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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Justice

Index Number : 105249/2010

GORDON, KEVIN

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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~~ proceeding for leave to serve a late Notice of Claim is granted in accordance with the accompanying memorandum 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 141B).

Dated: JUL 20 2010

ALICE SCHLESINGER 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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK 1A PART 16

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KEVIN GORDON,

Petitioner,

Index No. 105249/2010
Motion Seq. No. 001

-against-

THE CITY OF NEW YORK, PARKING ENFORCEMENT DISTRICT VIOLATION TOW POUND,

Respondent.

SCHLESINGER, J.

Petitioner Kevin Gordon commenced this special proceeding seeking leave to serve a late Notice of Claim pursuant to General Municipal Law §50-e(5). Respondent The City of New York, Parking Enforcement District Violation Tow Pound, has opposed the petition, contending that petitioner has failed to satisfy the requisite statutory criteria.

Background Facts

According to the Notice of Claim served on November 12, 2009 (Exh. C to the Petition), the underlying claim sounds in negligence. The City towed the car belonging to Mr. Gordon on August 5, 2009. When he went to pay the fines and retrieve the car on August 8, 2009, he was unable to drive it; while the car started, it only rolled very slowly, despite the roaring engine. Accordingly to his affidavit submitted in support of the petition, Mr. Gordon brought this problem to the attention of two or three tow-pound officers and an attendant at the front gate, who "proceeded to look over at the car and agreed that it was not drivable." Mr. Gordon had to leave the car at the pound and arrange for AAA to pick it up and bring it to their authorized mechanic, which AAA did about ten days later.

As Mr. Gordon further explains in his affidavit, the AAA mechanic "determined that the tow pound had punctured [the] transmission and the car had been driven without

transmission fluid." Repairs were made, but they proved insufficient. Ultimately, the entire transmission needed to be replaced to put the car in good working order. This work was completed on October 8, 2009 when the mechanic installed a rebuilt transmission. Gordon explains that the mechanic advised him to drive the car for a few weeks to confirm that all the damage had been fully repaired.

Mr. Gordon determined that all necessary repairs had been completed after a long drive the weekend of November 8. He then gathered the necessary information and served his Notice of Claim on November 12, 2009. He commenced a proceeding in Small Claims Court on February 1, 2010, and commenced this proceeding to have his Notice of Claim deemed timely filed in April 2010.

Petitioner is Entitled to Leave to Serve a Late Notice of Claim

Pursuant to General Municipal Law §50–e, subd. 1(a), a claimant commencing a tort action against a public corporation must serve and file a proper Notice of Claim within ninety days after the claim arises. The related action or proceeding must be commenced within one year and ninety days of the event. Gen. Mun. Law §50–*i*. An application for an extension of time to serve a Notice of Claim may be made before or after the action has been commenced, but not after the one-year and ninety-day statute of limitations has run, unless the statute has been tolled. Gen. Mun. Law §50-e, subd. 5.; see also, *Nunez v The City of New York,* 307 A.D.2d 218, 219 (1st Dep't 2003); *Pierson v. City of New York,* 56 N.Y.2d 950, 954 (1982).

In determining whether leave should be granted to serve a Notice of Claim after the ninety-day period, "the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time

frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative'." *Velazquez v. The City of New York Health and Hospitals Corp.*, 69 AD3d 441 (1st Dep't 2010), quoting *Matter of Dubowy v. City of New York*, 305 AD2d 320, 321 (2003).

Petitioner herein timely filed this application on April 21, 2010, whether the year and ninety days is calculated from the towing on August 5, 2009, as the City alleges, or the time when Mr. Gordon picked up his car and discovered the damage on August 8, 2009. In addition, Mr. Gordon has established the requisite criteria for leave to file a late Notice of Claim.

Petitioner's delay in filing was very brief, a few days at most. Even if measured from August 5, the Notice of Claim should have been filed on or about November 5, but it was filed on November 12. Respondent claims that petitioner's excuse related to his mechanic's "trial and error" approach is inadequate. However, this Court finds the brief delay excusable. "The statute [providing for a late notice of claim] is remedial in nature and, therefore, should be liberally construed ..." *Porcaro v City of New York*, 20 AD2d 357-58 (1st Dep't 2005)(citations omitted). In any event, "the presence or absence of any one of the statutory factors is not determinative ... and the absence of a reasonable excuse is not, standing alone, fatal to the application ..." *Id.* (citations omitted). Thus, in *Porcaro*, the Appellate Division reversed the trial court and granted petitioner leave to file a late notice of claim where the party had delayed until the injury had been confirmed, explaining:

> As we have previously held, petitioner should not be penalized for waiting to see if his symptoms, which resembled a cold or the flu, would resolve themselves. To hold otherwise would encourage preemptive filing of notices of claim by claimants who have no good-faith basis for believing that they were actually injured.

That same rationale applies here in petitioner's favor, particularly in light of the detailed affidavit provided by petitioner to document his efforts to have his car repaired fully and cost-effectively.

Notwithstanding claims by the City's counsel to the contrary, petitioner has amply demonstrated here that respondent had notice of the essential facts constituting the claim so as to justify the late filing. The intent underlying the notice requirement is "to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity 'to explore the merits of the claim while information is still readily available'." *Porcaro*, 20 AD2d at 358, quoting *Teresta v City of New York,* 304 NY 440, 443 (1952). "The statute, however, is not intended to operate as a device to frustrate the rights of individuals with legitimate claims ..." *Id.* (citations omitted).

Mindful of this policy, this Court finds that respondents had adequate notice of the facts. As Mr. Gordon explained in his affidavit, employees at the Tow Pound observed the problems with the car on August 8 and knew that Mr. Gordon had to leave the car there because he could not drive it. The employees were present when the AAA came and towed the car. These circumstances suffice to constitute notice of the facts underlying petitioner's claim. See, e.g., *Figueroa v. NYCHHC*, 49 AD3d 454 (1st Dep't 2008) (hospital's possession of medical records gave actual notice of facts underlying malpractice claim); *Johnson v New York City Transit Authority, 278 AD2d 83* (1st Dep't 2000) (line of duty

report establishes notice of facts relating to trip and fall by officer in the station house); *In re Sokolowski*, 173 AD2d 239 (1st Dep't 1991) (possession of accident report with details of the occurrence constituted actual notice).

Nor can respondent reasonably claim prejudice resulting from the short delay of only a few days. Not only did the City have an opportunity to interview witnesses and gather essential evidence about the August 2009 incident when the Notice of Claim was filed in early November 2009, but they presumably did a full investigation in February 2010 when Mr. Gordon commenced the Small Claims proceeding. Further, considering the short time that has elapsed, the City may well be able to contact any witnesses again. Where, as here, the City has offered no evidence to substantiate counsel's conclusory claim of prejudice, the late Notice of Claim should be allowed. *See, Giannicos v Bellevue Hospital Medical Center*, 42 AD3d 379 (1st Dep't 2007).

Accordingly, it is hereby

ORDERED AND ADJUDGED that petitioner's motion for leave to serve a late Notice of Claim is granted, and the Notice of Claim is deemed timely served in the form annexed to the petition as Exhibit C and served upon the City on November 12, 2009.

This constitutes the decision and judgment of the Court.

Dated: July 20, 2010

JUL 20 2010

J.S.C.
ALICE SCHLESINGER

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 141B).