[* 1]

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

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

SIERRA CABRERA, FROILAN

-v-

THE CITY OF NEW YORK, ETAL.

INDEX NO. 107884/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for leave to serve late notice of claim

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 12/20/11
DEC 20 2011

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

----------x

In the Matter of the Claim of:
FROILAN SIERRA-CABRERA,

Petitioner,

For Leave to Serve a Late Notice of Claim, *Nunc Pro Tunc*,

-against-

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

Respondents.

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Index No. 107884/11

Argued: 9/27/11

**DECISION & ORDER**



BARBARA JAFFE, JSC:

**For petitioner:**
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**For respondent City:**
Suzzane K. Colt, ACC
Michael A. Cardozo
Corporation Counsel
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By order to show cause dated July 11, 2011, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order deeming notices of claim served on respondents timely served, *nunc pro tunc*, or, in the alternative, for leave to serve them with late notices of claim. Respondent City opposes.

I. BACKGROUND

On November 16, 2010, at the intersection of East 86th Street and Third Avenue in Manhattan, petitioner was struck by an Access-a-Ride Program vehicle as he was crossing the street. (Affirmation of Joshua E. Goldblatt, Esq., dated July 1, 2011 [Goldblatt Aff.], Exh. A). A

police report prepared the day of the accident and a Department of Motor Vehicles search performed on November 23, 2010 reflect that Columbus Transit, LLC (Columbus) owned the vehicle. (*Id.*).

On April 7, 2011, Columbus examined petitioner pursuant to GML § 50-h, and he learned that respondent New York City Transit Authority (NYCTA) owned the vehicle that struck him. (*Id.*; Affirmation of Suzanne K. Colt, ACC, in Opposition, dated Aug. 4, 2011 [Colt Opp. Aff.], Exh. A).

On April 11 and 26, 2011, petitioner served City and NYCTA, respectively, with notices of claim. (Goldblatt Aff., Exh. B).

Sometime thereafter, petitioner made an identical application in Bronx County Supreme Court, which was denied with leave to bring the instant motion in this court. (*Id.*). When NYCTA responded to the application, petitioner learned that respondent Metropolitan Transportation Authority (MTA) administered the Access-a-Ride Program on the date of the accident, and on June 20, 2011, he served it with a notice of claim. (*Id.*, Exh. C).

## II. CONTENTIONS

Petitioner asserts that his late filing is reasonably excused by his delayed discovery that NYCTA owned the vehicle and that MTA administered the Access-a-Ride Program, that respondents obtained knowledge of the facts underlying his claim through his GML § 50-h examination, as Columbus, NYCTA, and MTA share counsel, and that they will not be prejudiced as a result. (*Id.*).

In opposition, City contends that petitioner's potential claim is meritless, as there is no indication that it owned the vehicle that struck him, and in any event, that he fails to demonstrate

a reasonable excuse for his late filing, actual knowledge on its part, or a lack of prejudice. (Colt Opp. Aff.).

## III. ANALYSIS

### A. City

Absent any indication that City owned the vehicle that struck plaintiff, plaintiff's motion is denied as to City. (*See Matter of Hess v W. Seneca Cent. School Dist.*, 15 NY3d 813 [2010] [where proposed negligence claim patently meritless, as agency established that it did not cause or create injury-causing dangerous condition, motion for leave to serve late notice of claim denied]).

### B. NYCTA and MTA

Pursuant to GML §§ 50-e(l)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. 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 or agency 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 or agency in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). "Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay." (*Williams ex rel Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). In considering these factors, none is dispositive (*Pearson ex rel*

*Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account all other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

Here, as petitioner first discovered NYCTA's ownership of the vehicle and MTA's management of the Program more than 90 days after his accident, and as he promptly served both entities with notices of claim and moved for an order deeming them timely served soon thereafter, he has demonstrated both a reasonable excuse for his delay and actual knowledge. (*See Matter of Gershanow v Town of Clarkson*, 2011 NY Slip Op 7424, 931 NYS2d 131 [2d Dept Oct. 18, 2011] [petitioner demonstrated reasonable excuse where, during GML § 50-h examination, he discovered that accident site located within boundaries of municipality and promptly moved for leave to serve late notice of claim; proposed notice of claim annexed to motion provided municipality with actual knowledge]; *Matter of Ruffino v City of New York*, 57 AD3d 550 [2d Dept 2008] [same]; *Bertone Commissioning v City of New York*, 27 AD3d 222 [1st Dept 2006 ] [same]). Absent any evidence of prejudice to NYCTA or MTA, petitioner is entitled to the relief he seeks. (*See Bertone*, 27 AD3d 222] [where municipality obtained actual knowledge of facts underlying claim through late service of notice of claim, and absent evidence of prejudice, notice deemed timely served]).

## IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion is denied as to respondent City of New York; and it is further

ORDERED, that the notice of claim petitioner served on respondent New York City

Transit Authority on April 26, 2011 is deemed timely served, *nunc pro tunc*; and it is further

ORDERED, that the notice of claim petitioner served on respondent Metropolitan Transportation Authority on June 20, 2011 is deemed timely served, *nunc pro tunc*.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 20, 2011
New York, New York
DEC 20 2011

FILED

DEC 23 2011

NEW YORK
COUNTY CLERK'S OFFICE