

**Hammond v New York Convention Ctr. Operating
Auth.**

2011 NY Slip Op 31103(U)

April 28, 2011

Supreme Court, New York County

Docket Number: 115894/10

Judge: Saliann Scarpulla

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: SCARPULLA
Justice

PART 19

RICHARD HAMMOND
- v -

NY CONVENTION CENTER OPERATING AUTHORITY

INDEX NO. 15894/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

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

FILED

APR 29 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/28/11

Saliann Scarpulla
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDGE

SETTLE ORDER/ JUDGE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X

RICHARD HAMMOND,

Petitioner,

- against-

NEW YORK CONVENTION CENTER
OPERATING AUTHORITY, NEW YORK
CONVENTION CENTER OPERATING
CORPORATION AND JEROME BELL,

Respondents.

----- X

For Petitioner:
Brown & Gropper, LLP
275 Seventh Avenue, 25th Floor
New York, NY 10001

For Respondent:
Law Offices of Edward Garfinkel
12 Metrotech Center, 28th Floor
Brooklyn, NY 11201

Index No.: 115894/10

Submission Date: 2/16/11

DECISION AND ORDER

Papers considered in review of this order to show cause for leave to file a late notice of claim:

- Order to Show Cause. 1
- Aff in Opp 2
- Reply 3

HON. SALIANN SCARPULLA, J.:

Petitioner Richard Hammond (“Hammond”) moves by order to show cause for an order deeming his Notice of Claim timely served, *nunc pro tunc*

On February 17, 2010, Hammond was employed by Fiesta Concession Corporation and was working at the Toy Show held at Javits Center. He was injured when freight carried by a forklift operated by Jerome Bell toppled over and struck Hammond’s left arm. At that time, the Javits Center Public Safety Department completed an incident report detailing the accident, and arranged for Hammond to be transported to Roosevelt

Hospital via ambulance. He underwent surgery on his left shoulder on September 29, 2010.

On December 3, 2010, Hammond served a Notice of Claim upon respondents New York Convention Center Operating Authority and Jerome Bell (“respondents”).

By order to show cause dated November 29, 2010, Hammond moves for an order deeming his Notice of Claim timely served, *nunc pro tunc*. In support, Hammond submits an affidavit indicating that the pursuant to the incident report, respondents had actual knowledge of the facts constituting his claim and could not be prejudiced by the delay in serving the Notice of Claim. Hammond further maintains that after the accident, he returned home to California planning to make a full recovery. However, over the next several months, his injuries worsened and he was forced to devote more time, energy and effort to treating his injuries, while being unable to concentrate on other aspects of his life. He underwent surgery to his shoulder on September 29, 2010 and subsequent rehabilitation.

In opposition, respondents argue that ten months passed from the date of Hammond’s accident to the time he served his Notice of Claim. They maintain that Hammond has not presented a reasonable excuse for his delay in serving the Notice of Claim, specifically that Hammond fails to demonstrate that he first became aware of the seriousness of his injuries after the 90 day period for filing of a Notice of Claim.

Discussion

The intent underlying the notice of claim requirement embodied in General Municipal Law § 50-e is to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still fresh. *Nieves v. New York Health and Hospitals Corp.*, 34 A.D.3d 336, 336 (1st Dept. 2006). Pursuant to General Municipal Law §50-e, an application may be made to file a late notice of claim which the court, in its discretion, may grant or deny based on the consideration of a number of factors. These factors include (1) whether the petitioner demonstrated a reasonable excuse for failing to file a timely notice of claim; (2) whether the respondent acquired actual notice of the essential facts constituting the claim within ninety days after the claim arose or within a reasonable time thereafter; and (3) whether the respondent was prejudiced by the delay. *See Nieves v. New York Health and Hospitals Corp.*, 34 A.D.3d 336 (1st Dept. 2006).

A factor that should be accorded great weight is whether the respondent received actual knowledge of the facts constituting the claim in a timely manner. *See Battle v. City of New York*, 261 A.D.2d 614 (2nd Dept. 1999); *Morris v. County of Suffolk*, 88 A.D.2d 956 (2nd Dept. 1982) *affd* 58 N.Y.2d 767 (1982). However, nothing in the statute makes the presence or absence of any one factor determinative. *Bay Terrace Cooperative Section IV, Inc. v. New York State Employees' Retirement System Policemen's and*

Firemen's Retirement System, 55 N.Y.2d 979, 981 (1982). The absence of a reasonable excuse is not fatal. *Dubowy v. City of New York*, 305 A.D.2d 320, 321 (1st Dept. 2003).

Here, it is undisputed that respondents had actual notice of the essential facts surrounding Hammond's claims, as evidenced by the incident report completed at the time of his accident. As they were aware of all of the facts surrounding the incident at the time of the incident, they would not be prejudiced by Hammond's less than one year delay in serving a Notice of Claim. Further, respondents make no allegation as to how the delay resulted in any prejudice to their defense. While Hammond does not offer much evidence in support of his excuse for his delay, i.e. that after the accident his time, energy and effort were all spent treating his injuries, such is not fatal to his application. As such, the Court grants Hammond's application. *See generally Renelique v New York City Hous. Auth.*, 72 A.D.3d 595 (1st Dept. 2010); *Weiss v. City of New York*, 237 A.D.2d 212 (1st Dept. 1997).

In accordance with the foregoing, it is

ORDERED that petitioner Richard Hammond's order to show cause for an order deeming his Notice of Claim timely served, *nunc pro tunc*, is granted pursuant to General Municipal Law Section 50-e is granted, and his Notice of Claim served on December 3, 2010 is deemed timely served, *nunc pro tunc*.

FILED

APR 29 2011

This constitutes the decision and order of the Court.

Dated: New York, New York
April 28, 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Saliann Scarpulla
J.S.C.

SALIANN SCARPULLA