

**Matter of Mocon v New York City Tr. Auth.**

2007 NY Slip Op 31586(U)

May 29, 2007

Supreme Court, Queens County

Docket Number: 0007671/2007

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

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In the Matter of JAN MOCON,  
Petitioner,  
  
-against-  
  
NEW YORK CITY TRANSIT AUTHORITY,  
Respondent.  
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Index No. 7671/07  
  
Motion  
Date May 8, 2007  
  
Motion  
Cal. No. 5  
  
Motion  
Sequence No. S001

The following papers numbered 1 to 10 read on this application by petitioner for leave to serve a late Notice of Claim.

	<u>PAPERS</u> <u>NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits.....	1-4
Answering Affirmation.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that petitioner's application for leave to serve a late Notice of Claim is denied. (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, petitioner, Jan Mocon seeks to recover from respondent, New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of an accident occurring on January 24, 2006 when he allegedly tripped and fell upon a metal plate at the Willets Point/Shea Stadium Station of the #7 train in Queens, New York. Petitioner alleges

that the metal plate had been placed down by the respondent, its agents, servants, employees, and/or contractors. Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after January 24, 2006. It is undisputed that petitioner served a Notice of Claim on February 22, 2007. Petitioner brought the instant Order to Show Cause on March 27, 2007.

Actual Knowledge of Essential Facts Underlying Claim Within 90-Day Statutory Period

Petitioner maintains that "respondent was placed on notice immediately following the incident as it had workers at the scene of the accident." Petitioner's counsel argues that petitioner testified at his statutory hearing held on April 9, 2007 that he believed the accident was witnessed by a New York City Transit Authority worker and that petitioner gave a description of the worker and where she worked. Petitioner also alleges that respondent has gained actual knowledge of the facts and circumstances surrounding the claim within a reasonable time. Petitioner lastly maintains that respondent has failed to include in its opposing papers an affidavit by a person with knowledge to refute petitioner's assertion that actual notice was acquired.

Respondent asserts that it did not acquire any knowledge about the essential facts underlying the claim. Respondent further asserts that its first awareness of any alleged accident on the date and location claimed was upon receipt of the purported notice of claim served on its offices over one year after the occurrence. Furthermore, respondent contends that no accident or incident reports were filed with defendant, that no emergency personnel were called to the scene of the accident, and that petitioner was not removed from the scene by ambulance.

This Court finds that the respondent did not have actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter. 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, supra*). Respondent asserts that it had no notice as to the accident until more than a year after its alleged occurrence. It is undisputed that petitioner failed to file any incident or accident reports with the respondent. Also, despite petitioner's contentions, the alleged fact that the respondent had workers at the scene of the accident does not provide adequate notice to the respondent of the essential facts constituting the claim. The respondent has failed to concede that the respondent had workers at the scene of the accident, and furthermore, "what satisfies the statute is not knowledge of the alleged wrong, but rather, knowledge of the nature of the claim." (*Matter of Shapiro v. Nassau*, 208 AD2d 545 [2d Dept 1994]). While petitioner states that he gave respondent essential facts at the statutory hearing, said hearing was held almost 15 months after the accident date.

### Reasonable Excuse for the Delay

Petitioner's counsel maintains that petitioner was unaware that a Notice of Claim had to be filed within 90 days and that the delay was also due to petitioner's attempting to recuperate from his injuries and other medical problems before retaining an attorney.

Respondent argues that neither ignorance of the Notice of Claim requirement or failure to promptly contact an attorney do not exonerate the petitioner from compliance with the statute, and are not legally acceptable excuses for failure to comply, citing (*Matter of Gofman v. City of New York*, 268 AD2d 588 [2d Dept 2000]; *Matter of Ragin v. City of New York*, 222 AD2d 678 [2d Dept 1995]; *Matter of Ealy v. City of New York*, 204 AD2d 720 [2d Dept 1994]). Respondent also argues that petitioner's excuse of physical disability contributing to the disability must fail because there is neither a medical affidavit nor hospital records attached to petitioner's motion. Respondent contends that petitioner avers that he sustained serious injuries requiring surgical intervention, but he does not state when or where the surgery occurred, whether he was hospitalized due to his injury, or state whose medical care he was under.

This Court finds that petitioner has failed to sufficiently explain the delay in filing the application for leave to serve a late notice of claim approximately 14 months after the accident date. The petitioner proffers the excuse of ignorance of the law and failure to promptly contact an attorney. The Appellate Division, Second Department has held that such explanations fail to constitute a reasonable excuse for the delay (*see, Matter of Ealy, supra* at 720-721; *see also, Matter of Mallory v. City of New York*, 135 AD2d 636 [2d Dept 1987]). Additionally, petitioner's counsel sets forth the excuse that petitioner was suffering from his injuries in this accident, which required surgical intervention, as well as from other medical problems, which also involved surgery. However, petitioner has failed to provide any medical affidavit or any medical records or reports. Petitioner additionally fails to provide any details as to the dates and places of his surgeries. As the petitioner has failed to provide sufficient medical documentation, such medical explanation is deemed unreasonable (*see, Matter of Perry v. City of New York*, 133 AD2d 692 [2d Dept 1987]).

### Substantial Prejudice as a Result of the Delay

Petitioner asserts that respondent cannot show any prejudice in the late filing of the Notice of Claim, and that respondent has now gained knowledge of the facts and circumstances regarding the claim. Petitioner avers that respondent was placed on notice immediately following the incident as it has workers at the scene of the accident and that had a Notice of Claim been timely filed,

the condition would have been removed prior to that time by respondent. Petitioner maintains that the areas was the same as it was on the date of the accident with the exception of the removal of the metal plates that were placed down by respondent, and removed by respondent immediately after the job. Therefore, petitioner argues, the metal plates would not have been present even if the Notice of Claim was filed within the 90-day period following the accident, and the information available at the time fo the late filing was substantially the same as it would have been even if a claim was timely filed. Petitioner also asserts that respondent has failed to set forth the investigative steps that it could have taken 90 days after the accident that it could not take at this point. It has not claimed that supervisors or employees are no longer available and has failed to show what, if any, investigation it has pursued. Finally, petitioner contends that since the accident in question was a worksite accident, there must be contracts and other documents that show the work that petitioner and respondent were undertaking on the project.

Respondent maintains that it has been substantially prejudiced in its defense of this claim by its inability to conduct an investigation of the claim and otherwise assess the merits of the claim. Over a year has passed since the alleged accident and as such, respondent asserts it has been deprived of the opportunity to investigate the site as it existed in or about the time of the accident, and to investigate the accident when evidence and information were readily available. Respondent also argues that information from petitioner's statutory hearing on April 9, 2007, nearly 15 months after the accident demonstrated the substantial prejudice caused to respondent by the delay. Respondent cites to petitioner's admission at the statutory hearing that he did not report the accident to any personnel from respondent on the date of the accident and did not request medical assistance at the scene. Respondent also maintains that based upon petitioner's testimony, there is the question of whether the property involved was the respondent's. Finally, respondent maintains that it has been unable to ascertain whether it had any other projects in the area or whether any of respondent's supervisors or project liaisons were present at the time of the accident.

This Court finds that the delay would substantially prejudice the respondent in maintaining its defense on the merits. At the outset, the Court notes that it is unnecessary to reach the issue of prejudice, since where there is a lack of knowledge of the essential facts constituting the claim and a lack of a reasonable excuse for petitioner's failure to provide timely notice, the Court must deny the petition (*Matter of Carpenter v. City of New York*, 2006 NY Slip Op 5010 [2d Dept 2006]). However, even *assuming arguendo*, that this Court were to consider the issue of prejudice, it would be found that under the circumstances, the delay of over one year substantially prejudiced the respondent's ability to investigate the accident scene as well as other circumstances surrounding the accident

(*Matter of Konstantinides v. City of New York*, 278 AD2d 235 [2d Dept 2000])(an over six-month delay was held substantially prejudicial). In the instant case, the purported Notice of Claim was not served until almost 13 months after the accident. Under the circumstances, "the New York City Transit Authority was clearly prejudiced by not being able to conduct a proper investigation while the facts surrounding the incident were still fresh." (*Illera v. New York City Transit Authority*, 181 AD2d 658 [2d Dept 1992]). The respondent was not given a sufficient opportunity to "timely and efficiently" investigate the merits of the claim (*Matter of Light v. County of Nassau*, 187 AD2d 720 [2d Dept 1992]); see also, *Pollicano v. New York City Transit Authority*, 225 AD2d 750 [2d Dept 1996]) stating, "[p]rompt and accurate information is especially important in cases involving a defective condition which is transitory in nature. . . ."

### Conclusion

In conclusion, the petitioner has failed: to establish that the respondent had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or a reasonable time thereafter, to establish a reasonable excuse for the delay in filing the Notice of Claim, and to establish that respondent would not be substantially prejudiced in defending the claim on the merits. Accordingly, petitioner's application is denied.

This constitutes the decision and order of this Court.

Dated: May 29, 2007

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Howard G. Lane, J.S.C.