

Matter of Victors v City of New York

2010 NY Slip Op 30583(U)

March 18, 2010

Supreme Court, New York County

Docket Number: 115767/09

Judge: Cynthia S. Kern

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

JAMES VITINS

INDEX NO. 115767/09

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

City of NY

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached decision.

FILED
MAR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/18/10

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
In the Matter of the Application of JANET VICTORS,

Petitioner,

Index No. 115767/09

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Respondent.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

FILED
MAR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Petitioner has brought the present petition seeking leave to serve a late Notice of Claim based on a trip and fall on a curb cut. For the reasons set forth below, petitioner's motion is granted.

The relevant facts are as follows. On July 8, 2009, petitioner allegedly tripped and fell due to a defective curb cut at the intersection of Seventh Avenue and West 23rd Street. Her left eye was injured in the fall. Surgery was performed on that eye on August 6, 2009. Petitioner alleges that due to the fall, her vision was severely impaired and that she was homebound from the date of the fall until the surgery. She further states that she continued to be homebound for nearly three months after the surgery, with the exception of doctor's appointments, due to

continued vision problems, headaches, vertigo, sensitivity to light and drowsiness from the pain medication she was prescribed. Petitioner failed to serve respondent the City of New York (the "City") with a timely Notice of Claim. On or about November 9, 2009 petitioner filed a Notice of Claim and brought an Order to Show Cause seeking permission to file that Notice of Claim, nunc pro tunc.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law ("GML") §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the delay prejudiced the municipality's defense and whether the municipality acquired "actual knowledge of the essential facts constituting the claim" within ninety days after the claim arose or within a reasonable time thereafter. *See* GML §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993). It is petitioner's burden to prove each of these elements, including lack of prejudice to the respondent. *See Delgado v City of New York*, 39 A.D.3d 387 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the respondent acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See Justiniano v New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993); *see also Gelish v Dix Hills Water District*, 58 A.D.3d 841 (2nd Dept 2009) (delay of less than one month merited granting leave to file late notice of claim even where petitioner had no reasonable excuse).

Considering all the above factors together, petitioner's motion to serve a late notice of claim is granted. First, petitioner states a reasonable excuse for her delay. Physical incapacity, if supported by medical evidence, is a reasonable excuse. *See Ansong v City of New York*, 308 A.D.2d 333 (1st Dept 2003); *Dubowy v City of New York*, 305 A.D.2d 320 (1st Dept 2003); *Silva v City of New York*, 246 A.D.465 (1st Dept 1998). In the instant case, petitioner submits an affidavit in which she explains that she was unable to retain an attorney and file a notice of claim because she was homebound and physically impaired following the accident and then her surgery. She also submits her medical records which substantiate that she sustained a serious injury.

Moreover, while it is true that the City did not acquire actual knowledge of the claim within the statutory period, the City did acquire knowledge only 4 weeks after that period had expired, which is a reasonable time thereafter. *See* GML §50-(e)(5); *Strauss*, 195 AD2d 322; *Gelish*, 58 A.D.3d 841 (delay of less than one month a reasonable time after expiration of 90-day period). Although petitioner's initial argument that an accident report prepared by the fire department and a Big Apple map gave the City notice of the claim is without merit, the City still had notice within a reasonable time after the expiration of the statutory period. *See Wollins v NYC Board of Education*, 8 A.D.3d 30 (1st Dept 2004) (accident reports prepared by city employees not sufficient to show actual notice); *Pineda v City of New York*, 305 A.D.2d 294 (1st Dept 2003) (same); *see Gomez v City of New York*, 250 A.D.2d 443 (1st Dept 1998) (Big Apple map may give the City notice of the alleged defect but does not constitute notice of petitioner's claim); *Konstantinides v City of New York*, 278 A.D.2d 235 (2nd Dept 2000) (same).

Finally, the fact that petitioner's notice of claim was only 4 weeks late and that the

