

Oliver-Osbourne v City of New York

2011 NY Slip Op 31802(U)

June 30, 2011

Sup Ct, NY County

Docket Number: 105258/11

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Index Number : 105258/2011
OLIVER-OSBOURNE, G. ATHENA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. 105258/11
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

JUL 05 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

Dated: 6/30/11

PK
CYNTHIA S. KERN 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 52

-----x
G. ATHENA OLIVER-OSBOURNE,

Petitioner,

Index No. 105258/11

-against-

DECISION/ORDER

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

Respondents.

FILED

JUL 05 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 case
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Petitioner brought the instant petition to serve a late Notice of Claim for her action to recover damages for personal injuries she sustained when she was a passenger in a motor vehicle which was involved in an accident with a bus owned and operated by Amboy Bus Co. Inc. ("Amboy") on September 8, 2010. For the reasons set forth below, her petition is denied.

The relevant facts are as follows. On September 8, 2010, petitioner was a passenger in a motor vehicle which was involved in an accident with a bus owned and operated by Amboy. Immediately after the accident, the New York City Police Department ("NYPD") investigated the accident and completed a report containing the details of the occurrence. On September 24,

2010, petitioner's counsel forwarded a letter to the Discover Property & Casualty Insurance Company ("DPCIC"), the insurance company for Amboy informing DPCIC that petitioner retained counsel to represent her with respect to her claim for injuries resulting from the September 8, 2010 accident. Plaintiff alleges that on or about February 18, 2011, a representative from Gallagher Bassett Services, Inc., the third party administrator for DPCIC, informed petitioner's counsel that it represents respondent New York City Department of Education ("DOE") in this matter. On or about May 1, 2011, almost five months after the ninety day statute of limitations expired, petitioner petitioned this court for leave to serve a late Notice of Claim.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety 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 her 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 ninety day statutory period or shortly thereafter. *See Justiniano v. New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993).

Considering all the above factors together, petitioner's motion to serve a late notice of claim is denied. Petitioner has not provided any excuse for the delay in serving the Notice of Claim. 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).

Moreover, respondents have not acquired actual knowledge of the facts forming the basis of the claim within the statutory period or shortly thereafter. Although plaintiff asserts that respondents acquired actual knowledge when the NYPD investigated the accident and completed a report detailing such investigation, this argument is without merit. "Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim. A municipality often will have numerous employees assigned to separate and diverse agencies or departments, and the purpose of the statutory notice of claim requirement would simply not be fulfilled if all information obtained by municipal employees, officers or agencies in the regular course of their business was to be imputed to the municipality." *Caselli v. City of New York*, 105 A.D.2d 251, 256 (2nd Dept 1984). Further, it is unclear whether the DOE ever had knowledge of any potential claim against it as the DOE is not named on the police report as being involved in the accident. Nor is there any evidence that the insurance company for Amboy had any communication with the DOE about the accident or about any claim against the DOE.

Furthermore, as respondents have not acquired actual knowledge of the facts underlying petitioner's claim, they have been prejudiced by the delay in filing the Notice of Claim. Respondents have not had the opportunity to conduct an investigation of the incident in a timely

