

**Matter of Whitehurst v New York City School Constr.
Auth.**

2011 NY Slip Op 31482(U)

June 3, 2011

Sup Ct, NY County

Docket Number: 102543/11

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

PRESENT: J.S.C.
Justice

PART 52

Marces Whitehurst

INDEX NO. 102543/11

- v -

MOTION DATE _____

NYC School Construction

MOTION SEQ. NO. 03

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 decided in accordance with the attached decision.

FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/3/11

PK
CYNTHIA S. KERN J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 52

-----X
In the Matter of the Application of
MARCUS WHITEHURST,

Petitioner,

Index No. 102543/11

-against-

DECISION/ORDER

NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

Respondent.

FILED

JUN 07 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>
Affirmations in Opposition.....	<u>2</u>
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

Petitioner commenced the instant action to recover damages for personal injuries he allegedly sustained when he was injured while working on a construction site located at 55 Battery Park, New York, New York on March 8, 2010. Petitioner now seeks leave to serve a late Notice of Claim upon respondent. While petitioner has sufficiently demonstrated that he should be granted leave to serve a late Notice of Claim, his petition is denied without prejudice as the Notice of Claim offered by petitioner is legally insufficient.

The relevant facts are as follows. On March 8, 2010, petitioner was working on a

construction site located at 55 Battery Park, New York, New York, also known as the Battery Park School, Number 276. On that date, petitioner was allegedly installing sheet metal on the 4th floor of the school and used a 12 foot metal ladder to access a work area 10 feet above the ground. Petitioner was injured when the ladder on which he was standing shifted, and in an attempt to avoid falling, petitioner grabbed an exposed metal stud which severely lacerated his hand. Petitioner asserts that the incident was immediately reported to petitioner's employer and general contractor, who were respondent's agents. After the accident, petitioner was transported to Downtown Hospital and underwent surgery to his injured hand. In February 2011, petitioner filed the instant application for leave to file a late Notice of Claim upon respondent as petitioner did not file the requisite Notice of Claim by June 8, 2010, within ninety days of the date of the accident.

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 his 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 (1st 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 (1st 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 (1st 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 (1st Dept 2010).

Petitioner has not provided a reasonable excuse for his failure to timely serve a Notice of Claim. While petitioner asserts that he did not file a timely Notice of Claim because his injury to his hand limited his activities while under his doctor's care, this is not a reasonable excuse. Petitioner has failed to meet his burden of establishing that his physical incapacitation was of such an extent and duration that he was prevented from filing a Notice of Claim within the statutory period. *See Pope v. City of New York*, 282 A.D.2d 236 (1st Dept 2001); *see also Perry v. City of New York*, 133 A.D.2d 692 (2d Dept 1987). Moreover, petitioner asserts that his application to file a late Notice of Claim was further delayed because petitioner thought the correct party against which to bring a lawsuit was the New York City Board of Education. This excuse is not reasonable, however, as the misidentification of a proper party is not a reasonable excuse for a delay in filing a Notice of Claim. *See Quinn v. Manhattan and Bronx Surface Transit Operating Authority*, 273 A.D.2d 144 (1st Dept 2000); *see also Seif v. City of New York*, 218 A.D.2d 595 (1st Dept 1995). 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 (1st Dept 2003); *see also Porcaro v. City of New York*, 20 A.D.3d 357 (1st Dept 2005).

Respondent acquired actual knowledge of the facts forming the basis of the claim within the statutory period or shortly thereafter. After his accident, petitioner alleges that his employer

and the general contractor, respondent's agents, were informed of petitioner's accident so that they had the ability to investigate. The notice provided to respondent's agents at the accident site was sufficient because petitioner fell in the presence of respondent's agents and as it was a construction accident, respondent and its agents had a duty to investigate and report the accident. *See Bollerman v. New York City Sch. Constr. Auth.*, 247 A.D.2d 469 (2d Dept 1998) (the City had actual knowledge when petitioner was injured on a New York City construction site as the incident was promptly reported to the supervisors who were present). Finally, petitioner brought his petition approximately eight 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 (2nd Dept 2006) (delay of eleven months was held to be a reasonable time after expiration of 90 day period).

This court now turns to respondent's argument that the Notice of Claim offered by petitioner is legally insufficient as it does not specifically state the nature and location of petitioner's claim. Under § 50-e(2) of the General Municipal Law, the Notice of Claim must state sufficient information to enable a municipality to investigate the claimant's claim. *See Brown v. City of New York*, 95 N.Y.2d 389 (2000). To that end, "courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident." *Id.* The Notice of Claim must state the place of occurrence with enough particularity to permit a respondent to locate the site of the alleged defect and conduct a proper investigation of the site. *Caselli v. City of New York*, 105 A.D.2d 251 (2d Dept 1984).

In the instant action, this court finds that the Notice of Claim offered by petitioner is

