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

PRESENT: BARBARA JAFFE J.S.C. PART 5
Justice

PUNDY, JEFF S.

-v-

WILDLIFE CONSERVATION SOCIETY

INDEX NO. 112225/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 101

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

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).

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

Dated: 6-27-11

JUN 27 2011

BARBARA JAFFE 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 5

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In the Matter of the Claim of JEFF S. PURDY and KRISTIN PURDYon behalf of ERIKA L. PURDY, a minor,

Petitioners,

-against-

WILDLIFE CONSERVATION SOCIETY; NEW YORK CITY DEPARTMENT OF PARKS & RECREATION; and THE CITY OF NEW YORK,

Respondents.

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Index No.	11225/10
Motion Date:	4/21/11
Motion Seq. No.:	001
Calendar No.:	101

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioners:
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For respondent:
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By notice of motion dated August 18, 2010, petitioners move pursuant to General Municipal Law (GML) § 50-e(5) for an order granting leave to serve a late notice of claim. City opposes. For the reasons that follow, the motion is granted.

I. ALLEGED FACTS

Petitioners allege that on March 20, 2010, infant petitioner's foot became entangled in the rope webbing of a playground structure, causing her to fall approximately four feet and break her right arm. (Affirmation of Eric. C. Nordby, Esq., dated August 23, 2010 [Nordby Aff.]). The structure, designed to resemble a spider web, is located at the Central Park Zoo, at 830 Fifth Avenue in Manhattan. (*Id.*). Petitioners allege that immediately after the acccident, the Zoo

investigated and completed a "Guest Incident Report and Codes," reflecting that infant petitioner was climbing on the structure and fell off. (Nordby Aff.; Affidavit of Kristin Purdy, dated Aug. 23, 2010 [Purdy Affid.], Exh. B).

On June 21, 2010 petitioners served City and the New York City Department of Parks & Recreation with a notice of claim. (Purdy Affid., Exh. B). By letter dated July 9, 2010, the Office of the Comptroller notified petitioners that the claim was disallowed as untimely. (*Id.*, Exh. E).

II. CONTENTIONS

Petitioners contend that due to an inadvertent miscalculation (Nordby Aff., Exh. A), the notice of claim was submitted one day late, a *de minimis* delay that does not prejudice City, especially as City received actual knowledge of the incident with the incident report. Moreover, as the injured party is an infant, petitioners argue that she should not bear the responsibility to insure the diligent prosecution of her claim. (Nordby Aff.).

City opposes, arguing that petitioners have not satisfied their burden of proving actual knowledge of the facts underlying the claim or that City is not prejudiced by the delay. It also maintains that law office failure is not a reasonable excuse for a late notice of claim and that the claim is patently meritless as it rests solely on a cause of action for negligent maintenance, control, operation and conduct, rather than on a defect in the playground structure. (Affirmation of Pantea Yazdian, ACC, dated Sept. 13, 2010).

In response, petitioners argue that City's agent acquired actual knowledge of the essential facts of the claim from the incident report and the late notice, that the absence of a reasonable excuse for the delay is not dispositive to whether a late notice of claim can be filed, and that City has failed to demonstrate how it was prejudiced by the delay. Petitioners also maintain that he

need not prove the merit of the claim at this early stage of the case. (Reply Affirmation of Eric C. Nordby, Esq., dated Oct. 12, 2010).

III. ANALYSIS

Pursuant to GML § 50-e(1)(a) and 50-i, a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the date on which the claim arose. The court may extend the time to file the notice, 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; *Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]). In considering these factors, none is dispositive. (*Barnes v County of Onondaga*, 103 AD2d 624, 628 [4th Dept 1984], *affd* 65 NY2d 664 [1985], *citing Bay Terrace Co-op. Section N v New York State Empls.' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979 [1982]). The court may also consider the petitioner's infancy, even in the absence of any nexus between the infancy and the delay. (GML § 50-e[5]; *Lisandro v New York City Health and Hosp. Corp.,* 50 AD3d 304 [1st Dept 2008], *lv denied* 10 NY3d 715; *Harris v City of New York,* 297 AD2d 473 [1st Dept 2002], *lv denied* 99 NY2d 503). The standards are flexible, the court may consider all other relevant facts and circumstances (*Beary* v *City of Rye*, 44 NY2d 398, 407 [1960]), and given the remedial nature of the statute, it is liberally construed (*Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]; *Camacho* v *City of New York*, 187 AD2d 262 [1st Dept 1992]).

alerted to its potential liability. In any event, there is no evidence that it was sent to the appropriate entity.

However, pursuant to GML § 50-e(5), the court considers whether the municipality acquired actual knowledge within the time specified or within a reasonable time thereafter. (*Gelish v Dix Hills Water Dist.*, 58 AD3d 841 [2d Dept 2009] [court abused its discretion in denying petition to serve late notice of claim when plaintiff served notice less than one month after expiration of 90-day period]; *Pearson v New York City Health and Hospitals Corp.*, 43 AD3d 92 [1st Dept 2007] [plaintiff's notice of claim, filed without leave of court, just over six months from time of incident does not prevent court from granting permission to file late notice of claim]; *Urgiles v New York City School Const. Auth.*, 283 AD2d 434 [2d Dept 2001] [submission of late notice of claim seven days after 90-day period was reasonable time thereafter]; *Matter of Harrison v New York City Hous. Auth.*, 188 AD2d 367 [1st Dept 1992] [NYCHA's receipt of notice of claim one month after expiration of 90-day period was reasonable time thereafter]).

Here, petitioners submitted a notice of claim only one day late, which contained the essential facts underlying the claim, and the notice alerted City of potential liability within a reasonable time after the 90-day deadline.

B. Prejudice

"Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by . . . a delay." (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). 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 witnesses." (*Arias v New York City Hous. Auth.*, 40 AD3d 298 [1st Dept

2007]). Given that City received actual knowledge of the essential facts underlying the claim within a reasonable time of the 90-day deadline, and the structure where the alleged injury occurred still exists, there is no articulable prejudice arising from the short delay.

C. Reasonable excuse

Failure to show a reasonable excuse alone is not a sufficient basis for denying a petition to serve a late notice of claim where the moving party shows actual knowledge and an absence of prejudice from the delay. (*Matter of Ansong v City of New York*, 308 AD2d 333, 334 [1st Dept 2003]). Petitioners contends that the one-day delay in filing the notice of claim was a result of an honest mathematical mistake. Although law office failure does not constitute a reasonable excuse for the delay (*see Deegan v City of New York*, 227 AD2d 620 [2d Dept 1996]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990]), the lack of reasonable excuse, in and of itself, does not constitute a sufficient basis for denying the motion.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED, that petitioners' application for leave to serve a late notice of claim is granted.

This constitutes the decision and order of the court.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 27, 2011
New York, New York

JUN 27 2011

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).