

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

D28562
H/prt

_____AD3d_____

Submitted - September 22, 2010

MARK C. DILLON, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-00358

DECISION & ORDER

In the Matter of Adhiambo A. Mitchell, appellant,
v City of New York, respondent.

(Index No. 16359/09)

Finkelstein & Partners LLP, Newburgh, N.Y. (Andrew L. Spitz of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F.X. Hart, Mary Ann Holden, and Marta Ross 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 petitioner appeals from an order of the Supreme Court, Kings County (Miller, J.), entered November 30, 2009, which denied the petition and dismissed the proceeding.

ORDERED that the order is affirmed, with costs.

The Supreme Court providently exercised its discretion in denying the petition for leave to serve a late notice of claim under the relevant facts and circumstances of this case. Initially, the petitioner failed to demonstrate a reasonable excuse for not serving a timely notice of claim. Furthermore, he failed to establish that the respondent received actual timely notice of the essential facts constituting his claim that the accident was caused by a defective guardrail (*see Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147; *Matter of National Grange Mut. Ins. Co. v Town of Eastchester*, 48 AD3d 467, 468; *Weber v County of Suffolk*, 208 AD2d 527, 528). The investigation performed by the New York City Police Department (hereinafter the NYPD) revealed that the accident occurred when the petitioner, who was operating his vehicle at a speed of

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about 100 miles per hour, lost control of the vehicle and broke through the guardrail along the Belt Parkway. The NYPD's investigation failed to suggest any connection between the happening of the accident and any alleged negligence by the respondent in the maintenance of the guardrail (*see Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992; *Matter of Godwin v Town of Huntington*, 56 AD3d 671, 672; *Matter of Acosta v City of New York*, 39 AD3d 629, 630; *Bridgeview at Babylon Cove Homeowners Assn., Inc. v Incorporated Vil. of Babylon*, 41 AD3d 404, 406).

Moreover, under the circumstances of this case, a late notice of claim would prejudice the respondent (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531).

DILLON, J.P., BALKIN, CHAMBERS and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court