

**Bove v City of New York**

2010 NY Slip Op 32144(U)

August 10, 2010

Supreme Court, New York County

Docket Number: 104909/10

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. *Reading*

PART 52

Index Number : 104909/2010  
**BOVE, FRANCO**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 001  
LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. 104909/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

in 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.*

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

**FILED**  
AUG 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/10/10

CYNTHIA S. KERN J.S.C.  
*CSK*

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 52

-----X  
FRANCO BOVE,

Petitioner,

Index No. 104909/10

-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

Notice of Motion and Affidavits Annexed.....  
Notice of Cross Motion and Answering Affidavits.....  
Affirmations in Opposition to the Cross-Motion.....  
Replying Affidavits.....  
Exhibits.....

Numbered **FILED**  
**AUG 13 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

\_\_\_\_\_  
2  
\_\_\_\_\_  
3

Petitioner commenced the instant action to recover damages for personal injuries he allegedly sustained when he was injured by a piece of metal protruding from a bench in a bus shelter on September 11, 2009. Petitioner now seeks leave to serve a late Notice of Claim. For the reasons set forth below, his motion is granted.

The relevant facts are as follows. On September 11, 2009, petitioner arose from a bench in a bus shelter when he was allegedly injured by a piece of metal protruding from the bench. On December 3, 2009, petitioner filed a Notice of Claim with the MTA and MTA Bus Company Inc. On December 4, 2009, petitioner filed a Notice of Claim with the New York City Transit Authority. At petitioner's 50-H hearing at the offices of the New York City Transit Authority on

February 17, 2010, petitioner learned that the City of New York (the “City”) is responsible for maintaining bus shelters. Petitioner subsequently filed a Notice of Claim with the City that same day. The City disallowed the claim because the Notice of Claim was filed more than 90 days after the incident and petitioner now seeks leave to serve a late Notice of Claim.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within 90 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 90 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 (1<sup>st</sup> Dept 1993). It is plaintiff’s burden to prove each of these elements, including lack of prejudice to the defendant. *See Delgado v City of New York*, 39 A.D.3d 387 (1<sup>st</sup> Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1<sup>st</sup> Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant 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 (1<sup>st</sup> Dept 1993). The lack of a reasonable excuse alone is not fatal. *See Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1<sup>st</sup> Dept 2010).

Considering all the above factors together, petitioner’s motion to serve a late notice of claim is granted. First, petitioner has demonstrated a reasonable excuse for his delay in filing a

Notice of Claim. The courts have recognized mistakenly filing a Notice of Claim against a different public corporation than the one against which the claim should have been asserted as an excusable reasonable error when the petitioner promptly takes steps to correct the mistake upon learning that he or she had filed incorrectly. *See Harris v. Dormitory Authority of State of N.Y.*, 168 A.D.2d 560 (2<sup>nd</sup> Dept 1990); *see also Flynn v. Town of Oyster Bay*, 256 A.D.2d 341 (2<sup>nd</sup> Dept 1998). In the instant case, petitioner filed Notices of Claim with two public corporations, one of which scheduled a 50-H hearing, leading petitioner to believe that he had served at least one public corporation that bore responsibility for the alleged defect. He promptly filed a Notice of Claim with the City on the same day that he found out it that it was responsible for bus shelters. As a result, he has shown that he has a reasonable excuse for his failure to file a timely Notice of Claim on the City.

Moreover, while it is true that the City did not acquire actual knowledge of the claim within the statutory period, the City did acquire actual knowledge when petitioner initially filed a Notice of Claim against it only 2 months after that period had expired, which is a reasonable time thereafter. *See GML §50-(e)(5)*; *see also March v. Wappinger*, 29 A.D.3d 998 (2<sup>nd</sup> Dept 2006) (delay of 11 months was held to be a reasonable time after expiration of 90 day period). Finally, the fact that petitioner moved for leave to file a late Notice of Claim only 4 months late and that the alleged defect was not transitory makes it unlikely that respondent was prejudiced by the delay. *See Silva v City of New York*, 246 A.D.465 (1<sup>st</sup> Dept 1998).

Accordingly, petitioner's motion to serve a late Notice of Claim is granted. This

