

**Matter of Medina v Metropolitan Transp. Auth. &
MTA Capital Constr. Co.**

2011 NY Slip Op 30824(U)

April 1, 2011

Supreme Court, New York County

Docket Number: 100128/2011

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

In the matter of LUIS MEDINA,

INDEX NO. 100128/2011

Petitioner,

- against -

MOTION DATE 1/31/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 83

METROPOLITAN TRANSPORTATION
AUTHORITY AND MTA CAPITAL
CONSTRUCTION COMPANY,
Respondent.

The following papers, numbered 1 to 8 were read on this petition for leave to serve late notice of claim

Papers Numbered

Petition— Affirmation — Exhibits A-C

1-4

Answering Affirmation — Exhibits

5-6

Replying Affirmation — Exhibits

7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ADJUDGED that this petition for leave to serve a late notice of claim on

defendants Metropolitan Transportation Authority (MTA) and METROPOLITAN TRANSPORTATION COMPANY
(MTA Capital Construction) is denied.

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).

Petitioner Luis Medina alleges that on "April 2, 2010, at approximately 10:00 PM, when he was crossing 83rd Street from the southwest corner to the northwest corner... he was caused to trip and fall due to a hazardous, dangerous, unlevelled, and broken condition in the middle of the street". See Ex. B, Notice of Claim. According to petitioner's testimony, he and a friend were walking north on Second Avenue and as he was crossing East 83rd Street, his foot was caught between a hole and a metal plate that was allegedly used to cover the hole, in the middle of the street. See Medina 50-h, pp.11-13. Petitioner testified that there was construction going on "all over Second Avenue" and the construction was "on the street and the sidewalk". See *Id.* p. 14, lines 7-25. Petitioner also stated that, at the time of the incident, construction work was being performed. See *Id.* p. 15, lines 1-3.

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

According to the motion papers, petitioner retained counsel on April 7, 2010, five days after the alleged incident. Thereafter, counsel purportedly served a Notice of Claim dated May 13, 2010 naming the City of New York and the New York City Department of Transportation (DOT). See Ex. B, Notice of Claim. An examination of petitioner Medina, pursuant to Section 50 (h) of the General Municipal Law, was conducted on August 20, 2010.

Petitioner now seeks an order permitting service of late notices of claim upon respondents Metropolitan Transportation Authority (MTA) and MTA Capital Construction Company. According to the affirmation of petitioner's counsel, after both service of the notice of claim upon the City and the 50 h hearing, an investigator discovered that "the area and the metal plates in the middle of the street to cover excavation done in the street at the accident location were all part of the Second Avenue Subway construction project, which is a multiyear, multiphase construction project to build a subway....". See Savedoff Affirmation, ¶ 4. This petition for leave to serve a late notice of claim was served upon the MTA and MTA Capital Construction on January 6, 2011.

As to the application to serve a late notice of claim on the MTA Capital Construction Company, Public Authorities Law § 1276 (6) states, "The provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority". Unlike, e.g., NYCTA and MABSTOA which are separate public authorities, MTA Capital Construction Company is a subsidiary corporation of the MTA; thus, it is unnecessary to serve a notice of claim upon the Metropolitan Capital Construction Company, a subsidiary corporation of the authority. See *Andersen v Long Island R.R. Authority*, 59 N.Y.2d 657; See also *Burgess v Long Island R.R. Authority*, 172 A.D.2d 302 (1991); Public Authorities Law

§§ 1276 (1), (2), and (6). Therefore, petitioner's motion for leave to serve a late notice of claim on Metropolitan Capital Construction Company is denied.

As to the application to serve a late notice of claim upon respondent Metropolitan Transportation Authority, General Municipal Law § 50-e(1) (a) provides:

"In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation... the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises...."

General Municipal Law § 50-e(5) provides:

"Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted...."

The purpose of the notice of claim requirement is to protect the public corporation from "unfounded claims and to make sure that it has opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available". See *Teresta v City of New York*, 304 NY 440; See also *Dubowy v City of New York*, 305 AD2d 320. However, the statute "should not operate as a device to defeat the rights of persons with meritorious claims". See *Annis v. New York City Tran. Auth.*, 108 A.D.2d 643. Where the notice of claim is not served within the 90-day as-of-right period, leave of court must be sought to grant late notice of claim. The Court has discretion in whether to grant or deny an application for leave to serve a late notice of claim. See General Municipal Law § 50-e (5). Although one


factor is not more determinative than another, when considering whether to grant or deny leave to serve a late notice of claim, this Court must consider the various factors listed in General Municipal Law § 50-e (5), including whether the petitioner had a reasonable excuse for failing to file a timely notice of claim, whether the MTA acquired actual notice of the incident within 90 days after the claim arose or a reasonable time thereafter and whether the MTA would be substantially prejudiced in its defense by the delay. See General Municipal Law § 50-e (5); See also *Dubowy v City of New York*, 305 AD2d 320.

Here, petitioner's time to file a timely notice of claim expired on July 1, 2010, 90 days after the date of the incident. Petitioner served the instant petition for leave to serve a late notice of claim on respondents on January 6, 2011, about 9 months after the date of the incident. Whether petitioner, in serving a notice of claim, made an excusable error concerning the identity of the public corporation against which the claim should be asserted may be considered by this Court. According to petitioner, it was not until an investigator surveyed the area, after the 50-h hearing, that petitioner was made aware of the Second Avenue subway project in the area of the incident. However, during the 50-h hearing conducted on August 20, 2010, about 4 ½ months after the date of the incident, when asked if the hole that caused her trip and fall was in the construction area, petitioner replied, "Well, everything that was in that area is construction. Everything; the middle of the street, they had the whole west side of the street. All that's getting constructed. It's Second Avenue train system, I guess." Thus, petitioner's own testimony at his 50-h hearing shows that petitioner was aware of the Second Avenue subway construction, during the 50-h hearing, which was held 4 ½ months after the incident. Petitioner has not provided a reasonable excuse for the delay in seeking leave 9 months after the incident.

Furthermore, petitioner has not provided evidence that respondents had actual notice of the incident

within the 90 days after the claim arose or within a reasonable time thereafter. Petitioner has not provided any police or ambulance reports, transit records or anything else indicating that respondents were aware of the incident, including the essential facts supporting petitioner's claim, on April 2, 2010 or 90 days thereafter. The only indication provided of notice to respondents is the affidavit of service indicating that these motion papers were served upon respondents on January 6, 2011, nine months after the date of the incident. See Joe Affidavit of Service. Thus, the delay deprived respondent of an opportunity to timely investigate the conditions that existed on the date of the incident. Therefore, this petition for leave to serve late notice of claim upon respondent Metropolitan Transportation Authority is denied.

Dated: 4/9/11
 New York, New York


 HON. MICHAEL D. STALLMAN, J.S.C.

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

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