

Matter of Perez v City of New York

2010 NY Slip Op 32782(U)

October 4, 2010

Supreme Court, New York County

Docket Number: 107070/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5
Justice

Index Number : 107070/2010
PEREZ, ADA
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 late notice of claim

PAPERS NUMBERED

1
2
3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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: 10/4/10
OCT 04 2010

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 5

-----X
In the Matter of the Application of ADA PEREZ,

Index No. 107070/10

Petitioner,

Motion Date: 8/17/10
Motion Seq. No.: 001

for an Order pursuant to General Municipal Law Section
50e deeming service of a late notice of claim to be
timely served nunc pro tunc,

-against-

DECISION AND JUDGMENT

CITY OF NEW YORK,

BARBARA JAFFE, JSC:

For petitioner:
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For respondent:
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UNFILED JUDGMENT
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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).

By notice of petition dated May 26, 2010, petitioner moves pursuant to General
Municipal Law (GML) § 50-e(5) for an order deeming her notice of claim timely served *nunc pro*
tunc. Respondent opposes the petition. For the following reasons, the petition is denied.

I. BACKGROUND

On June 11, 2009, petitioner was allegedly injured while participating in a simulation
with another student during a New York City Police Department (NYPD) training class.
(Verified Petition, dated May 25, 2010 [Pet.]). Petitioner alleges that she immediately notified
the NYPD instructor that she had been injured, and that the instructor then notified an NYPD
sergeant about the incident. (*Id.*). The incident was documented in an NYPD Command Log,

which reflects that “[petitioner] injured her right wrist during the weapon disarming block of [instruction].” (*Id.*, Exh. A). On February 25, 2010, plaintiff served on City her notice of claim. (*Id.*, Exh. B).

II. CONTENTIONS

Petitioner argues that the petition should be granted as respondent acquired actual knowledge of the essential facts constituting her claim within 90 days of its accrual, relying on the command log record of the injury and the transmittal of the occurrence to the NYPD by the instructor. She also claims that respondent has not been prejudiced by the delay. (Affirmation of Antonette M. Milcetic, Esq., dated May 25, 2010).

Respondent observes that petitioner fails to offer any excuse for her delays, and denies having acquired actual knowledge of the incident absent any indication that petitioner informed the NYPD that her injuries were caused by its negligence. Respondent also argues that plaintiff has failed to show an absence of prejudice resulting from her delays. (Affirmation of Jeremy Jorgensen, Esq., dated July 16, 2010).

In reply, petitioner maintains that a reasonable excuse for a delay in serving a notice of claim is not dispositive if actual notice has been received and there is an absence of prejudice, and that having received actual notice of the facts underlying her claim, respondent had sufficient information to conduct an investigation. (Reply Affirmation, dated July 22, 2010).

III. ANALYSIS

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]).

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).

Here, petitioner does not allege that she informed the NYPD of anything other than that she had been injured during the training class; the command log conveys no additional information. Thus, petitioner has failed to show that respondent acquired actual knowledge of her claim that the NYPD had been negligent in any way that caused or contributed to her injury. (*Godfrey v City of New Rochelle*, 74 AD3d 1018 [2d Dept 2010] [even if plaintiff informed defendant about injury, mere general knowledge of injury insufficient notice]; *Indar v City of New York*, 71 AD3d 635 [2d Dept 2010] [while defendant may have had notice that plaintiff had been injured in accident, no information in submitted documents would have given defendant notice of facts underlying claim]; *Hill v New York City Transit Auth.*, 68 AD3d 866 [2d Dept 2009] [incident and investigation reports indicated only that petitioner slipped and fell]; *Jantzen*

v Half Hollow Hills Cent. School Dist. No. 5, 56 AD3d 474 [2d Dept 2008] [statement given to respondent that petitioner had been injured in wrestling scrimmage did not give respondent actual knowledge of petitioner's claim that it had been negligent in supervising scrimmage]; *Webb v New York City Housing Auth.*, 35 AD3d 313 [1st Dept 2006] [entry in file contained no causal connection between injuries and any negligence by defendant]; *Carpenter v City of New York*, 30 AD3d 594 [2d Dept 2006] [even if respondent's agent informed that petitioner fell on ice in parking lot, insufficient to give respondent actual knowledge of claim]).

B. Prejudice

Petitioner did not serve her notice of claim until eight months after the 90-day deadline had passed, and did not file the instant petition until three months thereafter. In asserting that respondent is not prejudiced by her delay, petitioner relies solely on her contention that respondent obtained actual knowledge of her claim on the date of her accident. As respondent did not obtain actual knowledge of the facts underlying the theory on which liability is predicated until her notice of claim was served eight months after her accident, petitioner has not established that respondent was not prejudiced by her delay.

C. Reasonable excuse

As petitioner fails to explain her delay in serving her notice of claim and filing the instant petition, there is no factual basis for finding the delays are reasonable. (See *Hendrix v City of New York*, 76 AD3d 613 [2d Dept 2010] [petitioner offered no explanation, much less reasonable one]; *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]).


For all of these reasons, petitioner has failed to establish any ground on which her petition may be granted. (See *Castro ex rel. Sanabria v Clarkstown Cent. School Dist.*, 65 AD3d 1141 [2d Dept 2009] [petition denied as petitioner offered no excuse for delay, accident claim form indicated only that petitioner had been injured and thus did not establish that respondent had actual knowledge of facts underlying negligent supervision claim, and she failed to establish that nine-month delay would not substantially prejudice respondent]; *Petersen v Susquehanna Valley Cent. School Dist.*, 57 AD3d 1332 [3d Dept 2008] [although petitioner reported accident to school nurse and accident report reflected that she was injured after another student pulled out chair from under her, respondent was not thereby made aware of claim that injuries resulted from its negligent supervision, and petitioner had no excuse for five-month delay]).

IV. CONCLUSION

Accordingly, it is

ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:



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

DATED: October 4, 2010
New York, New York

OCT 04 2010

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