

**Matter of Rohlehr v City of New York**

2011 NY Slip Op 30697(U)

March 18, 2011

Sup Ct, NY County

Docket Number: 115321/10

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

Rohlehr, ALLYSIA

INDEX NO.

115321/10

MOTION DATE

- v -

MOTION SEQ. NO.

01

City of New York

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 annexed decision.

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

**FILED**

MAR 22 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/18/11

eJK  
CYNTHIA S. KERN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
In the Matter of ALLYSIA ROHLEHR,

Petitioner,

Index No. 115321/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK and THE NEW YORK  
CITY BOARD OF EDUCATION,

**FILED**

Respondents.

MAR 22 2011

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

NEW YORK  
COUNTY CLERK'S OFFICE

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>

The petitioner commenced the instant action to recover damages for personal injuries she allegedly sustained when she came into contact with an exposed metal plate and lock mechanism protruding from a wall in the satellite gymnasium of Baruch College Campus High School on March 11, 2010. The petitioner now seeks leave to serve a late Notice of Claim upon respondents. For the reasons set forth below, her petition is granted.

The relevant facts are as follows. On March 11, 2010, the petitioner came into contact with a metal plate and lock mechanism which was protruding from the wall of the satellite gymnasium where she was playing basketball at Baruch College Campus High School, New

York, New York. Petitioner alleges that she was playing basketball under the supervision and direction of respondents' employees when she sustained her serious and permanent injuries.

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 her 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 A.D.2d 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 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). Additionally, the court may take into account whether the plaintiff is an infant when determining whether to grant leave to file a late notice of claim. See GML §50-e(5).

Considering all the above factors together, petitioner's motion to serve a late notice of claim is granted. Petitioner has not provided any excuse for her failure to serve a timely Notice of Claim. However, the lack of a reasonable excuse is not by itself fatal to an application for

leave to file a late Notice of Claim. *See Ansong v. City of New York*, 308 A.D.2d 333 (1<sup>st</sup> Dept 2003); *see also Porcaro v. City of New York*, 20 A.D.3d 357 (1<sup>st</sup> Dept 2005).

Respondents acquired actual knowledge of the facts forming the basis of the claim within the statutory period or shortly thereafter. After her accident, the petitioner alleges that she reported the accident to the school, at which point the school completed an incident report. The incident report specifically alerted the Department of Education and the City of New York to the facts forming the basis of the petitioner's claim -- the existence of a defective condition on school property that caused her to be injured. While respondents claim that they are not in possession of an incident report involving petitioner's alleged accident, that argument is without merit as they have not provided an affidavit from someone with personal knowledge as to whether an incident report does in fact exist.

In any event, it is immaterial whether the incident report actually exists because petitioner brought her petition approximately five months after the expiration of the statutory period, 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 eleven months was held to be a reasonable time after expiration of 90 day period). The five month delay coupled with the fact that the alleged defect was not transitory makes it unlikely that respondents were prejudiced by the delay. *See Silva v City of New York*, 246 A.D.465 (1<sup>st</sup> Dept 1998).

Finally, respondents disclaim liability alleging they do not own the property where the incident occurred. The court, however, will not address the merits of petitioner's claim as the opposition to a motion for leave to serve a late Notice of Claim is not the proper forum to address the merits of the underlying claim. *See Tatum v City of New York*, 161 A.D.2d 580 (2d Dept

