Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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DOREEN CETINER and ERKAN CETINER,

Petitioner,

- against -

CITY OF NEW YORK and NEW YORK CITY FIRE DEPARTMENT,

Respondents.

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Index Number: 5955/07

Motion Date: 04/03/07

Motion Cal. Number: 3

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this application by petitioner for an Order pursuant to General Municipal Law § 50(e)(5) granting leave to serve a late Notice of Claim.

	Papers Numbered
Order to Show Cause-Petition-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply Affirmation.....	7-9

Upon the foregoing papers it is ordered that the petition is decided as follows:

Petitioner's application for an order granting leave to file a late notice of claim, pursuant to General Municipal Law §50 (e)(5), is denied and the petition is hereby dismissed.

Petitioner allegedly sustained injuries as a result of the negligent care she received by Emergency Medical Services workers on February 19, 2006. Petitioner brought the order to show cause on March 7, 2007.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295

A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Petitioner has failed to articulate an excuse for her failure to serve respondents within the statutory period, or to proffer any admissible or probative evidence that she was incapacitated to such an extent that she could not have complied with the statutory requirement to file the notice of claim in a timely manner (see Bergmann v. County of Nassau, 297 A.D.2d 807 [2d Dept. 2002]). Petitioner's allegation that she was preoccupied with medical treatment and was physically unable to file a timely notice of claim is unsupported by an affirmation of a physician (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2nd Dept 1994]). The narrative report of her treating neurologist annexed as Exhibit "B" is neither sworn to nor affirmed and is, thus, of no probative value (see Grasso v. Angerami, 79 NY 2d 813 [1991]). Even were it properly affirmed, it fails to state a causal connection between plaintiff's injuries and the alleged negligent care and fails to substantiate her claim that she was physically unable to file a timely notice of claim (see Matthews v. New York City Housing Authority, supra).

In addition, petitioner failed to demonstrate that respondent had actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter.

The contention of petitioner's counsel that the City had actual knowledge of the facts constituting the claim by virtue of the fact that the EMS workers who allegedly rendered the negligent care were City employees is without merit. The municipality does not acquire actual knowledge of the facts underlying the claim merely because its employees were at the scene of the accident and may have had general knowledge that a wrong had been committed (see Morrison v. NYC Health and Hospitals Corp., 244 AD 2d 487 [2nd Dept 1997]).

Petitioner's counsel also contends that actual knowledge was acquired by the City through the FDNY prehospital care report prepared by the EMS workers (Exhibit "A"). However, this report does not apprise the City of the facts constituting the claim. It merely states that they found petitioner on the floor passed out, notes her condition and indicates that they transported her to the hospital. There is nothing contained therein that would put the City on notice that they had done anything wrong.

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for leave to serve a late notice of claim without an adequate excuse for the delay and without any indication that respondents received timely actual knowledge of the facts constituting petitioner's claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

The lengthy delay of over nine months beyond the expiration of the 90-day statutory period substantially prejudices the City's ability to investigate the claim and other circumstances surrounding the incident (see, Matter of Gofman v. City of New York, 268 A.D.2d 588 [2d Dept. 2000]).

Accordingly, the application must be denied, and the petition is hereby dismissed. Respondents may enter judgment accordingly.

Dated: April 9, 2006

KEVIN J. KERRIGAN, J.S.C.