

**Matter of Plotkin v Dormitory Auth. of State of  
N.Y.**

2008 NY Slip Op 32271(U)

August 6, 2008

Supreme Court, New York County

Docket Number: 0109747/2008

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE  
*Justice*

PART 4

FRANCES M. PLOTKIN and EDWARD S. PLOTKIN

INDEX NO. 109747/08

MOTION DATE 07-31-08

- v -

MOTION SEQ. NO. 001

THE DORMITORY AUTHORITY OF  
THE STATE OF NEW YORK

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion to Serve late notice of claim

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


	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1</u>
Answering Affidavits -- Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, the motion is decided in accordance with the annexed Judgement/Decision.

**UNFILED 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 appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: August 6, 2008

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 4

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and matters of course cannot be entered hereon. To obtain entry, consent or authority representative must appear in person at the Judgment Clerk's Desk (Room 1470)

-----X  
In the Matter of the Application of  
FRANCES M. PLOTKIN and EDWARD S. PLOTKIN,

Petitioners,

Seeking leave to serve and file a late  
Notice of Claim

-against-

Index No. 109747/08

THE DORMITORY AUTHORITY OF  
THE STATE OF NEW YORK,

Judgment/Decision

Respondent.

-----X  
KIBBIE F. PAYNE, J.:

In this special proceeding, commenced by order to show cause, petitioners Frances and Edward Plotkin seek leave to serve a late notice of claim against respondent The Dormitory Authority of the State of New York ("DASNY") pursuant to General Municipal Law § 50-e (5). Respondent has opposed the application.

Petitioners claim that on April 9, 2008, they were walking on the Campus of the City College of New York of the City University of New York ("City College") when Mrs. Plotkin tripped and fell due to a defective sidewalk. The allegedly defective portion of the sidewalk was specifically located on Convent Avenue, between the Marshak Building and the Administration Building. As a result of the fall, Mrs. Plotkin suffered injuries, including a fractured hip.

While petitioners filed a timely notice of claim on July 7,

200, naming City College as the negligent party, at that time the DASNY was not served with any such notice. In filing the original notice of claim, petitioners relied on their attorney's research including City College's own property map, which did not reflect DASNY ownership of the subject property. On July 8, 2008, however, petitioners' counsel received a report that he had previously requested from Big Apple Pothole Company, which indicated that the area where Mrs. Plotnick fell was "private property." As a result of that information, petitioners' counsel conducted further research and determined that on September 17, 2004, the property in question had been transferred to the DASNY.

Initially, the DASNY argues that the court must evaluate the merits of this action as against it and, thus, deny petitioners' application. However, the cases the DASNY cites in support of this argument are inapposite on both the facts and the law.<sup>1</sup> Most of the cases cited by the DASNY concern dispositions on summary judgment motions, whereas in the case at bar the court is tasked with determining a motion seeking leave to file a late notice of claim. Consequently, the court finds the DASNY's

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<sup>1</sup> See *Mazzilli v. New York*, 115 AD2d 604 (2d Dep't 1985) (granting extension to file late notice of claim where, inter alia, petitioner's mental disability excused delay); *Green v. Dormitory Authority of State*, 173 AD2d 1 (3d Dep't 1991) (summary judgment motion in action involving personal injuries sustained by plaintiff when she was raped and attacked in her dormitory); *García v. Dormitory Auth.*, 195 AD2d 288 (1st Dep't 1993) (summary judgment motion); *Bonifacio v. 910-930 S. Blvd., LLC*, 295 AD2d 86 (1st Dep't 2002) (summary judgment motion); *Shrenkel v. New York State Dormitory Auth.*, 266 AD2d 369 (2d Dep't 1999) (summary judgment motion).

argument-viz., that an evaluation of petitioners' underlying claim would warrant denial of this petition-unavailing.

Turning then to the applicable statute, General Municipal Law § 50-e (5) provides that the court may extend a party's time to serve a notice of claim, so long as that extension does not exceed the appropriate statute of limitations for the commencement of an action by the claimant against the public corporation. Further, in making the determination as to whether an extension of time should be granted, the court should consider, inter alia,

whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within [90 days] or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including:

\* \* \*

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; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

(General Municipal Law § 50-e [5]; see also Public Authorities Law § 1691 [1]).

Here, an extension of time to file a late notice of claim would not exceed the applicable statute of limitations and the DASNY acquired actual knowledge of the essential facts concerning petitioners' claims via the instant order to show cause, served

on the DASNY within three weeks after the 90-day period following Mrs. Plotnick's fall had expired. Additionally, petitioners have a reasonable excuse for their delay in serving their notice of claim on the DASNY.

Due to the information they discovered, after their attorney's research, petitioners' error in believing that City College was the proper public corporation against which their claims should be asserted is an excusable one (see *Tadros v. New York City Health & Hospitals Corp.*, 112 A.D.2d 85, 86 [1st Dep't 1985]). Further, petitioners' prompt application for the instant relief-after discovering that City College may not have been the proper governmental entity to be served-weighs in favor of excusing that error (see *Farrell v. City of New York*, 191 AD2d 698, 698 [2d Dep't 1993]).

Finally, the DASNY has failed to demonstrate that this brief delay will prejudice it (*Ahferom v. Dormitory Auth.*, 282 AD2d 343, 344 [1st Dep't 2001] [leave to file late notice of claim is proper where delay is relatively short and DASNY makes no showing of resultant prejudice]). Thus, the instant motion is granted and the notice of claim as attached to the moving papers is deemed served on the DASNY, nunc pro tunc. Accordingly, it is

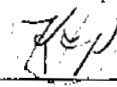
ORDERED and ADJUDGED that petitioners' motion is granted and

the notice of claim, in the form attached to the moving papers,  
is deemed served on respondent the Dormitory Authority of the  
State of New York, nunc pro tunc.

The foregoing constitutes the decision, order and judgment  
of the Court.

Dated: August 6, 2008

ENTER:



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KIBBIE F. PAYNE  
J.S.C.

**UNFILED JUDGMENT**

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1412).