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

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

Scott Madsen

- v -

The City of New York

INDEX NO. 111202/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for Pltf Cate N/C

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
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: 11/15/10
NOV 15 2010

J.S.C.
BARBARA JAFFE

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

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SCOTT MADSEN and MASAMI MADSEN,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

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Index No. 111202/10

Motion Date: 9/21/10
Motion Seq. No.: 001

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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For respondents:
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By order to show cause dated August 24, 2010, petitioners move pursuant to General Municipal Law (GML) § 50-e for an order granting leave to serve respondent, *nunc pro tunc*, with a late notice of claim. City opposes. For the following reasons, the petition is denied.

I. ALLEGED FACTUAL BACKGROUND

Petitioners' claim arose on March 31, 2010 at approximately 11:45 a.m. when Scott Madsen fell off a steel beam while working as an ironworker for DCM Erectors, Inc. on the 21st floor of the Freedom Tower at 1 World Trade Center, New York, New York. (Affidavit of Scott Madsen, dated Aug. 23, 2010). Immediately after the accident, he felt severe physical pain in his neck, back, right arm, right knee, right ankle, and right leg, and he continues to experience swelling, stiffness, and instability in his right knee, as well as continued pain in his neck and back, and has difficulty walking, climbing and descending stairs, squatting and bending. (*Id.*).

II. PERTINENT PROCEDURAL BACKGROUND

On August 9, 2010, petitioners retained counsel who, on August 11, 2010, filed a notice of claim with respondent. (Affirmation of Camille A. Fortunato, Esq., dated Aug. 23, 2010 [Fortunato Aff.], Exh. A).

III. CONTENTIONS

Petitioners explain their delay in filing their notice of claim with respondent as resulting from Scott Madsen's lack of awareness of the requirements set forth in GML § 50-e(a) and of the seriousness of his injuries. They observe that, in any event, the delay was *de minimis*, and that given respondent's earlier, actual notice of the events giving rise to the claims by virtue of the presence at the scene of the accident of respondent's agents and employees and the preparation of an accident report, it will not be prejudiced in maintaining its defense on the merits. In support of the merits of their claim, they rely on Labor Law § 240(1) which posits a non-delegable duty on contractors and owners to furnish workers with necessary security devices to protect them from falling from elevated locations. (Fortunato Aff.).

In opposition, respondent denies that it had actual notice of petitioners' claim and asserts that its defense is thereby prejudiced by the late notice. It also maintains that the claim patently lacks merit as a search of title and ownership of the location reflects that at the time of the accident, record title for the block was held by the Port Authority of New York and New Jersey, and that respondent's interest in the location is "limited solely to Greenwich Street, Fulton Street, Dey Street and Cortlandt Street as they are to be located within Block 58, Lot. 1," explaining that the Port Authority owns the entire lot that is not a future street. (Affirmation in Opposition of Andrew Lucas, ACC, dated Sept. 17, 2010, Exh. A [Affidavit of David Schloss, Senior Title Examiner, New York City Law Dept., dated Sept. 14, 2010]). It also submits an

online printout from the New York Times in which the Port Authority is identified as the owner. (*Id.*, Exh. B). In the alternative and to the extent the petition is granted, respondent argues that it should not be granted *nunc pro tunc* and that petitioner should be ordered to file its notice of claim through the Comptroller. (*Id.*).

IV. ANALYSIS

Pursuant to General Municipal Law (GML) § 50-e(l)(a) and 50-i, a tort action against a municipality must be commenced by service of a notice of a claim upon the municipality within 90 days of the date on which the claim arose. The court may extend the time to file the notice, 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. (GML § 50-e; *Grant v County Indus. Dev. Agency,* 60 AD3d 946, 947 [2d Dept 2009]). In considering these factors, none is dispositive. (*Barnes v County of Onondaga,* 103 AD2d 624, 628 [4th Dept 1984], *affd* 65 NY2d 664 [1985], *citing Bay Terrace Co-op. Section N v New York State Empls.' Retirement Sys. Policemen's & Firemen's Retirement Sys.,* 55 NY2d 979 [1982]). The standards are flexible, the court may consider all other relevant facts and circumstances (*Beary v City of Rye,* 44 NY2d 398, 407 [1960]), and given the remedial nature of the statute, it is liberally construed (*Porcaro v City of New York,* 20 AD3d 357, 358 [1st Dept 2005]; *Camacho v City of New York,* 187 AD2d 262 [1st Dept 1992]).

A. Actual knowledge

A municipality receives actual knowledge of the essential facts constituting a claim when

it acquires knowledge of the facts underlying the theory on which liability is predicated. (*Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]). Generally, facts constituting the claim are facts which demonstrate a connection between the accident and any negligence on the part of the municipality. (*Id.*; *Saafir v Metro-North Commuter R.R. Co.*, 260 AD2d 462 [2d Dept 1999], *lv denied* 93 NY2d 816). The municipality must have notice or knowledge of the specific claim and not merely some general knowledge that a wrong has been committed. (*Wright v City of New York*, 66 AD3d 1037, 1039 [2d Dept 2009]; *Arias v New York City Health and Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York*, 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *lv denied* 76 NY2d 875).

While petitioners allege that respondent's employees were present at the scene, there is no indication as to the information they obtained which would connect the accident to any negligence on respondent's part, and there is no evidence that the accident report was filed with respondent. Consequently, there is an insufficient factual basis for inferring that respondent had knowledge of the facts constituting the claim.

B. Prejudice

Absent respondent's knowledge of the facts constituting the claim, petitioners have not demonstrated that respondent is not prejudiced.

C. Reasonable excuse

Ignorance of the filing requirement does not constitute a reasonable excuse for the failure to file a notice of claim, nor does any unawareness of the extent of injury. (*See Jensen v City of New York*, 288 AD2d 346 [2d Dept 2001] [statute of limitations under GML § 50-i not tolled pending discovery of injuries or damages]). Moreover, only counsel asserts the latter argument.

D. Merit of claim

Where a claim "patently lacks merit," leave to file a late notice of claim should not be granted. (*West Seneca Cent. School Dist. v Hess*, 15 NY3d 813, 814 [2010]). Here, respondent has satisfactorily demonstrated that it does not own the location at which the accident occurred. Consequently, the claim against it is patently meritless.

V. CONCLUSION

While the notice of claim was served on respondent well within the statute of limitations and only six weeks beyond the 90-day deadline, the delay is not *de minimis*, petitioners offer an insufficient excuse for it, and do not demonstrate that respondent obtained actual knowledge of the facts constituting their claim. Given the prejudice necessarily resulting therefrom and the lack of merit, it is hereby

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

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 15, 2010
New York, New York

NOV 15 2010

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).