

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

In the Matter of TROY WARD and
KATRINA RICHARDSON,
Petitioners,

Index No. 26876/07
Motion
Date November 13, 2007

-against-

Motion
Cal. No. 13

THE CITY OF NEW YORK and THE NEW
YORK CITY DEPARTMENT OF
TRANSPORTATION, METROPOLITAN
TRANSPORTATION AUTHORITY and MTA
NEW YORK CITY TRANSIT,
Respondents.

Motion
Sequence No. S001

The following papers numbered 1 to 8 read on this order to show
cause by petitioners for an order pursuant to CPLR 3043(b)
granting petitioners leave to file and serve a late notice of
claim pursuant General Municipal Law § 50(e)(5) and deem the
Notice of Claim to be served nunc pro tunc, against respondents,
The City of New York, The New York City Department of
Transportation, Metropolitan Transportation Authority and MTA New
York City Transit.

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits.... 1-8

Upon the foregoing papers it is ordered that this
application for leave to serve a late Notice of Claim against
respondents, The City of New York, The New York City Department
of Transportation, Metropolitan Transportation Authority and MTA
New York City Transit, is granted on default (see, General
Municipal Law § 50-e[1][a]). It is within the Court's discretion
to extend the time to serve a Notice of Claim (*In the Matter of
Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]).
"The key factors to be considered in determining whether to grant
an application to serve a late Notice of Claim are whether the
[governmental unit or its attorneys or its insurance carrier]
acquired actual knowledge of the essential facts of the claim

within the statutory 90-day period, whether the petitioners had a reasonable excuse for the delay, and whether the delay would substantially prejudice the [governmental unit or its attorneys or its insurance carrier] in its defense on the merits." (*Matter of "Jane Doe" v. Hicksville Union Free School District*, 24 AD3d 666 [2d Dept 2005]; General Municipal Law §50-e[5]; *Fox v. City of New York*, 91 AD2d 624 [2d Dept 1982]).

In the underlying action, petitioners, Troy Ward and Katrina Richardson seek to recover from respondents, The City of New York, The New York City Department of Transportation, Metropolitan Transit Authority, and MTA New York City Transit for personal injuries suffered as a result of an accident occurring on June 19, 2007 on Frances Lewis Boulevard in the County of Queens, City and State of New York where petitioner Ward, while operating a motorcycle, "unsuccessfully attempted to avoid a large pothole and uneven manhole cover along the roadway and abutting bus pad at/or near the bus stop and was caused to strike a light pole and was thrown off his motorcycle into the northbound lanes and sustained severe and permanent injuries as a result of the above-described dangerous and defective conditions in, on and about said location." Petitioner Richardson, his wife, sues for sustained loss of services and the medical expenses incurred on account of her husband's injuries. Pursuant to General Municipal Law § 50-e, petitioners' time to file a Notice of Claim expired on September 17, 2007. Petitioners served the Notice of Claim on September 18, 2007.

Actual Knowledge of Essential Facts Underlying Claim Within 90-Day Statutory Period or Within a Reasonable Time Thereafter

_____Petitioners maintain that respondents accrued actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter. Petitioners claim that they filed a Notice of Claim with all respondents 91 days after the accident, exactly one day late. They also claim that they made a FOIL request to the New York City Department of Transportation, on August 24, 2007, 66 days after the accident in order to determine whether the City had been given prior written notice of the defective condition. The request specified the accident location, the date of the accident, the petitioners' name, and it requested documentation including permits, violations, letters and notices of defect, a printout of all verbal or telephone complaints, and a Big Apple map for the location of the accident. Petitioners state: that the correspondence was sent on the attorneys' office's letterhead, that it identified petitioner as a client of the law

office (ie. a potential claimant), and that it referenced petitioners' "file number."

This Court finds that the respondents had actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter, and therefore, they had sufficient opportunity to investigate the circumstances of the claim. The petitioners filed the notice of claim just one day after the statutory period--one day is certainly deemed a reasonable amount of time. Additionally, as the FOIL request which was undisputedly received by the City of New York and the New York City Department of Transportation well within the 90-day statutory period, provided the accident location, the date of the accident, the petitioner's name, and made it clear that petitioner was a client in plaintiff's counsel's law office (ie. a potential claimant), the said respondents had actual knowledge of the essential facts constituting the claim. The Appellate Division, Second Department has held that this factor "should be accorded great weight." (See, *In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]).

Substantial Prejudice as a Result of the Delay

Petitioners assert that the respondents had actual knowledge of the essential facts constituting the claim within ninety (90) days after the claim arose (or at worst, within a reasonable time thereafter) and as such, no prejudice will accrue to respondents. They maintain that the photographs of the accident location taken shortly after the occurrence confirm the defective condition of the accident location, and the photographs afford respondents the opportunity to review the condition of the accident location and the ability to defend the petitioners' claims on the merits. Further, petitioners maintain that the roadway is located in a residential area where witnesses would be able to document the roadways' condition. Finally, petitioners contend that upon information and belief, the subject condition has not changed since the happening of the accident, and thus is the same condition as it was had the Notice of Claim been timely filed.

This Court finds that the delay would not substantially prejudice the respondents in their defense on the merits. The petitioners filed the Notice of Claim one (1) day after the statutory period expired and just over three (3) months after the claim arose. "As the [Respondents] had actual knowledge of the essential facts underlying the claim, there is no substantial

prejudice to the [Respondents] as a result of the delay." (*In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]). The respondents could have conducted an investigation while the facts regarding the incident were still fresh (see, *In the Matter of Mariya Gofman v. City of New York*, 268 AD2d 588 [2d Dept 2000]).

Reasonable Excuse for the Delay

_____Petitioners argue that due to an error in calendaring the ninety (90) day time frame, a Notice of Claim was served on the respondents ninety one (91) days after the subject accident. Petitioners' counsel maintains that they were one day late because they did not take into account the 31 days in both July and August when calculating ninety (90) days after the accident.

This Court finds that petitioners have failed to offer a legally acceptable excuse for their failure to timely serve the Notice of Claim, since the proffered excuse of law office failure is not a legally sufficient excuse (see, *Belenky v. Nassau Cmty College*, 4 AD3d 422 [2d Dept 2004]). However, the Appellate Division, Second Department has held that "where, as here, there was actual notice and an absence of prejudice, the absence of a reasonable excuse for failing to timely serve a notice of claim will not bar the granting of leave to serve a late notice of claim." (*Nardi v. County of Nassau*, 18 AD3d 520 [2d Dept 2005][citations omitted]; see also, *Bertone Commissioning v. City of New York*, 27 AD3d 222 [1st Dept 2006])(holding that the absence of a reasonable excuse is not, in and of itself, fatal to the application).

Conclusion

_____In conclusion, the petitioners have established that the respondents, The City of New York, the New York City Department of Transportation, Metropolitan Transportation Authority, and MTA New York City Transit had knowledge of the essential facts underlying the claim within the statutory 90-day period or within a reasonable time thereafter, and will not be prejudiced in defending the claim on the merits. Additionally, petitioners' application was made within the applicable period to commence an action (see, *Haynes v. City of New York*, 100 AD2d 572 [2nd Dept 1984]). Accordingly, under all the circumstances, petitioners' application is granted.

Petitioners are given leave to serve their Notice of Claim within thirty (30) days from the date of this order with notice of entry.

Accordingly, it is hereby

ORDERED, that pursuant to General Municipal Law § 50-e(5), petitioners are granted leave to serve a late Notice of Claim upon the respondents, The City of New York, The New York City Department of Transportation, Metropolitan Transportation Authority and MTA New York City Transit in a form as required under General Municipal Law § 50-e(2); and it is further

ORDERED, that the proposed Notice of Claim annexed to petition as Exhibit C, is hereby deemed served upon the respondents, The City of New York, The New York City Department of Transportation, Metropolitan Transportation Authority and MTA New York City Transit as required under General Municipal Law § 50-e, effective of the date of this order.

This constitutes the decision and order of this Court.

A courtesy copy of this order is being mailed to counsel for petitioners.

Dated: December 7, 2007

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Howard G. Lane, J.S.C.