

**Markou v Banle Assoc., LLC**

2008 NY Slip Op 31466(U)

May 21, 2008

Supreme Court, Queens County

Docket Number: 0003612/2008

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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CHRISTOS MARKOU,  
Petitioner,  
  
-against-  
  
BANLE ASSOCIATES, LLC, et al.,  
Respondents.  
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Index No. 3612/08  
  
Motion  
Date April 8, 2008  
  
Motion  
Cal. No. 9  
  
Motion  
Sequence No. S001

PAPERS  
NUMBERED

Order to Show Cause-Affidavits-Exhibits..... 1-3  
Affirmation in Opposition..... 4-8  
Reply Affirmation..... 9-10

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, Christos Markou seeks to recover from respondents, The City of New York ("City") and the New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of an accident occurring on November 14, 2006 when he allegedly was walking on the sidewalk

on the east side of the commercial premises known as 163-15 Horace Harding Expressway, Fresh Meadows, New York, "[w]hen he was caused to trip and fall as a result of uneven, improperly maintained and hazardous area of the sidewalk, including cracks and a metal protrusion in the sidewalk which caused a snare and/or trap-like condition to exist at the location." Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after November 14, 2006 or until February 12, 2007. While the petitioner does not include an affidavit of service with the instant order to show cause, it is undisputed that the petitioner served the City on February 11, 2008 and the NYCTA on February 20, 2008.

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

Petitioner maintains that NYCTA and the City had actual knowledge of the essential facts underlying the claim on the day of the accident since on or about January 28, 2008, petitioner was informed by Big Apple Pothole & Sidewalk Protection Committee that defendant NYCTA and City had prior written notice of the metal protrusion at the location, and petitioner attached a Big Apple Map with a legend to its moving papers. Petitioner maintains that the Big Apple Map demonstrates that the defects at issue in this case were known to respondents NYCTA and the City as early as May 30, 2003.

NYCTA asserts that it did not acquire actual knowledge about the claim until the instant Order to Show Cause which was served upon it one year and ninety-eight days after the alleged accident occurred. It maintains that it had never had any notice of the defect. The Big Apple Pothole & Sidewalk Map was served upon the New York City Department of Transportation, which is a City agency which is not affiliated with the NYCTA, and so service upon the Department of Transportation did not put respondent NYCTA on notice of any defective conditions.

The City disputes that it had actual notice as far back as May 30, 2003 based on the Big Apple Map. Respondent City cites to first and second department case law that holds that Big Apple Pothole and Sidewalk Map does not give the City actual knowledge of the essential facts constituting the claim. Respondent alleges that the City has received thousands of maps with allegedly countless defects and the maps have no essential facts as to any accidents caused by the alleged defects reflected on them. The City concludes that it did not have knowledge of the claim.

This Court finds that the City 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*). The City asserts that it had no notice as to the accident until nearly fifteen months after its alleged occurrence. The Court finds that the Big Apple Pothole and Sidewalk Map did not impute actual knowledge of the essential facts underlying the claim to the City. Neither knowledge of a defective condition, nor the petitioner's assumptions about the possible existence of records, serves to fulfill the purposes for which a notice of claim is mandated. (*Matter of Miguel Rios v. The City of New York*, 180 AD2d 801 [2d Dept 1992]). "[W]hat 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]). Accordingly, petitioner has failed to demonstrate that the City had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

This Court finds that the NYCTA 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*). NYCTA asserts that it had no notice as to the accident until more than fifteen months after its alleged occurrence. It is undisputed that The Big Apple Pothole & Sidewalk Map was served upon the New York City Department of Transportation. As it is undisputed that the NYCTA is an entity that is separate and distinct from the City and does not share the City's connection with the Department of Transportation, service of any maps upon the Department of Transportation did not put respondent NYCTA on notice of any defective conditions. "[W]hat satisfies the statute is . . . knowledge of the nature of the claim." (*Matter of Shapiro v. Nassau*, 208 AD2d 545 [2d Dept 1994]). Accordingly, petitioner has failed to demonstrate that NYCTA had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

### **Substantial Prejudice as a Result of the Delay**

Petitioner asserts that there is a lack of prejudice to the respondent as a result of the delay. Petitioner maintains that

the metal protrusion and sidewalk are in substantially the same condition today as they were on the date of the accident. Thus, the respondents, NYCTA and the City, can still conduct a full investigation of the accident location. Additionally, petitioner asserts that he has exchanged photographs that fairly and accurately depict the defective conditions as they appear at the time of the accident. Petitioner maintains that the respondents' investigation will be limited to a review of the Big Apple Pothole & Sidewalk Map to determine if there is prior written notice and therefore, any liability, and that respondent, City, has been in possession of the subject map for over three years. Furthermore, petitioner contends that any other Department of Transportation records and/or documents necessary to the City's defense are in the City's exclusive possession and control. Also, petitioner alleges that respondent NYCTA also had access to these records and the Big Apple Pothole & Sidewalk Map and can acquire same through a FOIL search, and so it will not be substantially prejudiced. Finally, petitioner maintains that the defective conditions are located in a residential neighborhood and that petitioner is in possession of witness information and so respondents can now interview and question such witnesses.

NYCTA asserts that it will be substantially prejudiced by the delay and states that it never had notice of the defect. NYCTA asserts that its ability to adequately defend itself has clearly been prejudiced and that respondent NYCTA's ability to inspect the condition at a time close to the accident has been lost. NYCTA argues that it was not afforded an opportunity to investigate promptly and aggressively the incident with an eye towards future litigation. NYCTA maintains that had petitioner filed a timely Notice of Claim, NYCTA would have immediately been able to "canvass the area for possible witnesses, conduct a statutory hearing of the petitioner and interview its own employees to preserve any knowledge of the incident and condition while memories were still fresh." Finally, respondent contends that the mere passage of time which has prevented a prompt investigation has been held sufficient to constitute prejudice, citing, *Phillips v. New York*, 415 NYS2d 349, Sup Ct. Kings Co., (1979).

The City asserts that it will be substantially prejudiced by the delay since nearly one year and three (3) months have passed since the alleged accident occurred. Respondent maintains that the petitioner's failure to file a timely notice of claim has denied the City an opportunity to conduct a prompt and thorough investigation while the facts surrounding the claim are still fresh. Finally, respondent, City, asserts that it is a speculative argument on petitioner's part that the allegedly

defective condition is the same today as it was on the date of the accident.

This Court finds that the delay would substantially prejudice both respondents' the City and the NYCTA in maintaining their defenses on the merits. The delay of approximately fifteen (15) months from the time the claim arose until the instant motion was brought substantially prejudiced both respondents' 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 to be substantially prejudicial]). Under the circumstances, the respondents were "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]). Neither the City, nor the NYCTA was 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, *Phillips v. City of New York*, 415 NYS2d 349 [Sup. Ct., Kings Co. 1979] [holding the mere passage of time preventing a prompt investigation has been held to constitute prejudice to municipalities]; *Matter of Perry v. City of New York*, 133 AD2d 692 [2d Dept 1987][holding a 14-month delay was substantially prejudicial]; *Pappalardo v. City of New York*, 2 AD3d 699 [2d Dept 2003] [holding a 15-month delay was substantially prejudicial]). "Finally, the [petitioner's] determination that the accident site was unchanged . . .between the happening of the accident and the time when the [respondents] [were] given actual notice of the claim does not negate the danger that the passage of time prevented an accurate reconstruction of the circumstances existing at the time the accident occurred. (*Matter of Miguel Rios v. City of New York*, 180 AD2d 801 [2d Dept 1992]).

### **Reasonable Excuse for the Delay**

Petitioner maintains that it has a reasonable excuse for the delay. Petitioner asserts that there were no markings or identifying marks on the metal protrusion indicating ownership. Petitioner also maintains that the sidewalk where he tripped is adjacent to a commercial property and parking lot owned by defendant BANLE associates ("BANLE"). Petitioner maintains that after the accident, he promptly notified the owner of the property, BANLE, of the accident, and on October 16, 2007 BANLE's insurance carrier informed petitioner's counsel that the metal protrusion was the remains of a New York City signpost.

Petitioner's counsel maintains that at that point, petitioner investigated the situation and found that respondents, NYCTA and the City had prior written notice of the protrusion and then petitioner promptly moved for the instant relief to serve a late notice of claim.

NYCTA argues that petitioner has failed to offer any reasonable excuse for the delay upon respondent NYCTA. NYCTA asserts that petitioner failed to conduct a timely and proper investigation.

The City argues that petitioner has failed to offer any reasonable excuse for the delay upon respondent City. The City contends that petitioner's counsel fails to mention what, if any, investigation he undertook from the date he was retained as counsel on or about January 2007 up until October 16, 2007, the date defendant BANLE's insurance carrier advised him of ownership of the metal protrusion, in order to determine ownership of the protrusion. Respondent argues that petitioner failed to account for the four months after October 16, 2007 before he brought the petition. The City concludes that the excuse amounts to nothing more than law office failure which is not a sufficient excuse for failing to timely file a notice of claim.

As the Court has already been determined that the moving respondents did not have actual knowledge of the essential facts constituting the claim and that the moving respondents have been substantially prejudiced as a result of the delay, the Court need not reach a determination as to whether a reasonable excuse has been proffered (*see, Matter of Mandia v. County of Westchester*, 162 AD2d 217 [1st Dept 1990]).

**Conclusion**

In conclusion, the petitioner has failed to establish that the respondents City and NYCTA had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or a reasonable time thereafter, and has failed to establish that respondents would not be substantially prejudiced in defending the claim on the merits. Accordingly, under the circumstances, petitioner's application is denied.

The foregoing constitutes the decision and order of this Court.

Dated: May 21, 2008

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

