

Matter of Farias v City of New York

2010 NY Slip Op 32721(U)

September 20, 2010

Supreme Court, New York County

Docket Number: 105657/10

Judge: Cynthia S. Kern

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

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

PART 52

Index Number : 105657/2010
FARIAS, ELIZABETH
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. 105657/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

n 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
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/20/10

CK
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

ELIZABETH FARIAS,

Petitioner,

Index No. 105657/10

for Leave to Serve and File Late Notice of Claim

-against-

THE CITY OF NEW YORK,

Respondent.

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

DECISION/ORDER
FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

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> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Petitioner commenced the instant action to recover damages for personal injuries she allegedly sustained when she slipped and fell on liquid on the floor in the second floor auditorium of the Police Academy of the City of New York on May 21, 2009. Petitioner now seeks leave to serve a late Notice of Claim. For the reasons set forth below, her motion is denied.

The relevant facts are as follows. On May 21, 2009, petitioner allegedly slipped and fell on coffee that had been spilled on the floor of the second floor auditorium of the Police Academy of the New York City Police Department. Several reports were prepared on the day of the

accident, including a Line-of-Duty Injury Report, Aided Card, and Witness Statement. However, none of these reports stated that petitioner slipped on coffee - they simply stated that she slipped and fell. Petitioner now seeks leave to file 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 (1st 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 (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 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 (1st 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 (1st Dept 2010). Where a plaintiff has not provided a reasonable excuse and the defendant did not have actual knowledge of the claim, the courts have declined to grant plaintiff leave to file a late notice of claim. *See Gitis v City of New York*, 68 A.D.3d 489 (1st Dept 2009).

Considering all the above factors together, petitioner’s motion to serve a late notice of

claim is denied. Petitioner does not present any excuse for her delay. Although she states that she did not hire counsel until after the 90-day statutory period, she does not provide an excuse for her delay in retaining counsel.

Moreover, the City did not acquire actual knowledge of the claim within the statutory period or shortly thereafter. “[K]nowledge of the facts underlying an occurrence does not constitute knowledge of the claim. What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of the claim.” *Liberty Group Holdings, Inc. v. City of New York*, 5 A.D.3d 148, 149 (1st Dept 2004) (internal quotations omitted). “Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim. A municipality often will have numerous employees assigned to separate and diverse agencies or departments, and the purpose of the statutory notice of claim requirement would simply not be fulfilled if all information obtained by municipal employees, officers or agencies in the regular course of their business was to be imputed to the municipality.” *Caselli v. City of New York*, 105 A.D.2d 251, 256 (2nd Dept 1984). However, the courts have held that the City does acquire actual knowledge through accident reports when a City employee is injured in the course of his or her employment when the accident report mirrors the proposed Notice of Claim in all central respects. *See Swensen v. City of New York*, 126 A.D.2d 499, 500 (1st Dept 1987).

In the instant case, the accident reports prepared after petitioner was injured did not provide the City with actual knowledge of her claim. The reports do not mirror the proposed Notice of Claim. They only indicate that plaintiff slipped and fell but do not indicate or even suggest that she may have slipped on a dangerous substance. The Line-of-Duty Injury Report

prepared on May 21, 2009 simply states that petitioner slipped and fell. The Aided Card prepared on May 21, 2009 states that petitioner slipped and fell while on duty. The Witness Statement given by Tanisha Gurley on May 21, 2009 states that the witness saw petitioner slip and fall to the ground. None of these reports suggest that petitioner may have a claim against the City because she slipped and fell on a dangerous foreign substance and therefore do not provide the City with actual knowledge of the facts underlying petitioner's claim. The document (labeled an Amendment to the Line-of-Duty Injury Report) that petitioner sent to the Commanding Officer of the Medical Division on June 30, 2009 that stated that she slipped on a foreign substance cannot be considered an accident report for the purpose of satisfying the actual knowledge requirement. It is not an accident report filed and submitted through the appropriate procedure but a letter to an officer within the Medical Division, a completely unrelated division of the police department that has no role in investigating accidents. As a result, it can only be considered to provide knowledge to the police officer who received and read it and not to the City pursuant to *Caselli, supra*. The witness statement given by Sgt. Thomas Vetell on March 23, 2010 also does not provide the City with actual knowledge because it was given seven months after the expiration of the statutory period.

Finally, the Court finds that the City was in fact prejudiced by petitioner's failure to file a timely notice of claim. Because the City had no knowledge of the facts underlying petitioner's claim, it was not able to investigate her accident. Petitioner's argument that the mere passage of time is insufficient to establish real prejudice is without merit. The cases cited to support her argument are all distinguishable from the present case because in each of those cases, the municipality had actual knowledge of the facts underlying the claims and therefore had the

