[* 1]

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

PRESENT: KERN Justice

PART 52

IEMETTI, SALVATORE

INDEX NO. 113639/11

MOTION DATE

- v -

MOTION SEQ. NO. 01

MTA CAPITAL CONSTRUCTION CO, ETAL

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

FILED

JAN 30 2012

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

RECEIVED

JAN 30 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: _____

OK

J.S.C.

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

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 55

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In the Matter of the Application of

SALVATORE IEMETTI,

Petitioner,

Index No. 113639/11

-against-

DECISION/ORDER

MTA CAPITAL CONSTRUCTION COMPANY, LONG ISLAND RAILROAD, NEW YORK CITY TRANSIT AUTHORITY AND THE METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

----------x

HON. CYNTHIA S. KERN, J.S.C.

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.....	1
Notice of Cross Motion and Answering Affidavits.....	
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	2
Exhibits.....	3

Petitioner commenced the instant action to recover damages for personal injuries he allegedly sustained when he was struck by a rubber pipe (also knows as a "slick line") in the course of his employment. Petitioner now seeks to serve a late Notice of Claim against MTA Capital Construction Company, Long Island Railroad, New York City Transit Authority and the Metropolitan Transportation Authority (collectively the "respondents"). For the reasons set forth below, his motion is granted.

The relevant facts are as follows. On May 27, 2011, petitioner was excavating caverns

for underground railroad tunnels underneath 49th Street and Madison Avenue in New York City. While he was working, a scooper/mucker machine being operated by another employee picked up a 5 inch 100 foot long rubber pipe which was buried underneath the muck. When it came up, it struck petitioner's left ankle and caused him to fall to the ground. Co-workers had to use a crow bar to remove the pipe from pinning petitioner's ankle against the wall. An MTA Supervisor's Accident Investigation Report was completed documenting the accident.

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 his delay, whether the delay prejudiced the municipality's defense and whether the municipality acquired "actual knowledge of the essential facts constituting the claim" within ninety days after the claim arose or within a reasonable time thereafter. *See* GML §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 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 387 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 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 90-day statutory period or shortly thereafter. *See Justiniano v New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993). The lack of a reasonable excuse alone is not fatal. *See Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1st Dept 2010).

Petitioner fails to satisfy the first factor, the existence of a reasonable excuse. Although petitioner states that it was hard for him to get around after the accident, he has failed to provide evidence demonstrating that his injuries were so severe that he could not consult with an attorney. Moreover, petitioner's excuse that he did not know that he could bring a lawsuit against respondents is also not reasonable because ignorance of the law and, in particular, of the 90-day deadline for filing a Notice of Claim, does not constitute a reasonable excuse. *See Gaudio v City of New York*, 235 A.D.2d 228 (1st Dept 1997). Nonetheless, the lack of such an excuse is not fatal. *See Velasquez*, 69 A.D.3d 441.

Respondents, however, have acquired actual knowledge of the claim within the statutory period or shortly thereafter. Within a month of the incident, a Supervisor's Accident Investigation Report was completed by an MTA supervisor regarding this incident which specifically alerted respondents to the facts forming the basis of petitioner's claim – that while petitioner was working in an underground cavern, a mucking machine picked up a buried slick line pipe that was not known to be there and caught petitioner's left ankle, pinning it between a slick line pipe and the cavern wall causing injury. Because the report contained details sufficient to furnish notice of a claim of negligence, respondents acquired actual knowledge of the facts underlying plaintiff's claim. *See Rao v. Triborough Bridge and Tunnel Authority*, 223 A.D.2d 374 (1st Dept 1996).

Felice v Eastport/South Manor Cent. School Dist., 50 A.D.3d 138 (2d Dept 2008), the case that respondents cite for the proposition that an accident report is insufficient to give actual notice, is distinguishable. In *Felice*, the court found that the accident report which merely stated that the petitioner, a high school cheerleader, was "dismounting in a vertical position from an

extended stunt and landed awkwardly on her right foot" which caused her to break a bone and require surgery did not provide essential facts constituting the plaintiff's claim. The plaintiff in *Felice* alleged in her notice of claim facts that were not included in the accident report such as that the "basers" were too small to catch a "flyer" such as petitioner and that petitioner had made known to the coach her dissatisfaction with the team members assigned as "basers". *See id* at 150. The instant action is distinguishable from *Felice* in that unlike in *Felice*, the MTA accident report, as discussed more fully above, provided a detailed account of the essential facts that constitute the claims made in petitioner's notice of claim.

Finally, respondents have not been prejudiced by the slight delay in filing the Notice of Claim. Because respondents had actual knowledge of the claim, they has had the opportunity to conduct an investigation of the incident in a timely manner. Petitioner brought his petition approximately three months after the expiration of the statutory period, which is a reasonable time thereafter. *See* GML §50-(e)(5); *see also March v. Wappinger*, 29 A.D.3d 998 (2nd Dept 2006) (delay of eleven months was held to be a reasonable time after expiration of 90 day period).

Accordingly, petitioner's motion to serve a late notice of claim is granted. This constitutes the decision and order of the court.

Dated: 1/27/12

Enter: _____
J.S.C.