

**Matter of Fuller v Metropolitan Transp.  
Auth.**

2008 NY Slip Op 31639(U)

June 9, 2008

Supreme Court, Queens County

Docket Number: 0008443/2008

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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In the Matter of the Petition of  
LINDA FULLER,  
Petitioner,  
  
-against-  
  
METROPOLITAN TRANSPORTATION  
AUTHORITY,  
Respondent.  
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Index No. 8443/08  
  
Motion  
Date May 27, 2008  
  
Motion  
Cal. No. 6  
  
Motion  
Sequence No. 1

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NUMBERED

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Upon the foregoing papers it is ordered that petitioner's application for leave to serve a late Notice of Claim against respondent, Metropolitan Transportation Authority ("MTA") is granted.

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, Linda Fuller seeks to recover from respondent, Metropolitan Transportation Authority for personal injuries suffered as a result of an accident occurring on July 24, 2007 when she tripped and fell on platform "A" on the westbound side of the LIRR ("Long Island Rail Road")

Kew Gardens Station, Queens, New York, said pathway being adjacent to the rear of 82-70 Austin Street, Queens, New York (the premises known as Austin's Ale House). Petitioner maintains that the accident was the result of a defective walkway condition, and that the MTA was negligent in maintaining the walkway. Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after July 24, 2007. Petitioner served the instant Order to Show Cause on the MTA on about April, 2008.

Actual Knowledge of Essential Facts Underlying Claim Within 90-Day Statutory Period or Within a Reasonable Time Thereafter

Petitioner maintains that respondent accrued actual knowledge of the essential facts underlying the claim within a reasonable time after the 90-day statutory period. Petitioner claims that the respondent is acquiring actual knowledge of the incident within a reasonable time after the 90 day time limit, via this petition, which was served on about April 2008. Respondent fails to dispute that it had actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter.

This Court finds that the respondent had actual knowledge of the essential facts underlying the claim within a reasonable time after the 90-day statutory period, and therefore, they had sufficient opportunity to investigate the circumstances of the claim. In addition, petitioner maintains that the condition of the location of the accident is the same today as it was on the day of the accident. The petitioner filed the petition to file a late notice of claim against the MTA less than (6) months after the statutory period expired. Such time period is deemed a reasonable amount of time under the circumstances. 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*, 273 AD2d 467 [2d Dept 2000]).

Substantial Prejudice as a Result of the Delay

Petitioner assert that the respondent will not be prejudiced by the delay and can still do a proper investigation because the condition was not transitory, and because the defect is still in the same condition today as it was on the day of the accident. Petitioner argues that the respondent could still interview and inspect the location to discover the cause of the accident. Respondent fails to assert that it will be prejudiced in any way by the granting of the instant motion.

This Court finds that the delay would not substantially prejudice the respondent in its defense on the merits. The

petitioners filed the petition for a late Notice of Claim less than (6) months after the statutory period expired. "As the [Respondent] had actual knowledge of the essential facts underlying the claim, there is no substantial prejudice to the [Respondents] as a result of the delay." (*In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]). Moreover, it has been alleged that the condition that caused plaintiff's accident has remained unchanged since the day of the accident (*see, Kalenda v. Buffalo Municipal Housing Authority*, 203 AD2d 937 [4th Dept 1994]). The respondent could have conducted an investigation while the facts regarding the incident were still fresh (*see, In the Matter of Mariya Gofman v. City of New York*, 268 AD2d 588 [2d Dept 2000]). Furthermore, "no actual prejudice has been demonstrated by the city, and we see no reason for us to presume the existence of prejudice from a silent record." (*Evers v. City of New York*, 90 AD2d 786, 787 [2d Dept 1982]).

#### Reasonable Excuse for the Delay

Petitioner asserts that it originally placed the City of New York and the LIRR on notice of the claim via service of a notice of claim, and then sent an investigator to the location to take photographs and to conduct an investigation of the location. The investigation revealed that the location where the petitioner fell is maintained by the MTA. Petitioner further maintains that the defect was a defect and crack on the pathway and that it was virtually impossible to determine that the MTA or the LIRR is a possible owner of the sidewalk. Respondent fails to assert that petitioner does not have a reasonable excuse for the delay.

This Court finds that petitioner has sufficiently explained the delay in filing the application for leave to serve a late Notice of Claim. Pursuant to General Municipal Law § 50-e(5), in determining whether permission to file a late Notice of Claim should be granted, one of the factors a Court shall consider is "whether the claimant in serving a Notice of Claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted." (*See also, Medley v. Cichon*, 305 AD2d 543 [2d Dept 2003]). This Court finds that petitioner has provided a reasonable excuse for the delay, in that an excusable error was made concerning the identity of the MTA. But even if the petitioner did not proffer a reasonable excuse for the delay, the application would still be granted, as the Appellate Division, Second Department has held that "where . . . there was actual notice and an absence of prejudice, the absence of a reasonable excuse for failing to timely serve a notice of claim will not bar the granting of leave to serve a late notice of claim." (*Nardi v. County of Nassau*, 18 AD3d 520 [2d Dept 2005][citations omitted]; *see also, Bertone Commissioning v. City of New York*, 27 AD3d 222 [1st Dept

2006]) (holding that the absence of a reasonable excuse is not, in and of itself, fatal to the application).

Conclusion

In conclusion, the petitioner has established that the respondent, MTA had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or within a reasonable time thereafter, that there is a reasonable excuse for the delay, and that respondent will not be prejudiced in defending the claim on the merits. Additionally, petitioner's application was made within the applicable period to commence an action (see, *Haynes v. City of New York*, 100 AD2d 572 [2d Dept 1984]). Accordingly, under all the circumstances, petitioner's application is granted.

Additionally, the Court notes that while the LIRR states in its opposition papers that the MTA and LIRR do not own, operate, or maintain the staircase upon which petitioner fell, the opposition papers make no mention of the walkway upon which petitioner asserts to have fallen.

Petitioner is given leave to serve their Notice of Claim within thirty (30) days from the date of this order with notice of entry.

Accordingly, it is hereby

ORDERED, that pursuant to General Municipal Law § 50-e(5), petitioner is granted leave to serve a late Notice of Claim upon the respondent, Metropolitan Transportation Authority in a form as required under General Municipal Law § 50-e(2); and it is further

ORDERED, that the proposed Notice of Claim annexed to petition as Exhibit A, is hereby deemed served upon the respondent, MTA as required under General Municipal Law § 50-e, effective of the date of this order.

The foregoing constitutes the decision and order of this Court.

Dated: June 9, 2008

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