

Matter of Dassardo v City of New York

2011 NY Slip Op 31892(U)

July 7, 2011

Sup Ct, NY County

Docket Number: 104549/2011

Judge: Cynthia S. Kern

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

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

PART 52

MARCIA DASSARDO
- v -
CITY OF NY

INDEX NO. 104549/11
MOTION DATE _____
MOTION SEQ. NO. 02
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 annexed decision.

FILED

JUL 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/7/11 _____ *Cern*
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

In the Matter of the Application of

MARCIA DASSARDO,

Petitioner,

Index No. 104549/2011

-against-

DECISION/ORDER

THE CITY OF NEW YORK and THE COMPTROLLER
OF THE CITY OF NEW YORK,

FILED

Respondents.

JUL 12 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>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner brought the instant petition to serve a late Notice of Claim for her action to recover damages for personal injuries she allegedly sustained when she tripped and fell on a stairway inside the 84th Precinct of the New York City Police Department ("NYPD") located at 301 Gold Street in Brooklyn, New York. For the reasons set forth below, her petition is granted.

The relevant facts are as follows. Petitioner, a New York City police officer, alleges that on May 13, 2010 she sustained injuries when she tripped and fell on a stairway located inside the 84th Precinct of the New York City Police Department ("NYPD") located at 301 Gold Street in Brooklyn, New York while in the line of duty. Petitioner alleges that as she was descending the stairway, she was

distracted by the loud “bang” of a slamming door and raised voices. As she turned to see what was happening, her foot was caught in a depression created by a missing metal riser at the bottom step of the stairway, causing her to fall. Petitioner alleges that immediately after she fell, a supervisor called an ambulance. EMS arrived and took petitioner to Brooklyn Hospital for treatment. Approximately two hours later, petitioner returned to the 84th Precinct and completed a line-of-duty injury report. A witness statement, an Injury and Illness Incident Report and an Aided Report Worksheet and Aided/Accident Report were also completed. The line-of-duty injury report stated that petitioner fell down the stairs resulting in injury to lower back, left hand and left ankle. A photograph of the stairway where petitioner fell was also taken and kept with her line-of-duty incident report. Petitioner now moves for leave to serve a late Notice of Claim approximately nine months after the expiration of the ninety day period to serve a 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 petitioner’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 granted. Petitioner's excuse for her failure to file a timely notice of claim is that she did not contemplate filing a lawsuit against the City because she assumed initially that her injury would be curable and would not interfere with her future. In fact, as of August 2, 2010, only a week before the expiration of the 90-day limitation for filing a timely notice of claim, petitioner's treating physician opined that her prognosis for returning to full duty was "good." The court finds this excuse for the delay in serving the Notice of Claim to be reasonable. However, even if petitioner's excuse were not reasonable, 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).

Petitioner does show that the City acquired actual knowledge of the claim by virtue of the NYPD's line-of-duty injury report. Although accident reports are usually insufficient to prove that the City had actual knowledge of the claim, "where... a municipal employee is injured in the course of his employment, the filing of an accident report ... containing the essential facts constituting the claim, will be held to impart actual knowledge to the City." *Zbryski v City of New York*, 147 A.D.2d 705 (2nd Dept 1989); *see also Caselli v City of New York*, 105 A.D.2d 251, 256 (2nd Dept 1984); *Cicio v City of New York*, 98 A.D.2d 38 (2nd Dept 1983); *Lucas v City of New York*, 91 A.D.2d 637 (2nd Dept 1982). In the instant case, petitioner did file an injury report which contained the essential facts of the claim – that on May 13, 2010, petitioner fell down the stairs at the 84th Precinct station house resulting in injury to her lower back, left hand and left ankle. In addition, to the line-of-duty injury report, a photograph of the

