, N.Y., of counsel), for respondent.

In a proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim, the New York City Transit Authority appeals from an order of the Supreme Court, Queens County (Lane, J.), dated November 17, 2008, which granted the petitioner's motion, in effect, for leave to reargue the petition, which had been determined in an order dated April 24, 2008, and thereupon, granted the petition.

ORDERED that the order dated November 17, 2008, is reversed, on the facts and in the exercise of discretion, with costs, and the petitioner's motion, in effect, for leave to reargue the petition is denied.

The Supreme Court improvidently exercised its discretion in granting the petitioner's motion, in effect, for leave to reargue the petition, since the Supreme Court did not overlook or misapprehend the facts or law in its initial determination, or mistakenly arrive at its earlier determination (*see* CPLR 2221[d]; *Everhart v County of Nassau*, 65 AD3d 1277; *McDonald v Stroh*, 44 AD3d 720, 721; *E. W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654). The

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petitioner failed to offer a reasonable excuse for failing to serve a timely notice of claim. While the petitioner may have been physically incapacitated during the first 4½ months after the accident, due to an unrelated illness, he failed to proffer a reasonable excuse as to why his attorney waited an additional 8½ months after he was retained before seeking leave to serve the late notice of claim (*see Matter of Smith v Baldwin Union Free School Dist.*, 63 AD3d 1078, 1079; *Matter of Baglivi v Town of Southold*, 301 AD2d 597, 598; *Matter of Kittredge v New York City Hous. Auth.*, 275 AD2d 746). Furthermore, the appellant did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter (*see* General Municipal Law § 50-e[1], [5]). Here, neither the incident report completed by the bus driver involved in the underlying incident nor the accident/crime investigation report completed by a manager employed by the appellant on the date of the accident, both of which indicated that the petitioner lost his balance, slipped on the last step, and then tripped and fell on the sidewalk, provided the appellant with actual knowledge of the essential facts constituting the petitioner's present claim that he was caused to trip and fall by reason of the hazardous sidewalk and that the appellant was negligent in discharging the petitioner onto the hazardous sidewalk (*see Troy v Town of Hyde Park*, 63 AD3d 913, 914; *Matter of Carpenter v City of New York*, 30 AD3d 594, 595; *Matter of Henriques v City of New York*, 22 AD3d 847, 848; *Johnson v Katonah-Lewisboro School Dist.*, 285 AD2d 490). Finally, the petitioner failed to establish that the 10-month delay after the expiration of the 90-day statutory period would not substantially prejudice the appellant in maintaining a defense on the merits (*see Matter of Castro v Clarkstown Cent. School Dist.*, 65 AD3d 1141; *Troy v Town of Hyde Park*, 63 AD3d at 914; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 152).

FISHER, J.P., SANTUCCI, DICKERSON, CHAMBERS and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court