[* 1]

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

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

Justice

Duffy, James

-v-

City of N.Y.

INDEX NO. 105966/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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~~ Judgment.

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: 11-23-11

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 JAMES DUFFY and KERRI DUFFY,

Petitioners,

For Leave to File a Late Notice of Claim Against

THE CITY OF NEW YORK, THE METROPOLITAN TRANSPORTATION AUTHORITY and THE NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

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Index No. 105966/11

Motion Arg.: 9/13/11
Motion Seq. No.: 001

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioners:
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For respondents:
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By order to show cause dated May 23, 2011, petitioners move pursuant to General Municipal Law § 50-e(5) for an order granting them leave to serve respondents with a late notice of claim. Respondents oppose.

I. BACKGROUND

On December 10, 2010, petitioner James Duffy was allegedly injured when, while working for S3-11 Tunnel Constructors, Joint Venture (Constructors), a general contractor hired by respondents to perform work within the City of New York, he slipped and fell on hydraulic fuel or oil on a steel ramp at a construction site, causing him serious personal injuries. Petitioner had previously observed that inspectors, allegedly employed by the Metropolitan Transit Authority (MTA), maintained a presence at the site. Immediately after his fall, petitioner was

taken by ambulance to Roosevelt Hospital where he was treated and released. Constructors was given notice of the accident that day, and petitioner gave it a statement the following day. (Affidavit of James Duffy, dated May 18, 2011 [Duffy Affid.]). According to petitioner's Workers' Compensation claim dated December 21, 2010, Constructors first had notice of petitioner's injury on December 10, 2010. (Affirmation of Jeffrey Singer, Esq., dated May 19, 2011 [Singer Aff.], Exh. 1).

After the accident, petitioner traveled to Massachusetts to continue his medical care, and on December 15, 2010, he underwent surgery on his left leg. Thereafter, petitioner's leg was placed in a brace and he used crutches until at least March 28, 2011. Petitioner received medical care and physical therapy in Massachusetts between December 2010 and April 2011. (Singer Aff., Exh. 3). On April 15, 2011, petitioner first consulted an attorney about his injuries. (Duffy Affid.).

II. APPLICABLE LAW

Pursuant to GML § 50-a, in order to commence a negligence action against a municipality, a claimant must serve a notice of claim upon it within 90 days of the date on which the claim arose. Pursuant to GML § 50-e, 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. (*Matter of Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]; *Powell v City of New York*, 32 AD3d 227 [1st Dept

2006]).

III. ANALYSIS

A. Actual knowledge

A municipality receives actual knowledge of the essential facts constituting a claim when it acquires actual knowledge of the facts underlying the theory on which liability is predicated (*Matter of Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]), not merely knowledge of the facts underlying the incident (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *lv denied* 76 NY2d 875).

Petitioner contends that respondents had actual knowledge of his accident as inspectors were present at the work site and observed the allegedly dangerous condition which caused his fall, as they were aware that petitioner was transported by an ambulance to the hospital, as the accident was reported to Constructors, thus constituting notice to respondents, and as the accident was also reported to respondents' insurance carrier. (Singer Aff.).

Respondents deny having acquired actual knowledge of the facts underlying petitioner's claim as his assertion that inspectors were on the site is conclusory and unsupported by any proof, and even if true, does not establish that respondents learned of the accident, nor does it matter that petitioner's employer was informed of the accident as such notice may not be imputed to respondents. Respondents submit affidavits of their employees reflecting that searches of their records for any prior notice of petitioner's accident were fruitless. (Affirmation of Anthony Lugara, Esq., dated June 17, 2011 [Lugara Aff.]; Affidavit of Christopher Dickerson, dated June 16, 2011; Affidavit of Robin R. Cooper, dated June 15, 2011).

In reply, petitioner contends that as respondents' inspectors were present at the work site,

it is impossible to believe that they did not have notice of his accident and speculates that respondents may have prepared an accident form regarding his accident. He also argues that respondents' searches were insufficient. (Affirmation of Leon Segan, Esq., dated Aug. 22, 2011).

Petitioner, however, offers no proof that respondents learned of the accident or information relating to it at any time before the instant application, and even if inspectors were at the site on the day of petitioner's accident, petitioner offers no evidence that they were employed by respondents or that they learned of his accident, and his allegation that respondents must have prepared an accident report is unsubstantiated. Petitioner has thus failed to establish that respondents received actual knowledge of his claim within 90 days of his accident or a reasonable time thereafter. (*See Washington v City of New York*, 72 NY2d 881 [1988] ["Plaintiff failed to sustain his burden of establishing that the City acquired knowledge of the accident within a reasonable time, conclusorily alleging the existence of an accident report and offering no reliable basis to support his claim that the accident was reported to the City building inspectors who were assigned to the work site."]; *Matter of Purifoy v County of Suffolk*, 61 AD3d 873 [2d Dept 2009] [petitioner failed to establish that defendant possessed any records which provided it with actual notice of accident]; *Verizon New York, Inc. v City of New York*, 26 AD3d 247 [1st Dept 2006] [even if employees of City agency had actual knowledge by being present at scene on incident date, such knowledge not imputed to City itself]; *Matter of Bruzzese v City of New York*, 34 AD3d 577 [2d Dept 2006] [petitioner's allegation that incident report was filed with City was unsubstantiated and refuted by City's evidence, nor did presence of City employee at time of accident provide City with actual knowledge]; *Matter of Pico v City of New York*, 8 AD3d 287 [2d Dept 2004] [even if City employees were present at accident site, petitioner did not show that

City acquired actual knowledge of accident]; *Matter of Schifano v City of New York*, 6 AD3d 259 [1st Dept 2004], *lv denied* 4 NY3d 703 [2005] [City did not learn of claim merely by having inspector at site who responded to accident and took notes]).

Moreover, neither petitioner's report of the accident to Constructors, nor his filing of a workers' compensation claim, constitutes notice to respondents. (*See eg Matter of Grant*, 60 AD3d at 946 [even if petitioner immediately reported accident to general contractor on construction site owned by respondent and contractor investigated, it was insufficient to provide respondent with actual knowledge of accident]; *Matter of McLaughlin v N. Colonie Cent. School Dist.*, 269 AD2d 658 [3d Dept 2000] [even if petitioner received workers' compensation benefits, no evidence that respondent or its agent had notice of workers' compensation claim or that claim provided actual knowledge as required by section 50-e]; *Matter of Mark v Bd. of Educ. of City of New York*, 255 AD2d 586 [2d Dept 1998] [filing of workers' compensation does not constitute notice to respondents]).

B. Reasonable excuse

Petitioner contends that he was unable to serve his notice of claim timely while receiving medical care in Massachusetts. (Duffy Affid.).

Respondents deny that petitioner set forth a reasonable excuse for his delay as he was released from the hospital after his surgery and was able to use crutches to get around, and there is no medical reason explaining his failure to contact an attorney during the 90 days after his accident. (Lugara Aff.).

Absent any indication in petitioner's medical records that he was physically incapacitated to the extent that he was unable to consult an attorney or serve a notice of claim, there is no

reasonable excuse for his delay in filing the notice of claim. (*See Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882 [2d Dept 2009] [MRI report did not demonstrate that petitioner's injury incapacitated or disabled him to extent that he was unable to serve timely notice of claim]; *Matter of Kumar v City of New York*, 52 AD3d 517 [2d Dept 2008] [petitioner's hospital records showed that he was released from hospitalization two months before expiration of 90-day period]; *Matter of Carpenter v City of New York*, 30 AD3d 594 [2d Dept 2006] [even if petitioner was incapacitated for part of time within 90 days of accident, she failed to demonstrate that she was unable to serve notice of claim during that time]).

Moreover, petitioner also fails to explain the additional three-month delay following his initial contact with an attorney and filing the instant application. (*See Matter of Grant*, 60 AD3d at 947-948 [petitioner did not explain two-and-half month delay between retaining counsel and making application to serve late notice of claim]; *Matter of Smith v Otselic Val. Cent. School Dist.*, 302 AD2d 665 [3d Dept 2003] [petitioner did not sufficiently justify three-month delay between contacting attorney and filing application]). Petitioner thus did not demonstrate a reasonable excuse for the delay.

C. Prejudice

Petitioner argues that respondents are not prejudiced by his delay as they had actual knowledge of his claim and as the conditions of the site changed constantly, making it unlikely that the condition which caused his accident continued to exist throughout the 90 days after his accident. (Singer Aff.).

Respondents allege that they have been prejudiced as petitioner's delay has denied them the opportunity to investigate timely his claim as the allegedly dangerous condition was

transitory and likely no longer exists. (Lugara Aff.).

Here, absent any indication that the condition which allegedly caused petitioner's fall exists today, he has failed to demonstrate that respondents are not prejudiced by their inability to investigate the condition. (*See Matter of Schifano*, 6 AD3d at 260 [City prejudiced by delay in ability to investigate as condition which caused accident no longer existed at construction site]; *Williams v City of Niagara Falls*, 244 AD2d 1006 [4th Dept 1997] [plaintiff did not allege condition remained unchanged, and City demonstrated that as accident occurred at active construction site, it cannot investigate condition that existed at time of accident]).

IV. CONCLUSION

Accordingly, it is

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

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 23, 2011
New York, New York

NOV 23 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).