[* 1]

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

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 15

Marcia Whitehurst

- v -

City of Mt. Vernon

INDEX NO. 104147/84

MOTION DATE 3/24/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for leave to file and serve late notice of claim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

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: 6/1/11

BARBARA JAFFE J.S.C.

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

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In the Matter of the Application of MARCUS WHITEHURST,

Petitioner,

for Permission to File a Late Notice of Claim upon

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

Respondents.

Index No. 114800/10

Motion Date: 3/29/11
Motion Seq. No.: 001

DECISION AND JUDGMENT

BARBARA JAFFE, JSC:

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By order to show cause dated November 4, 2010, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order granting him leave to serve on respondents and file a late notice of claim. Respondents oppose.

I. BACKGROUND

On March 8, 2010, petitioner, an employee of Celtic Sheet Metal, was working on the fourth floor of Battery Park City School, school number 276, at 55 Battery Park in Manhattan.

(Affirmation of Michael H. Joseph, Esq., dated Nov. 4, 2010 [Joseph Aff.]; Affirmation in Reply of Michael H. Joseph, Esq., dated Feb. 25, 2010 [Joseph Aff. in Reply]. At approximately 10:00 a.m., petitioner, who was standing on a 12-foot ladder to access a work area 10 feet above the floor, allegedly fell when the ladder on which he stood shifted. (Joseph Aff.). As he fell, he grasped an exposed metal stud and lacerated his left, dominant hand, and he was immediately taken to a hospital emergency room. (Joseph Aff. in Reply, Exh. 3). On March 15, 2010, petitioner underwent surgery. (*Id.*).

Petitioner alleges that this injury has "greatly impeded" his activities of daily living. (Pet.). On June 8, 2010 and October 15, 2010, he attended two post-operative follow-up appointments, as he was experiencing complications that were not improving with treatment, including scarring and range of motion limitations. (Joseph Aff. in Reply, Exh. 2). In progress notes from both appointments, the treating physician states that petitioner appeared "alert and oriented," that he was "not in acute distress," and that petitioner's condition was not improving because he failed to regularly attend physical therapy sessions. (*Id.*).

In his proposed notice of claim, petitioner alleges that respondents' negligence and violations of sections 200, 241, and 240 of the Labor Law and the Industrial Code caused his injuries and other losses. (Joseph Aff., Exh. 2). Petitioner describes the time and place of his accident as "[o]n or about March 8, 2010 at approximately 10:00 a.m., upon 276 Battery Park, New York, N.Y." (*Id.*).

In an amended proposed notice of claim annexed to his reply, the nature of the claim and the damages and injuries sustained remain the same, but the location of the accident is "the Battery Park City School, School number 276, located at 55 Battery Park, New York. N.Y."

(Joseph Aff. in Reply, Exh. 1).

II. CONTENTIONS

Petitioner explains his delay in filing a notice of claim as resulting from his lack of awareness of the requirements of GML § 50-(e)(1)(a) and the seriousness of his injury. (Joseph Aff.). And, even if his ignorance and injury are not reasonable excuses for his delay, he contends that his application must be granted because respondents have actual knowledge of the facts underlying his claim, as his accident occurred on school property in the presence of his co-workers and employees of the general contractor who was hired by respondents and thus prepared, as their agent, an incident report describing his accident. (*Id.*). Moreover, as respondents have actual knowledge of the facts underlying his claim, and given the brief five-month delay between the 90-day deadline and the filing of his application, petitioner argues that respondents will not be prejudiced in defending this action on the merits. (*Id.*).

Respondents claim that petitioner's proposed notice of claim is legally deficient, as it cites a nonexistent address, contains no specific location, and thus they argue that they are prejudiced, as they cannot properly investigate the claim. (Affirmation of Jessica Wisniewski, Esq. in Opposition, dated Feb. 1, 2010 [Wisniewski Aff.]; Affirmation of Jennifer R. Freedman, Esq. in Opposition, dated Mar. 24, 2010 [Freedman Aff.]). They also maintain that petitioner has failed to demonstrate that they had actual knowledge of the facts underlying his claim, as he provides no proof that they received the incident report or that the report establishes a causal connection between their wrongdoing and his accident. (*Id.*). In any event, they argue that petitioner's application must be denied because he has failed to submit evidence necessary to establish that his injury constitutes a reasonable excuse for his delay, as he relies solely on

conclusory allegations regarding the severity of his injury and offers no medical records or affidavits from treating physicians, and that ignorance of the notice requirement does not constitute a reasonable excuse. (*Id.*).

In reply, petitioner provides medical records from his emergency room visit, surgery, and post-operative appointments and maintains that the address of the accident site set forth in the first notice of claim resulted from a clerical error and submits an amended proposed notice of claim with the correct address, school name, and school number. (Joseph Aff. in Reply). He argues, moreover, that he cannot provide the incident report, as no discovery has been conducted, and he maintains that respondents know of the facts underlying his accident, as they were statutorily required to investigate his accident, and even if they did not, they cannot claim lack of notice on the basis of their dereliction of duty. (*Id.*). Petitioner alleges that his delay will not prejudice respondents because the conditions of his accident were transitory and likely changed even before the time for filing a notice of claim expired. (*Id.*).

III. ANALYSIS

Pursuant to GML §§ 50-e(1)(a) and 50-I, in order to commence a tort 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, and the notice must include the claimant's name and address, the nature of the claim, the time, place, and manner in which the claim arose, and the damages or injuries sustained (GML § 50-e[2]). 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. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health and Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). "Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by . . . a delay." (*Williams ex rel Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). In considering these factors, none is dispositive (*Pearson v New York City Health and Hosp. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account all other relevant facts and circumstances (*Washington v New York*, 72 NY2d 881, 883 [1988]).

A. Sufficiency of proposed notice of claim

In determining whether a claimant has complied with GML § 50-e(2), the court must consider whether the notice contains information sufficient to permit the municipality to investigate the claim, or "whether, based upon the claimant's description, municipal authorities can locate the place, fix the time, and understand the nature of the claim." (*Rosenbaum v City of New York*, 8 NY3d 1,10 [2006]). Therefore, a claimant must describe the location of the accident with sufficient particularity, the sufficiency of the description determined by the circumstances of each case. (*Caselli v City of New York*, 105 AD2d 251, 253 [2d Dept 1984]). Information as to the location of an accident is especially important where the allegedly defective condition is transitory in nature. (*Marengo v City of New York*, 266 AD2d 438, 438 [2d Dept 1999]).

Here, although petitioner provides the address of the school and the school's number in his amended proposed notice of claim, he fails to specify where in the school he fell. As

respondents have no way of determining with reasonable certainty the exact location of petitioner's accident, petitioner has failed to describe the location of his accident with sufficient particularity to permit respondents to investigate his claim. (*See Matter of Peterson v New York City Dept. of Envtl. Protection,* 66 AD3d 1027, 1030 [2d Dept 2009] [description of location as "sink hole" on "roadway" in specific park insufficient]; *Lauro v County of Nassau,* 6 AD3d 394, 394 [2d Dept 2004] [description of location as defect in tennis court insufficient as petitioner failed to identify on which of several courts she fell and location of defect within court]; *Bayer v City of Long Beach*, 275 AD2d 433, 433-34 [2d Dept 2000] [description of location as 100-square foot area of boardwalk west of specific intersection insufficient]; *Caselli*, 105 AD2d at 253 [statement that accident occurred in specific intersection "too vague to enable the city to locate the alleged defect . . . with reasonable certainty and without conjecture"]).

B. Actual knowledge

A municipality has actual knowledge of the essential facts underlying a claim when it has knowledge of the facts underlying the theory on which liability is predicated. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, facts underlying a theory of liability are those that demonstrate a connection between the accident and any wrongdoing on the part of the municipality. (*Matter of Werner v Nyack Union Free School Dist.,* 76 AD3d 1026, 1027 [2d Dept 2010]). The municipality must have notice or knowledge of the specific claim and not merely some general knowledge that a wrong has been committed or that an accident has occurred. (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; *Matter of Wright v City of New York,* 66 AD3d 1037, 1038 [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, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]).

A petitioner bears the burden of demonstrating actual knowledge on the part of a municipality. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). Therefore, although an accident report may show actual knowledge if it has been filed with the appropriate official, shows ownership or control over the location where the accident occurred, and indicates the defect causing the injury and the negligence or fault of the location's owner (62A NY Jur Government Tort Liability § 453), the conclusory assertion that there exists an accident report evidencing such knowledge does not satisfy this burden (*Washington,* 72 NY2d at 883). As this is all petitioner provides with respect to the incident report allegedly describing his accident, he has failed to demonstrate City's actual knowledge on the basis of the report. A mere hope that the report will surface in discovery is insufficient.

Actual knowledge may also be imputed to a municipality where municipal employees witnessed or were involved in the accident. *(Matter of Boskin v New York City Tr. Auth.,* 44 AD3d 851 [2d Dept 2007]; *Frazzetta v Rondout Valley Cent. School Dist.*, 166 AD2d 843 [3d Dept 1993]; *Soreca v New York City Hous. Auth.*, 177 AD2d 254 [1st Dept 1991]). However, here, petitioner provides no proof of respondents' employees' presence at the accident site, claiming only that his co-workers and the general contractor's employees, none of whom were municipal employees, witnessed his accident. Consequently, there is no evidence that respondents obtained actual knowledge of the facts underlying petitioner's accident. (*See Matter of Pope v. City of New York*, 282 AD2d 236, 236 [1st Dept 2001] [petitioners' "vague and unsubstantiated" claim that unidentified City employees witnessed accident insufficient to show

actual knowledge]).

When a municipality is statutorily obligated to inspect an accident site or investigate an accident, it is presumed to possess maintenance and investigative records that provide it with actual knowledge of the claim. (*Ali ex rel. Ali v Bunny Realty Corp.*, 253 AD2d 356, 357-58 [1st Dept 1998]; *Matter of Holmes v City of New York*, 189 AD2d 676, 676 [1st Dept 1993]).

Here, petitioner cites 29 CFR 1904 and Workers Compensation Law § 110, which require employers to record and report their employee's injuries and illnesses in a certain manner and under certain circumstances. As petitioner was employed by a private employer, and not respondents, he has failed to show that respondents were statutorily required to investigate his accident, or even that respondents received notice of his accident such that an investigation would be possible. Thus, petitioner has failed to sustain his burden of establishing that respondents had actual knowledge of his claim. (*See Washington*, 72 NY2d at 883 [no actual knowledge where petitioner offered no reliable basis for his claim that accident was reported to building inspectors assigned to site]).

B. Prejudice

A petitioner also bears the burden of establishing a lack of prejudice. (*Matter of Kelley v New York City Health and Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010]). "Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by . . . a delay." (*Williams*, 6 NY3d at 539). Absent such notice, a delay in serving a notice of claim will "prejudice[] respondent[s'] ability to investigate, . . . identify witnesses, and collect their testimony based on fresh memories." (*Arias v New York City Hous. Auth.*, 40 AD3d 298, 299 [1st Dept 2007]). A claimant's failure to state with particularity the

location of the accident prejudices the municipality, as well, as this failure also deprives it of the opportunity to investigate his claim. (*Pelaez v City of New York*, 79 AD3d 1115, 1115-16 [2d Dept 2010]). And although the transitory nature of an alleged defect may demonstrate a lack of prejudice where "it is highly unlikely that the conditions existing at the time of the accident would have existed until the end of the 90-day period in which a claim would have been timely filed" (*Ferrer v City of New York*, 172 AD2d 240, 240 [1st Dept 1991]), this factor weighs against granting an application to file a late notice of claim where neither actual knowledge nor a reasonable excuse has been shown (*Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002]).

Here, although the ladder and the work site were most likely not in the same condition at the end of the 90-day period as they were at the time of petitioner's accident, petitioner has neither shown actual knowledge on the part of respondents (III.B.) nor provided them with enough information as to the location of his accident to enable them to investigate his claim (III.A.). He has thus failed to satisfy his burden of demonstrating that the late filing and service of a notice of claim will not prejudice respondents. (*See Matter of Polanco v New York City Hous. Auth.*, 39 AD3d 320, 320 [1st Dept 2007] [petitioner who allegedly tripped and fell on snow and ice failed to demonstrate lack of prejudice despite transitory nature of alleged defect, as she established neither actual knowledge nor reasonable excuse]).

C. Reasonable excuse

As ignorance of the filing requirement does not constitute a reasonable excuse for delay in filing a notice of claim (*Saafir v Metro-N. Commuter R.R. Co.*, 260 AD2d 462, 463 [2d Dept 1999]), petitioner's delay is not excused.

Injury or disability constitutes a reasonable excuse for delay in filing and serving a notice of claim when it is of such extent and duration as to prevent an individual from timely doing so. (*Pope*, 282 AD2d at 236). In determining whether an injury constitutes a reasonable excuse, courts examine a variety of factors, including whether the injury physically or cognitively prevented petitioner from seeking aid of counsel (*Jensen v City of Saratoga Springs*, 203 AD2d 863 [3d Dept 1994]) and whether the injury was so severe that petitioner was more concerned with his recovery than asserting his legal rights (*In re Ramunno*, 202 AD2d 511 [2d Dept 1994]).

Here, although petitioner's medical records reflect that he suffered post-operative scarring and range of motion limitations, they also reflect that his failure to attend physical therapy and comply with his physician's recommendations were largely to blame for his symptoms. Additionally, they reflect that he was neither cognitively nor physically incapacitated, as he was able to attend follow-up medical appointments, appearing to his physician to be "alert and oriented" and "not in acute distress." As there is no indication that his injury was so severe as to confine him to his home, impair his cognition and judgment, or preoccupy him with his recovery such that he was not concerned with pursuing legal remedies, it does not constitute a reasonable excuse for his delay in filing and serving a notice of claim, notwithstanding his unsupported allegation that he is greatly impeded in pursuing his daily activities. (*See Matter of Portnov v Glen Cove*, 50 AD3d 1041, 1042-43 [2d Dept 2008] [bone fracture does not provide reasonable excuse]; *Jensen*, 203 AD2d at 864 [no reasonable excuse where medical records only showed petitioner disabled from employment, and not incapacitated such that he could not retain or communicate with counsel]; *cf Matter of DeMolfetto v City of New York*, 216 AD2d 295, 296 [2d Dept 1995] [reasonable excuse demonstrated where serious head injury prevented petitioner from

timely filing notice of claim]; *Matter of Farrell v City of New York,* 191 AD2d 698, 698 [2d Dept 1993] [reasonable excuse where fractures of both feet confined petitioner to home for extended period]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that petitioner's application for leave to serve a late notice of claim is denied.

ENTER:

Barbara Jaffe, JSC

DATED: June 1, 2011
New York, New York

BARBARA JAFFE
J.S.C.

JUN 01 2011

UNFILED JUDGMENT

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COU[illegible]

Motion/ Order to Show Cause

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes

Upon the foregoing papers, it is [illegible]

Check one: ☑ [illegible]

Check if appropriate: [illegible]

SUBMIT ORDER/ JUDG. [illegible]

[* 14]

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

PRESENT: BARBARA JAFFE J.S.C. PART 15
Justice

Marcus Whitehurst

-v-

C. of N.Y., et al

INDEX NO. 101114784

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