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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN Justice

PART 32

MAURO, P.

- v -

CITY

INDEX NO. 105108/08

MOTION DATE 5/28/08

MOTION SEQ. NO. 001

MOTION CAL. NO. 1

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION/ORDER AND JUDGMENT.

ENTERED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must [illegible] Judgment Clerk's Desk (Room

Dated: June 30, 2008

PFF

J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
PETER MAURO and DIANA MAURO,
Petitioners,

-against-

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

Index Number 105108/2008
Submission Date 5/28/08
Mot. Seq. No. 001
Mot. Cal. No. 1

DECISION, ORDER AND JUDGMENT

Papers considered in review of this motion to file late Notice of Claim:

Papers	Numbered
Order to Show Cause	1
Attorney's Affirmation	2
Affirmation in Opposition	3
Reply Affirmation	4

PAUL G. FEINMAN, J.:

Petitioner moves by order to show cause for permission to file a late Notice of Claim pursuant to General Municipal Law § 50-e. For the reasons set forth below, the application is granted.

Background

Petitioner, a New York Department of Sanitation employee, seeks recovery against the City of New York for injuries allegedly incurred while walking down a ramp and stepping into a pothole in a City Department of Sanitation garage. A Line-of-Duty Injury (LODI) Report dates the accident as having occurred on April 6, 2007.[1] Petitioner offers a proposed Notice of Claim dated November 5, 2007, seven months after the cause of action arose. (Order to Show Cause,

[1] Although the investigator dated his portion of the LODI Report as "4-6-06" (a barely legible, unsigned correction above it is dated "4-6-07") (Order to Show Cause, Pet. Exh. 1), as the petitioner dated his portion as "4-6-07" and as the City has made no note of this discrepancy, the petitioner's date is presumed to be correct.

Pet. Exh. 3).

Discussion

General Municipal Law § 50-e [1] [a] requires that "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action...against a public corporation...the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises." This "is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available." *Caselli v City of New York*, 105 AD2d 251, 252 (2d Dept 1984). General Municipal Law §50-e (5) allows the court discretion to extend the time permitted for filing a late Notice of Claim. Among the various factors the court is instructed to consider in the application for an extension, one is set apart from the others: whether the city acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. *Casias v City of New York*, 39 AD3d 681, 682 (2d Dept 2007). Additionally the court is to consider "whether the petitioner has demonstrated a reasonable excuse for failure to serve a timely notice of claim" and "whether the delay would substantially prejudice the [public corporation] in maintaining its defense on the merits." *Matter of Strauss v New York City Tr. Auth.*, 195 AD2d 322, 322 (1st Dept 1993). "Moreover, the presence or absence of any one factor is not determinative." *Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 (1st Dept 2006).

1. Reasonable Excuse

The Appellate Division, First Department has repeatedly held that ignorance of the 90 day requirement for filing a Notice of Claim is not considered a "reasonable excuse" under the dictates of General Municipal Law § 50-e [5]. *See Bayo v Burnside Mews Assoc.*, 45 AD3d

495, 495 (1st Dept 2007). *See also, Matter of Nayyar v Board of Educ. of City of N.Y.*, 169 AD2d 628, 629 (1st Dept 1991); *Matter of Perez v New York City Hous. Auth.*, 156 AD2d 177, 177 (1st Dept 1989). However, "the lack of a reasonable excuse is not of itself fatal." *Harris v City of New York*, 297 AD2d 473, 473 (1st Dept 2002). Here, petitioner offers only a single reason for failing to file a timely Notice of Claim; that he was "not aware" that he was required to do so. (Order to Show Cause, Pet. ¶ 7). Petitioner's attorney offers an additional reason, that petitioner "was not allowed out of his home by order of the New York City Department of Sanitation." (Order to Show Cause, Memo of Law at 12). However, petitioner states that he "was required to take physical therapy from May 14th, 2007 to July 11, 2007. At that time, I returned to light duty..." (Order to Show Cause, Pet. ¶ 6), which appears to indicate that petitioner had either returned to work or begun physical therapy within the statutorily allowed period for filing of a Notice of Claim. Thus, it cannot be found that petitioner has proffered a reasonable excuse.

2. Actual Knowledge

In applying the discretion granted under General Municipal Law § 50-e [5], courts have allowed that accident and injury reports may provide actual knowledge of the essential facts of the claim. *See Caminero v New York City Health & Hosps. Corp.*, 21 AD3d 330, 330 (1st Dept 2005) ("by virtue of the hospital records made contemporaneously with the events giving rise to the claim, defendant public corporation had actual knowledge of the facts constituting the claim virtually from its inception"). *See also Miranda v New York City Tr. Auth.*, 262 AD2d 199, 199-200 (1st Dept 1999) ("[a]ccident reports prepared by the bus driver and a supervisor immediately after the subject accident, documenting the circumstances of plaintiff's injury, provided defendant with timely actual knowledge of the essential facts constituting the claim"); *Matter of*

Nayyar v Board of Educ. of City of N.Y., 169 AD2d 628, 629 (1st Dept 1991) ("The Board of Education was provided with the essential facts concerning the claim within the notice period as evidenced by the Comprehensive Accident Report...and the reports of respondent's physicians"); *Matter of Soma v City of New York*, 81 AD2d 889, 890 (2nd Dept 1981) ("[i]t is apparent that the city, by virtue of the line of duty injury report filed with its department of sanitation, had actual knowledge of all the facts relevant to the petitioner's claim"). The cases cited by the City in opposition to the foregoing proposition are distinguishable in that either the City agency did not receive an accident report or any form of constructive notice (*Tarquinio v City of New York,* 84 AD2d 251, 269 [1st Dept 1982]), the Notice of Claim failed to mention the specific location and cause of the injury alleged (*Caselli v City of New York,* 105 AD2d 251, 253 [2nd Dept 1984]), or a discrepancy existed between what the accident report and the proposed Notice of Claim each contained (*Lozada v City of New York Bd. of Educ.*, Index No. 104956/08, Decision and Order [Sup. Ct. New York County May 6, 2008] [Rakower, J.] (attached as Resp. Exh. A]). Here, petitioner offers a Line-of-Duty Injury Report filled out by petitioner as well as an investigating supervisor and filed with the Department of Sanitation. (Order to Show Cause, Pet. Exh. 1). This report precisely specified the incident as well as the date, time and location of the injury. *Id.* Additionally, petitioner offers medical reports (Order to Show Cause, Pet. Exh. 2) as well as his sworn statements as to periodic visits made to a Department of Sanitation clinic (*See* Order to Show Cause Pet. ¶ 7). Thus, it can be fairly found that the City obtained actual knowledge of the facts constituting the claim as enumerated by General Municipal Law § 50-e [5].

Additionally, the City maintains that "the city must have actual notice of the *claim*" (emphasis added) (Aff. in Opp. ¶ 17). However, General Municipal Law § 50-e [5] states that

courts may consider "whether the [public corporation] acquired actual knowledge of the *essential facts* constituting the claim" (emphasis added). The purpose of General Municipal Law § 50-e [5] is to provide courts with discretion to allow for late filings of Notice of Claims when actual notice of the claim has not been received within the statutory period. Thus the City's position is unpersuasive.

3. Prejudice

Once courts are satisfied sufficient notice of the facts underlying a claim has been afforded to the City, prejudice is unlikely to be found. *See, e.g., Matter of Beary v City of Rye*, 44 NY2d 398, 406 (1978); *Caminero* at 332; *Nayyar* at 629; *Matter of Gerzel v City of New York*, 117 AD2d 549, 551 (1st Dept 1986). In each case cited by the City in which prejudice was found, the City had neither constructive nor actual notice of the petitioner's claim. *See Jenkins v New York City Hous. Auth.*, 29 AD3d 319, 319-320 (1st Dept 2006); *Alexander v City of New York*, 2 AD3d 332, 332 (1st Dept 2003); *Smith v City of New York*, Index No. 113241/07, Decision and Order (Sup. Ct. New York County, Oct. 23, 2007) (Rakower, J.) (Resp. Opp., Exh. B). Thus, because the City was afforded sufficient notice of the facts underlying claimant's claim it cannot be held to have been prejudiced. More importantly, other than speculation, the City fails to identify how the passage of time has prevented it from investigating this claim given that the witnesses, if any, are likely to be City employees and there is no evidence that the alleged defect, a pothole, has yet been remedied.

On balance, a weighing of the three factors weighs in favor of permitting petitioners to have their day in court. Accordingly, the petition is granted. It is therefore

ADJUDGED and ORDERED that the petition to file a late Notice of Claim is granted; and it is further

ORDERED that the proposed Notice of Claim annexed to the petition as Exhibit 3 shall be deemed timely filed upon service of a copy of this decision, order and judgment with notice of entry upon the respondent.

This constitutes the decision, order and judgment of this court.

ENTER:

Paul G. Feinman

J.S.C.

Dated: June 30, 2008
New York, New York