STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN HENEHAN, JR.,

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 2991-08
RJI NO. 01-08-092715

NEW YORK STATE DORMITORY AUTHORITY,

Respondents.

Supreme Court Albany County All Purpose Term, May 27, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Finkelstein & Partners, LLP
Andrew L. Spitz, Esq.
Attorneys for Petitioner
436 Robinson Avenue
Newburgh, New York 12550

Hiscock & Barclay, LLP
Nikki Baldwin, Esq.
Attorneys for the Respondent
50 Beaver Street
Albany, New York 12207

TERESI, J.:

On June 28, 2007, while working at respondent's property on a construction project, petitioner was injured when he tripped over construction debris (excess concrete) left on respondent's grounds. Petitioner commenced this proceeding to obtain permission to serve and file a late Notice of Claim against the respondent.

A tort action against a public corporation, like the respondent herein, may be commenced only if a notice of claim is made and served on the municipal corporation within ninety days after

the claim arises. General Municipal Law §50-e(1)(a). However, General Municipal Law §50-e(5) specifically authorizes the Courts to extend the time for filing a notice of claim. The Third Department has held that: "the service of a late notice of claim may be authorized in the trial court's discretion after consideration of various factors, including, but not limited to, the statutory factors of (1) whether a reasonable excuse for the delay was presented, (2) whether the [respondent] or its agents had actual knowledge of the essential facts of the claim within 90 days after the claim arose, and (3) whether the delay in service of the notice of claim substantially prejudiced the ability to defend the claim on the merits" Isereau v. Brushton-Moira School District, 6 AD3d 1004, 1005 (3d Dept. 2004), *see also* Lemma v. Off Track Betting Corp., 272 A.D.2d 669 (3d Dept. 2000). Each of the above factors will be addressed in turn.

First, petitioner offers no excuse whatsoever for his failure to serve a timely notice. Clearly, this factor weighs against granting petitioner's request to file a late notice of claim. The failure to provide a reasonable excuse, however, "is not necessarily fatal to [an] application... because no one factor is dispositive of the issue". (Welch v. Board of Education of Saratoga Central School District, 287 AD2d 761, 762-63 (3d Dept. 2001) (internal quotations omitted); *see also* Isereau, 6 AD3d at 1005 (finding that the petitioners did not "seek to excuse the delay" between the time of the incident and the expiration of ninety days thereafter when they first consulted with an attorney, but still granted petitioner's application to allow late service of the notice of claim).

Second, petitioner alleges that respondent did have "actual knowledge" of the facts underlying his claim. Petitioner submits all the documents he obtained pursuant to a FOIL request from respondent and argues that such documentation shows respondent had "actual

notice" the day after the incident. Included in the FOIL response is a "Jobsite Incident Report" created by the respondent. It notes the petitioner's name, address, date of birth, the nature of the incident (i.e. injury upon respondent's property), the time and place of the incident, the manner in which it occurred (i.e. trip and fall over construction debris), the injury that petitioner sustained (i.e. knee injury), and specifically notes that the "Project Manager or Field Rep" was notified of the incident the day after the incident. The "Jobsite Incident Report" includes all of the information required to be included in a Notice of Claim under General Municipal Law §50-3(2).

Respondent argues that the "Jobsite Incident Report" fails to provide sufficient detail as to the extent of the petitioner's injury and as such fails to provide "actual notice" of all of the pertinent facts. However, a Notice of Claim only requires petitioner to notify respondent of the "items of damage or injuries claimed to have been sustained so far as then practicable". General Municipal Law §50-e(2)(4). As respondent received notice the day after the incident, the only injury "as then practicable" for the petitioner to notify defendant of was a knee injury. Respondent's claims are unavailing, and the Court finds that the respondent had "actual notice" of the petitioner's claim the day after it happened. This factor weighs in favor of this Court's granting petitioner's request.

Third, petitioner alleges that respondent has not been prejudiced by his late filing of a Notice of Claim because they had actual knowledge of the incident the day after it occurred and performed a timely investigation into the incident. Such investigation involved the respondent taking six photographs of the incident scene, e-mail correspondence between respondent's employees regarding the incident, respondent's collecting the investigation reports of petitioner's employer and the construction manager and its creation of a "Jobsite Incident Report".

Respondent contends that they were prejudiced because they would have conducted a more thorough investigation if they had know the extent of petitioner's injury, that witnesses may have been lost and that they may not be defended by parties who have a duty to defend them. Respondent offers no proof, however, that had a Notice of Claim been filed they would have conducted a more exhaustive investigation. Nor, as discussed above, would the Notice of Claim necessarily have informed respondent of the extent of the injury to warrant their claim of further investigation. Respondent offers no actual proof of a witness lost or that they will not be defended. Respondent's claimed prejudice is conclusory and speculative. Accordingly, the court finds that the respondent has not been prejudiced by petitioners failure to serve a timely notice of claim.

Considering each of the factors set forth above together, despite the petitioner's lack of any excuse which weighs heavily against his application, the "actual notice" and "lack of prejudice" factors outweigh the lack of excuse factor. Petitioner's application is granted. Petitioner must file and serve his Notice of Claim upon the respondent within fifteen days of the date of this Order.

All papers, including this Decision and Order, are being returned to the attorney for the petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: July 7, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated April 9, 2008, with Petition of Andrew L. Spitz, dated April 9, 2008, and supporting Affidavit of John Henehan, dated April 2, 2008, with attached Exhibits A & B;
2. Attorney Affirmation of Nikki L. Baldwin, dated May 13, 2008, with accompanying Memorandum of Law in Opposition to Petitioner's Application for Leave to Serve a Late Notice of Claim of Nikki L. Baldwin, dated May 13, 2008.
3. Reply Affirmation of Andrew L. Spitz, dated May 22, 2008.