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| Kobernick v City of New York |
| 2007 NY Slip Op 32127(U) |
| July 11, 2007 |
| Supreme Court, New York County |
| Docket Number: 0105263/2007 |
| Judge: Paul G. Feinman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

Alexander Kobernick

INDEX NO. 105263/07

MOTION DATE 6/6/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 5

- v -

City of New York

The following papers, numbered 1 to 2 were read on this motion to/for USNC

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 1A

2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED BY THE COURT FOR
WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 7/16/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X
ALEXANDER KOBERNICK,
Plaintiff,

- against -

THE CITY OF NEW YORK,
Defendant.
----- X

Index Number 105263/2007
Submission Date 6/6/07
Mot. Seq. No. 001
Mot. Cal. No. 5

DECISION & ORDER

FILED

JUL 16 2007,

NEW YORK
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Papers considered in review of this motion to file a late notice of claim:

| Papers | Numbered |
|--|----------|
| Order to Show Cause and Affidavits Annexed | 104 |
| Affirmation in Opposition | 2 |

PAUL GEORGE FEINMAN, J.:

Plaintiff moves by order to show cause for leave to file a notice of claim against the defendant City of New York (Gen. Mun. Law § 50-e, subd. 5). Plaintiff simultaneously commenced this action, having attached a copy of the summons and complaint to the order to show cause along with the proposed notice of claim (Ex. G). For the reasons that follow, the motion is granted.

On January 21, 2006, plaintiff Alexander Kobernick was the passenger in a motor vehicle being operated on Stoneleigh Avenue in Carmel, New York. Without warning, a tree on the side of the road fell and landed on the van, allegedly causing injury to Kobernick. A police report was filed at the scene and within the 90-day period required by the General Municipal Law, plaintiff served a notice of claim on the Town of Carmel and Putnam County (Gen. Mun. Law section 50-e). Subsequently, the Town of Carmel and Putnam County deposed the plaintiff pursuant to section 50-h of the General Municipal Law. In March 2007, during discovery in the Putnam County action, plaintiff learned for the first time that this particular roadway and the

accompanying trees, which border Croton Falls reservoir in the Town of Carmel, are not owned, operated, controlled or maintained by either the Town of Carmel or Putnam County. Rather, the reservoir and surrounding area are owned by the City of New York. Plaintiff now moves for leave to serve a late notice of claim on the City of New York.

General Municipal Law section 50-e (1)(a) provides that a notice of claim, which must be served upon a municipality prior to commencing a lawsuit, must “be served in accordance with the provisions of this section within ninety days after the claim arises.” However, subsection (5) provides an exception whereby “the court, in its discretion, may extend the time to serve a notice of claim” not to “exceed the time limited for the commencement of an action by the claimant against the public corporation,” meaning one year and ninety days. In making a determination as to whether to allow the filing and acceptance of a late notice of claim, three factors must be analyzed. *Pavone v City of New York*, 170 AD2d 493 (2^d Dept. 1991). First, whether the plaintiff has demonstrated a reasonable excuse for the failure to serve a timely notice of claim. Second, whether the defendant acquired actual knowledge of the essential facts within ninety days after the claim arose. Last, whether the delay substantially prejudices the defendant in maintaining a defense on the merits. (*Id.*) No single factor is dispositive, and “[i]t all goes into the mix.” *Pearson v New York City Health and Hosps. Corp.*, __ AD3d __; 2007 NY Slip Op 05843 (1st Dept. 2007) citing *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 538 (2006).

In the case at bar, after careful consideration of all the factors, the court is persuaded that the balance tips in favor of permitting the plaintiff to file a late notice of claim and have his case heard on its merits. Plaintiff reasonably believed that Town of Carmel and/or County of Putnam owned the roadway within its jurisdictional limits. (*Compare Arias v New York City Housing Authority*, 40 AD3d 298 [1st Dept. 2007]; plaintiff was denied a motion to file a late notice of

claim after incorrectly suing the wrong City agency for an injury that occurred within the confines of New York City). Plaintiff's conduct in promptly serving the Town of Carmel and Putnam County with a notice of claim was a reasonable course of conduct under the circumstances; he could not be reasonably expected to know that a particular road and bordering trees in a town 45 miles outside the New York City limits are actually owned, operated, controlled, or maintained by the City of New York. But more importantly, here plaintiff was affirmatively given reason to believe that he had identified the correct municipalities. Plaintiff was entitled to rely on a letter dated January 11, 2007 from the Town of Carmel Superintendent of Highways which states that the road in question was under the jurisdiction of Putnam County Highways and Facilities. (Order to Show Cause, Exhibit C). That communication from an authority of a government agency, coupled with the plaintiff's logical assumption as to ownership of the roadway, is, in this court's view, sufficient to satisfy the "reasonable excuse" prong of the test for granting leave to file a late notice of claim.

As for the second prong, actual notice, there is no argument made that the City had actual notice of the events within the ninety day notice of claim period.

Turning to the third prong, the defendant has not established that it has suffered any real prejudice by the delay. There is no presumption of prejudice to a municipality; rather it is the responsibility of the municipality in opposing an application of this nature to make a showing of prejudice. *Bensen v Town of Islip*, 99 AD2d 755 (2^d Dept. 1984). A tree which falls in the roadway is a transitory condition, which, one would expect is likely to be promptly removed. *See, Calix v New York City Housing Authority*, 234 AD2d 232 (1st Dept. 1996). Thus, even if the City had received timely notice on the ninetieth day after the accident, the condition, because of its transitory and inherently dangerous nature was no more likely to be available for inspection

than it is today. The City has made no credible showing that had it received notice within the proper time frame it would have dispatched inspectors or investigators to the scene. But unlike some cases where prejudice inures to the City because of the loss of witnesses or the ability to promptly depose the injured party, here there exists a contemporaneous police report from the accident scene and a 50-h hearing conducted within just three weeks of the accident. In all candor, the City cannot argue that it conducts its own 50-h hearings so promptly. Furthermore, the City points to no shortcomings in the 50-h hearing conducted on behalf of the Town of Carmel and Putnam County. While a police report does not satisfy the element of actual knowledge within the ninety day period (*Perry v City of New York*, 133 AD2d 692 [2^d Dept. 1987]), the existence of a detailed report, as well as the timely 50-h hearing, demonstrates a lack of prejudice to the City, as this evidence together describes the scene and the incident in great detail. In short, the City fails to identify any actual prejudice.

Given that no single element for granting an extension to a notice of claim is dispositive, (*Sloan*, 175 AD2d 838), and that two of the three factors militate in plaintiff's favor (reasonable excuse for the delay and lack of prejudice), the motion should be granted.¹ Accordingly, it is

¹It bears noting that this application for leave to file a late notice of claim was filed as a motion brought on by order to show cause which was filed and served simultaneously with a summons and complaint. Typically, a party seeking such relief must proceed by way of a special proceeding (petition) seeking permission to file a late notice of claim, which, if granted, is then followed by a later commenced plenary action under a new index number. It appears, although not expressly stated, that this was done given a looming statute of limitations. Plaintiff's accident occurred January 21, 2006 and the statute of limitations expired approximately April 21, 2007. The court notes that the receipts for the request for judicial intervention, the index number, and the filing of the summons and complaint all indicate a date of April 19, 2007. However, for reasons unclear to the court, the motion jacket and order to show cause was not presented to the court over at 80 Centre Street until April 24, 2007, which would appear to be after the expiration of the statute of limitations. Inasmuch as neither the form of the proceeding nor the date the order to show cause was signed was an issue raised and briefed by the City, the court has ignored the significance, if any, of these issues and has deemed

ORDERED that the motion to serve a late notice of claim upon defendant is granted; and it is further

ORDERED that plaintiff shall served defendant with a copy of this decision and order within 15 days of its entry; and it is further

ORDERED that the notice of claim as well as the summons and complaint annexed as Exhibit G shall be deemed timely served and filed upon compliance with the preceding paragraph; and it is further

ORDERED that upon service upon it of a copy of this decision and order, with notice of entry, the City shall have 30 days to answer the complaint.

This constitutes the decision and order of the court.

Dated: July 11, 2007
New York, New York

GAZ

J.S.C

(2007 D&O_105263_2007_001_MSP)

FILED
JUL 16 2007,
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any such arguments, if they did exist, waived.