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

PRESENT: JAFFE Justice

PART 5

FERNANDEZ, JUAN

-v-

THE CITY OF NEW YORK

INDEX NO. 118063/09

MOTION DATE 2/16/10

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this ~~motion~~ petition to/for serve late notice of claim

	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
MAR 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/3/10

MAR 03 2010 MAR 05 2010

BARBARA JAFFE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Claim of JUAN FERNANDEZ,

Index No. 118063/09

Motion Date: 2/16/10

Petitioner,

-against-

DECISION AND ORDER

THE CITY OF NEW YORK,
for an Order granting leave to serve a Notice of Claim
pursuant to GML Section 50-e(5),

Respondent.

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BARBARA JAFFE, JSC:

By order to show cause dated January 7, 2010, petitioner moves for an order granting him leave to serve a late notice of claim upon respondent and deeming the notice timely served *nunc pro tunc*. Respondent opposes the petition. For the following reasons, the petition is denied.

I. CONTENTIONS

Petitioner alleges that on January 18, 2009, while walking on Mulberry Street in Manhattan, he tripped on an uneven and cracked hole on the sidewalk and fell, sustaining physical injuries. (Affirmation of Alexander P. Kelly, dated Dec. 7, 2009 [Kelly Aff.]). An ambulance operated by an employee of the New York City Fire Department arrived soon thereafter and transported petitioner to a hospital. Petitioner offers an "FDNY Prehospital Care Report" (FDNY Report) which he allegedly received from the ambulance driver. The FDNY Report is a typewritten patient information form which reflects no details relating to petitioner or his accident. (*Id.*, Exh. C).

Petitioner explains that he did not timely file or serve respondent with his notice of claim because his prior attorney failed to do so. In August 2009, he retained present counsel, and on or about August 15, 2009, counsel hired an investigator to photograph the sidewalk hole. (*Id.*). Displayed in the photographs are pink spray-painted sidewalk markings which petitioner alleges are used by respondent to mark sidewalks for excavation after permits are issued. (*Id.*, Exh. B).

Petitioner's new attorney alleges that he learned from respondent that it had issued a permit to excavate the sidewalk on which petitioner tripped, and that the excavation was intended to allow for the placement of a pole for temporary lighting. On September 23, 2009, petitioner served on respondent a notice of claim. (*Id.*, Exh. A).

Petitioner thus contends that respondent acquired actual notice of the facts constituting his claim through the FDNY Report and when it issued a permit relating to the sidewalk. And as the sidewalk hole must have existed in 2008, petitioner also maintains that respondent must have known of it, that upon issuing the permit, respondent was duty-bound to inspect the site, and that respondent must have records relating to the permit process, thereby receiving an ample opportunity to investigate his claim. (*Id.*).

Respondent denies having received actual notice of the claim and asserts that petitioner fails to annex either a copy of the FDNY Report or the permit. Moreover, it argues that petitioner has failed to prove that a permit was actually issued, and that even if one were issued, it would not establish notice of the defect. It claims that petitioner's contention concerning the pink spray paint is based on inadmissible hearsay, and that petitioner has failed to prove an absence of prejudice arising from the delays in submitting the claim and filing the instant petition or offer a reasonable excuse for the delay. (Affirmation of Peter Lucas, Esq., dated Feb. 10, 2010

[Lucas Aff.]).

II. APPLICABLE LAW

Pursuant to General Municipal Law (GML) § 50-a, in order to commence a negligence action against a municipality, a claimant must serve a notice of claim upon the municipality within 90 days of the date on which the claim arose. Pursuant to GML § 50-e, the court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (*Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]).

III. ANALYSIS

A. Actual knowledge

A municipality receives actual knowledge of the essential facts constituting a claim when it acquires actual knowledge of the facts underlying the theory on which liability is predicated (*Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]), not merely knowledge of the facts underlying the incident (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *lv denied* 76 NY2d 875).

An accident report may provide a municipality with actual knowledge of a claim, if it has been filed with the appropriate official, shows ownership or control over the location where the accident occurred, and indicates the defect causing the injury and the negligence or fault of the location's owner. (62A NY Jur 2d, Government Tort Liability § 416 [2010]). It must be readily

inferred from the report that a potentially actionable wrong had been committed. (*Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009]). Its mere preparation is insufficient. (*Acosta v City of New York*, 39 AD3d 629 [2d Dept 2007]).

Here, as petitioner has failed to submit anything other than the FDNY Report, there is no basis for finding that City received any notice of his accident. (*See Devivo*, 68 AD3d at 991 [police and ambulance report only described response to scene, treatment of injuries, and transport to hospital]; *Delgado v City of New York*, 39 AD3d 387 [1st Dept 2007] [fire department ambulance report contained no information from which notice of claim could have been inferred]; *Acosta*, 39 AD3d at 629 [police accident report contained no facts relating to claim and did not connect accident to any negligence by respondent]; *Zimmerman v City of New York*, 161 AD2d 591 [2d Dept 1990], *lv denied* 76 NY2d 707 [ambulance report which stated that petitioner had fallen and sustained injury and police memo book that only indicated that officer responded to scene did not establish that defendant had actual knowledge]). Nor did petitioner allege that the FDNY Report was filed with the appropriate official.

Although counsel alleges that a permit to excavate the location was issued, he offers no evidence of it, and even if he had, the permit would not likely provide any details of petitioner's accident or his theory of liability. (*See eg Braverman v City of White Plains*, 115 AD2d 689 [2d Dept 1985] [contention that defendant had actual knowledge of claim based on its contracts with companies, issuance of work permits, and fact that employees or agents were at worksite was unsupported by evidence]).

Consequently, petitioner has failed to establish that respondent received actual knowledge of his claim.

B. Prejudice

Petitioner did not move for leave to serve a late notice of claim until slightly less than one year after the accident and the accident is alleged to have been the result of a sidewalk defect. In *Gomez v City of New York*, the court held that a delay of six months after such an accident substantially prejudices the municipal respondents' ability to investigate sidewalk defects and other circumstances surrounding an accident. (250 AD2d 443 [1st Dept 1998], *lv denied* 92 NY2d 809; *see Acosta*, 39 AD3d at 630 [delay of more than one year prejudiced respondent]; *Arias v New York City Hous. Auth.*, 40 AD3d 298 [1st Dept 2007] [delay of seven months between accident and petition prejudiced respondent's ability to investigate accident]). In any event, petitioner offers no evidence to rebut respondent's claim of prejudice (*White v New York City Hous. Auth.*, 38 AD3d 675 [2d Dept 2007]), and does not explain how respondent's permit records would negate any prejudice caused by the delay.

C. Reasonable excuse

As petitioner does not specify when his former lawyer stopped working on the case, there is no explanation for the delay from January 2009 to the time he hired his new lawyer. Nor is there any explanation of the delay from August 15 to September 23, 2009, or of why he waited until January 7, 2010 to file this petition. Absent any explanation, there is no factual basis for finding the delays are reasonable. (*See Nieves v Girimonte*, 309 AD2d 753 [2d Dept 2005], *lv denied* 1 NY3d 591 [2004] [petitioner offered no explanation for waiting additional five months after learning of respondent's involvement before filing petition]; *Fox v City of New York*, 91 AD2d 624 [2d Dept 1982] [petitioner failed to adequately explain unreasonable delay in bringing motion for leave more than 11 months after accident]).

The alleged law office failure of petitioner's prior attorney likewise does not constitute a reasonable excuse for the delay. (*See Deegan v City of New York*, 227 AD2d 620 [2d Dept 1996]; *Chattergoon*, 161 AD2d at 141 [counsel's claim that he had difficulty obtaining facts about respondent's possible liability was inadequate as record showed that he learned of essential facts when first retained; excuse amounted to law office failure]).

IV. CONCLUSION

Accordingly, it is

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

This constitutes the decision and order of the court.

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: March 3, 2010
New York, New York

MAR 03 2010

FILED
MAR 08 2010
COUNTY CLERK'S OFFICE
NEW YORK