

**PHH Arval/DL Peterson Trust v New York Tr.  
Auth.**

2007 NY Slip Op 30311(U)

March 19, 2007

Supreme Court, Queens County

Docket Number: 0024995

Judge: Howard G. Lane

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

-----  
PHH ARVAL/DL PETERSON TRUST,  
Petitioner,

Index No. 24995/06  
Motion  
Date February 6, 2007

-against-

NEW YORK TRANSIT AUTHORITY and  
MICHELLE L. DRAYTON,  
Respondents.  
-----

Motion  
Cal. No. 5  
Motion  
Sequence No. M001

The following papers numbered 1 to 8 read on this motion by petitioner to file a late Notice of Claim against respondent, New York City Transit Authority.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits.....	1-4
Answering Affirmation.....	5-6
Reply Affirmation.....	7-8

Upon the foregoing papers it is ordered that this order to show cause is determined as follows:

The Order to Show Cause by petitioner PHH Arval/DL Peterson Trust pursuant to General Municipal Law § 50-e(5) permitting the petitioner to file a late Notice of Claim against the respondent, New York City Transit Authority (hereinafter referred to as "NYCTA") (which is in essence an Order to Show Cause to have a previously served Notice of Claim deemed valid) is hereby granted.

In this action, petitioner seeks to recover for property damage which allegedly arose out of an accident occurring on October 7, 2005, wherein the respondent's bus struck the petitioner's parked vehicle on Saint Nicholas Avenue in Manhattan.

Pursuant to General Municipal Law § 50-e(1)(a), a Notice of Claim must be served within 90 days after the claim arises. In this case, the claim arose on October 7, 2005, the date of the accident.

Petitioner contends that it in fact served the Notice of Claim within the 90-day statutory period but that it did not properly serve it by certified mail or return receipt mail, or by personal service as required by the statute. Petitioner submits an Affidavit of Cheryl Leddon, the individual responsible for handling the claim on behalf of petitioner, wherein Ms. Leddon avers that she prepared and sent a Notice of Claim by regular mail to respondent on November 18, 1995<sup>1</sup>. Ms. Leddon asserts that more than thirty days after the date petitioner mailed the Notice to respondent, on January 13, 2006 she received a letter dated January 5, 2006 from respondent returning the notice. She states that the respondent's letter indicated that under the General Municipal Law the claim could be automatically disallowed if it is not refiled and properly served within 10 days. Ms. Leddon asserts that six (6) days after receiving respondent's letter (on January 19, 2006), she attempted to correct the defective service by serving a new Notice of Claim on the respondent by certified mail, return receipt requested, but the proof of such service has been lost.

Petitioner relies in part upon General Municipal Law § 50-e(3)(c) which states:

If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received. (emphasis added).

Petitioner asserts that as the respondent's letter dated January 5, 2006 acknowledges receipt of the notice, the notice was actually received by a proper person within the time specified by the section and that the respondent failed to return the notice, specifying the defect in the manner of service, within thirty (30) days after the notice was received. Respondent does not dispute these facts. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted." (*Kuehne & Nagel, Inc. V. Baider*, 36 NY2d 539 [N.Y. 1975]; see also, *Tortorello v. Carlin*, 260 AD2d 201 [1<sup>st</sup> Dept 1999]).

Inasmuch as respondents fail to rebut the assertion that the

notice was actually received by a proper person within the time specified by the section and that the respondent failed to return the notice, specifying the defect in the manner of service, within thirty (30) days after the notice was received, petitioner's assertion is deemed admitted by respondent. Accordingly, pursuant to General Municipal Law § 50-e(3)(c), petitioner's service is valid (see *Tacinelli v. Liberty Lines*, 123 AD2d 756 [2d Dept 1986]), and the respondent is deemed to have waived the statutory requirements as to service (see *Caro v. City of New York*, 31 Misc 2d 834 [Sup Ct, NY Cty 1961]).

This constitutes the decision and order of the Court.

Dated: March 19, 2007.....

**Howard G. Lane, J.S.C.**

<sup>1</sup>The Court assumes the "1995" date is a typographical error, and that petitioner intended to write "2005."