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

PRESENT: RAKOWER Justice

PART 5

BALBI, MARIA

- v -

THE CITY OF NEW YORK

INDEX NO. 110293/08

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
SEP 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: August 14, 2008

EILEEN A. RAKOWER J.S.C.
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 5

MARIA BALBI,

Petitioner,

INDEX NO. 110293/08

- v -

THE CITY OF NEW YORK

Respondent.

MOT. SEQ. 001

RAKOWER, EILEEN A., J.S.C.:

On April 27, 2007, petitioner sustained personal injuries when she tripped and fell at the intersection of Broadway and Hamilton Place, New York, New York. Petitioner alleges that respondent City of New York (City) was negligent in that the curb and sidewalk at the subject location are at an excessive level relative to the street level and, in addition, the sewer grate at the intersection was not flat and level.

Petitioner retained counsel and on July 26, 2007, he attempted to file, by regular mail, a notice of claim with City. By two letters dated August 22, 2007, City responded to petitioner, first acknowledging receipt of the notice of claim and then disallowing the claim on the ground that it was not received within ninety days of the accident as required by General Municipal Law § 50-e. Petitioner now files this Order to Show Cause seeking leave of the Court to file a late notice of claim. City opposes the application.

A notice of claim must be filed within 90 days of when the claim arose.(General Municipal Law 50-e(1)(a)). The court has discretion to grant leave to file a late notice of claim within one year and ninety days of accrual. (General Municipal Law 50-e(5)). Key factors to be considered include whether the petitioner has demonstrated a reasonable excuse for failing to file such notice timely, whether the public corporation acquired actual notice of the essential facts within 90 days after the claim arose or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in defending on the merits. No one of these factors is determinative. *(Nieves v. New York Health and Hospitals Corp*, 34 AD3d 336 [1st Dept. 2006]).The burden to prove lack of prejudice rests with petitioner. (*Williams v. Nassau County Medical Center,* 6 NY3d 531 [2006]).

Petitioner argues that she has a reasonable excuse for the delay because her attorney resorted to filing the notice of claim by regular mail out of medical necessity. Petitioner's counsel submits an affidavit affirming that he suffered from the flu for the entire week proceeding the ninety day deadline for filing a notice of claim. At oral argument, petitioner submits that City need not adhere to the "hyper-technical" requirement that a notice of claim be served upon City either personally, or by registered or certified mail. Petitioner also argues that City has received notice of the claim with the filing of an Order to Show Cause seeking leave to file a late notice of claim originally filed in December, 2007. Another Justice of this Court denied that petition in February, 2008 because the petition did not contain an affidavit of service. By decision dated March 11, 2008, that Justice amended his decision finding that, although there was no affidavit of service with the moving papers, the County Clerk's file contained a copy of an affidavit of service showing that petitioner served the Office of the Comptroller rather than the Office of the Corporation Counsel. The March, 2008 amended decision again denied the application, "without prejudice to a new proceeding seeking the same relief on properly served papers."

Petitioner again filed an Order to Show Cause on July 28, 2008, which this court first refused to sign because the one year and ninety days within which petitioner may file a late notice of claim pursuant to General Municipal Law 50-e(5) had expired on July 26, 2008. Petitioner re-submitted the Order to Show Cause with a letter noting that because the final day to file for permission to file a late notice of claim expired on a Saturday, petitioner's time was extended to the next business day, Monday, July 28, 2008, when this petition was actually filed. Petitioner now urges this court to look upon the July, 2007 notice of claim that was rejected by City and the December, 2007 petition as actual notice to City of his claim and deem his notice of claim filed within a reasonable time after the expiration of the ninety day deadline.

Petitioner further argues that City cannot demonstrate prejudice in connection with defending this claim. She states that City has not been disadvantaged in its ability to investigate the claim because he has appended photographs of the accident area taken within days of the accident. Petitioner states that as recently as two weeks ago petitioner's daughter observed that the condition remains the same now as it was then. Petitioner states that City cannot offer any proof that the condition has changed since the date of the accident because it is "a structurally stable condition wrought of steel and concrete . . . not at all a transitory condition." Further, she argues that any claim by City that it has lost its opportunity to locate and interview witnesses is without merit because witnesses would be irrelevant to her claim.

Lastly petitioner argues that considerations of fairness, the interest of justice and petitioner's interest in just compensation for her injuries, outweigh City's need for notification of claims against it.

City argues that the illness of petitioner's attorney is not a reasonable excuse for her delay in filing a notice of claim, particularly because petitioner has failed to provide supporting, independent medical evidence. City argues that petitioner's position that the statutorily required manner of service is hyper-technical is also not reasonable. It states that counsel for petitioner's hope that City would "cut me a little slack" in regard to petitioner's faulty service demonstrates disregard for the mandates of the statute. City states that it has been prejudiced by the delay because a prompt investigation of the claim is no longer possible. It states that City did not have actual knowledge of the facts of the claim and knowledge cannot be imputed to City by improper service of a notice of claim or by the service of papers on an improper City agency. City notes that it is petitioner's burden to show that City will not be prejudiced by the late filing and it argues that petitioner has failed to meet her burden. Lastly, City argues that after petitioner was informed of City's disallowance of her notice of claim in August, 2007, she did not make another attempt to file the notice of claim until the December, 2007 Order to Show Cause. City notes that when petitioner's first Order to Show Cause was denied without prejudice, she did not file again until months later, one year and ninety days after the incident.

Petitioner has failed to proffer any reasonable excuse for the extensive delay here. Initially, the notice filed was late. Upon City's rejection of such late notice, petitioner took no action for an additional four months. The action petitioner took in December 2007 was deemed improperly served, and denied by Justice Nicholas Figueroa. Despite the improper service of that December 2007 Order to Show Cause and its denial, Counsel for petitioner initiated an *ex parte* communication with that court. Justice Figueroa notes in his amended decision and order, "[a]fter petitioner's attorney telephoned chambers and informed the court that he had submitted an affidavit of service, the court requisitioned the County Clerk's file." Again, Justice Figueroa denied the petition for improper service, noting that the Corporation Counsel was NEVER served and that the Comptroller was served by ordinary mail. Despite Justice Figueroa's amended decision being dated March 11, 2008, no further application was made until July 28, 2008.

Petitioner's attorney sent a communication to this Court, urging that the Court's refusal to sign the Order to Show Cause was in error since the one year and 90th day

fell on a Saturday. Here, petitioner's attorney was relying on the technicalities to ensure his timely application. Nevertheless, petitioner's attorney offers no explanation for the delays occasioned by each application.

General Municipal Law 50-e (3) specifically states:

> How served; when service by mail complete; defect in manner of service; return of notice improperly served.
>
> (a) The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.

Petitioner argues that City received actual notice of the claim, first by service of its original late notice of claim and then again by its December 2007 Order to Show Cause. However, improper service of the ***late*** notice was not actual notice of the claim to City of essential facts constituting the claim within the time specified or within a reasonable time thereafter. First, the original notice was mailed by regular mail, and rejected by City as untimely. No further notice was received until the instant Order to Show Cause. The December Order to Show Cause, Justice Figueroa concluded, was never actually served.

General Municipal Law § 50-e (3)(c), a savings provision, specifies that if a notice of claim is timely served "but in a manner not in compliance with the provisions of this subdivision [3] " (emphasis added), service is nonetheless valid "if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it" or, alternatively, "if the notice is actually received by a proper person within the time specified by this section [i.e., within 90 days after the claim arises], and the public corporation fail [sic] to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received" (emphasis added). (*Scantlebury v. New York City Health and Hospitals Corp.*, 4 N.Y.3d 606[2005]).

Here, City did not receive the original mailed notice within 90 days after the claim arose, did not demand the examination of claimant, and promptly rejected the

untimely notice. The December Order to Show Cause, Justice Figueroa concluded, was never actually served upon the Corporation Counsel; and indeed, Justice Figueroa noted that with regard to the Order to Show Cause before him, the "Corporation Counsel has not appeared, and the court cannot speculate its failure to appear is attributable to anything but the lack of service."

Petitioner's position that her photographs are sufficient evidence of the defect and that witnesses are irrelevant is unavailing. The original notice described a sewer grate as well as a curb height being extreme, and therefore defective. City is entitled to sufficient notice to investigate both the structural claim and locate witnesses who may or may not corroborate how petitioner fell and which alleged defect, if any, was the proximate cause of that fall.

Petitioner has failed to meet her burden to prove that City has not been prejudiced by the numerous lengthy delays in petitioner's properly seeking the relief requested here. Additionally, the excuse that counsel suffered from the flu for one week during the one year and ninety days after the accident is not a reasonable excuse for improper and untimely service of the required notice. Wherefore, it is hereby

ORDERED that petitioner's application for leave to file a late notice of claim is denied.

This constitutes the decision and order of the court.

Dated: August 27, 2008

EILEEN A. RAKOWER, J.S.C.