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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE WILLIAM T. GLOVER IA Part 23
Justice

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Matter of JON J. GORMAN	x	Index		
	:	Number	<u>8877</u>	2001
	:			
- against -	:	Motion		
	:	Date	<u>May 30,</u>	2001
	:			
THE CITY OF NEW YORK, et al.	:	Motion		
	:	Cal. Number	<u>11</u>	
<hr/>				
	x			

The following papers numbered 1 to 7 read on this motion by plaintiff for leave to serve a late notice of claim or for his untimely notice of claim to be deemed timely filed, and for a stay or toll of the Statute of Limitations during the pendency of this motion.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-3
Answering Affidavits - Exhibits	4-5
Reply Affidavit.....	6-7

Upon the foregoing papers it is ordered that the motion is denied.

The plaintiff seeks to recover for damages allegedly suffered on January 4, 2000 while he was working in a construction area during the course of his employment. Plaintiff alleges that he injured his knee when he slipped and fell on grease on a ramp. Plaintiff seeks leave to file a late notice of claim insofar as his first notice of claim was not served until July 11, 2000, 99 days after the statutorily mandated 90-day period. (General Municipal Law § 50-e [1][a].) Defendant wrote plaintiff on July 20, 2000 to reject the late-filed notice. In the alternative, plaintiff requests that the rejected July 11, 2000 notice of claim be deemed timely nunc pro tunc, and that the Statute of Limitations for service of the summons and complaint be tolled during the pendency of this motion.

In opposition, defendants incorrectly maintain that the instant order to show cause is untimely. Defendant bases its argument on the principle that leave to serve a late notice expires upon the passage of one year and 90 days from the date of accrual

of the initial claim. (General Municipal Law § 50-i; Pierson v City of New York, 56 NY2d 950; Chikara v City of New York, 10 NY2d 862.) Defendant maintains that despite the fact that plaintiff purchased his index number on April 3, 2001, the order was not signed by this court until April 10, 2001, and as a consequence, plaintiff missed his April 4, 2001 deadline by six days. This reasoning is erroneous, however, as the courts have conclusively established that, pursuant to the commencement by filing provisions of CPLR 304, an action is commenced upon filing with the clerk of the court, which in the instant case, was timely accomplished on April 3, 2001. (Spodeck v New York State Commr. of Taxation & Fin., 85 NY2d 760; Krenzer v Caledonia Zoning Bd. of Appeals, 167 Misc 2d 708.)

Insofar as plaintiff's motion for leave to file a late notice of claim was timely, the court must next consider whether to permit the late filing. Initially, it is noted that defendant is correct that the untimely notice of claim served on July 11, 2000 is a legal nullity insofar as such service was made without leave of the court. (Chikara v City of New York, supra.) Defendant is further correct that such notice, being a nullity, shall have no effect in conferring actual knowledge upon it. (Mack v City of New York, 265 AD2d 308.)

Moreover, in determining whether to allow a late notice, the court must consider whether there is a reasonable excuse for the delay, whether defendant had actual knowledge of the facts constituting the claim, and whether defendant would be substantially prejudiced by the delay. (General Municipal Law § 50-e[5].) Here, plaintiffs offer absolutely no excuse for the delay in filing. Nor does plaintiff attempt to explain the over ten-month lapse between the July 20, 2000 rejection by defendant and the instant application for leave to file the rejected notice. The courts have long determined that law office failure is not an acceptable excuse. (Perez v City of New York, 250 AD2d 688.) Nor is there any showing that plaintiff was too incapacitated from his injuries to see to the proper filing of a notice. (Cf., Myette v New York City Hous. Auth., 204 AD2d 54.)

Plaintiff has further failed to meet his burden of establishing that the defendant had actual knowledge of the facts of his claim. (Washington v City of New York, 72 NY2d 881.) Plainly, the untimely July 11, 2000 filing cannot serve as notice of the underlying facts. (Mack v City of New York, supra.) Moreover, plaintiff concedes that there were no witnesses to his accident, that no accident report was filed, and that the condition that caused his accident was transitory insofar as the allegedly defective ramp was removed shortly after the incident. It is well established that the transitory nature of a condition does not excuse notice, but in fact that mandates that notice be set forth with even greater specificity. (Rodriguez v City of New York, 223 AD2d 536; Aviles v City of New York, 202 AD2d 530.) It has also

been recognized that the absence of witnesses or an accident report, combined with the delay, creates even further prejudice to defendant by denying it the opportunity to fully investigate the underlying facts. (Gilliam v City of New York, 250 AD2d 680; and see, Hussein v City of New York, 265 AD2d 302; Cali v County of Suffolk, 132 AD2d 555.) In total, over 18 months have elapsed since the alleged occurrence, thus plaintiff can hardly rely upon those cases which have permitted a late filing upon a mere minimal delay. (Gilliam v City of New York, *supra*; cf., Rosenblatt v City of New York, 160 AD2d 927; Chatman v White Plains Hous. Auth., 101 AD2d 838.) Granting the relief requested under the circumstances presented herein would be plainly prejudicial. (Gilliam v City of New York, *supra*; Hussein v City of New York, *supra*.)

In sum, the court finds that plaintiff has failed to demonstrate a legally acceptable excuse, or any other extenuating factor, to support his application for leave to file a late notice of claim or for the July 11, 2000 notice to be deemed timely nunc pro tunc. Therefore, the motion is denied in its entirety and the action is dismissed.

Dated: July 30, 2001

J.S.C.