ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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In the Matter of Praetorian Insurance Company and Wesco Insurance Company a/s/o Yaron Kayam,

Petitioners,

-against-

Long Island Power Authority,

Respondent.

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Index No.: 704116/13
Motion Date: 11/27/13
Motion Cal. No.: 4
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order granting petitioner leave to serve the attached proposed Notice of Claim, pursuant to General Municipal Law §50-e(5), *nunc pro tunc*, and an order deeming the proposed Notice of Claim served upon the respondent Long Island Power Authority, as required under General Municipal Law §50-e, effective as of the date of this Order.

	PAPERS NUMBERED
Notice of Petition - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5- 9
Reply Affirmation.....	10 - 12

FILED
MAR 12 2014
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Petitioners, Praetorian Insurance Company and Wesco Insurance Company a/s/o Yaron Kayam (collectively as "Petitioners") move by Order to Show Cause for an Order permitting Petitioners leave to serve and file a Notice of Claim against Respondent, Long island Power Authority ("LIPA") pursuant to General Municipal Law §50-e(5), and deeming the Notice of Claim annexed to the petition served upon LIPA as required under GML §50-e(5), effective the date of this

Order.

Petitioners have demonstrated, as more fully set forth below, that they had a reasonable excuse for their delay, that LIPA had actual knowledge of the essential facts within a reasonable time after the claim accrued and the delay did not substantially prejudice LIPA. Accordingly, Petitioners Order to Show cause is granted.

Facts

Petitioners are subrogating insurance carriers, having paid $665,000 for the loss of Yaron Kayam's[1] property at 114-20 Rockaway Beach Boulevard, Rockaway Park, NY 11694 (the "Premises"). The Premises was destroyed by a fire during Superstorm Sandy ("Sandy") in October of 2012.

LIPA was the exclusive provider of electrical power to the Belle Harbor neighborhood; a "barrier beach" designated by the New York City Office of Emergency Management ("OEM") as a hurricane evacuation "Zone A" because it is at the "highest risk of flooding from a hurricane's storm surge."[2] Belle Harbor faces the Atlantic Ocean to the south and the Rockaway Inlet to the north.

As early as 11:00 a.m. on October 28, 2012, the National Oceanic and Atmospheric Administration ("NOAA") warned the public and LIPA that a hurricane was expected along the cost of Long Island/New York City.

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[1]By a decision and order dated November 12, 2013, this court granted Kayam's Order to Show Cause to permit Kayam to file late Notice of Claim against LIPA.

[2]As noted in the OEM's "Hurricane Evacuation Zone Finder." (New York City Office of Emergency Management, http://www.nyc.gov/html/oem/html/hazards/storms.shtml [accessed October 29, 2013].)

On October 28, 2012, Mayor Michael Bloomberg issued Executive Order No. 163, which declared a State of Emergency for New York City. Mayor Bloomberg also ordered all New York City residents, located in Zone A, to evacuate their homes and businesses no later than 7:00PM on October 28, 2012.

On October 28, 2012, LIPA "De-Energized" Fire Island and on October 29, 2012 at 8:00PM, Consolidated Edison ("Con Ed") "De-Energized" Lower Manhattan and parts of Brooklyn.

It is undisputed that at no point prior to Sandy did LIPA De-Energize Belle Harbor.

The Moreland Commission[3] on Utility Storm Preparation and Response ("The Commission") stated in its Interim Report, issued on January 7, 2013, that "LIPA was also aware and actively anticipating a large storm surge and potential flooding.... LIPA was well aware of the potential storm surge and flood threat."The Commission also stated in the Interim Report that "[p]ursuant to protocols in place for such flooding, the applicable utility shuts down or de-energizes those areas in anticipation of significant flooding...to protect the public from fire and electrical hazards posed by wiring and circuits that may have come into contact with flood water."

On October 29, 2012, Sandy struck Belle Harbor causing surges and flooding. Petitioner contends that sea water resulting from Sandy came into contact with LIPA power equipment and ignited the fires in Belle Harbor.

LIPA's primary FOIL officer, General Counsel Nicolino, was subscribed to a "Daily Clip Report" during Sandy and acquired timely notice of the facts. Specifically, on October 30, 2012,

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[3] On November 13, 2012, Governor Andrew M. Cuomo established the Moreland Commission under the Moreland Act (Section 6 of the New York State Executive Law) to "study, examine, investigate, and review the response, preparation, and management of New York's power utility companies with respect to (hurricane Sandy)..." (*Moreland Commission on Utility Storm Preparation and Response*, Interim Report, p. 5, January 7, 2013.)

through the "Daily Clip Report", General Counsel Nicolino was made aware that "water coming into contact with transformers set off fires in the Rockaway area....More than 50 homes were destroyed..."

Tracy Burgess Levy, the Executive Director of Community and Government Affairs issued an update during the storm that "there is also an issue that's down in the South Shore, significant flooding in the areas of the Far Rockaway..."

As a result of the fire, the Insured's property was destroyed. Kevin Prast[4] ("Prast"), Vice President, Property Claims, Claims Administration Corporation ("CAC"), agent and third party administrator for Petitioners states in his affidavit that since October 29, 2012, Petitioners have been inundated with Superstorm Sandy Claims. Prast also states that Petitioners only became aware in June of 2013 that the damage to the Premises may have been due to LIPA's negligence. Petitioners moved several moths therafter for permission to file a late notice of claim.

Discussion

Timely service of a notice of claim is a condition precedent to the commencement of an action sounding in tort against LIPA. (General Municipal Law § 50–e[1][a]; *Platt v. New York City Health and Hospitals Corp.*, 105 A.D.3d 1026 [2nd Dept 2013]; *Scantlebury v. New York City Health and Hospitals Corp.*, 4 N.Y.3d 606 [2005].) In the within action, it is undisputed that Petitioners failed to serve a timely notice of claim.

In determining whether to grant leave to serve a late notice of claim, a court must consider various factors, including whether (1) the claimant has demonstrated a reasonable excuse for failing

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[4]Prast's affidavit establishes that CAC is an agent for the Petitioners and therefore his affidavit, as an agent for the Petitioners, is admissible evidence.

to serve a timely notice of claim, (2) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the public corporation in defending on the merits. (General Municipal Law § 50–e[5]; *Acosta v. City of New York*, 39 A.D.3d 629 [2nd Dept 2007]; *Benzinger v. Town of Brookhaven*, 288 A.D.2d 412 [2nd Dept 2001]; *Affleck v. County of Nassau*, 240 A.D.2d 569 [2nd Dept 1997]; *Williams ex rel. Fowler v. Nassau County Medical Center,* 6 N.Y.3d 531, 538 [2006].)

LIPA argues that actual knowledge of the essential facts constituting the claim within 90 days after the claim arose cannot be inferred. However, approximately 18 Notices of Claim previously filed concerning similar fires in the Belle Harbor provide a platform to infer notice of the instant fire claim. The previously filed Notices of Claim also allege that Belle Harbor residents sustained property damage due to LIPA's failure to de-energize in advance of Sandy. Furthermore, LIPA's General Counsel Nicolino acquired timely notice of the facts through the aforementioned "Daily Clip Report" including on October 30, 2012 when it was reported that fires in the Rockaway area were ignited when water came contact with transformers and " [m]ore than 50 homes were destroyed..." In addition, Tracy Burgess Levy, the Executive Director of Community and Government Affairs issued an update during the storm that "there is also an issue that's down in the South Shore, significant flooding in the areas of the Far Rockaway..." Finally, prior to the expiration of the 90 day notice period, the Moreland Commission issued its interim report and although not dispositive of the underlying cause of action, provides another indicia of notice of the essential facts.

"Actual knowledge of the essential facts is an important factor in determining whether to grant an extension, and should be accorded great weight." (*Matter of Kaur v New York City Health*

& Hosps. Corp., 82 A.D.3d 891, 892 [2nd Dept 2011]; see also *Matter of Whittaker v New York City Bd. of Educ.*, 71 A.D.3d 776 [2nd Dept 2010].) "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves." (Id. at 777 quoting *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 147-148 [2nd Dept 2008].) For the reasons set forth above, LIPA acquired actual knowledge of the essential factors within the 90 days after the claim arose.

In addition, there is no evidence that the Respondent would be substantially prejudiced if leave was granted to serve a late notice of claim. As noted above, the respondent was already made aware of the within situation by the 18 previously filed Notices of Claim. When the public corporation has actual knowledge of the facts constituting the claim, as is the case herein, it is easier for a claimant to meet this burden. (*Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 152 [2nd Dept 2008]; see *Jordan v. City of New York*, 41 A.D.3d 658 [2nd Dept 2007][holding that the City timely acquired actual knowledge of the essential facts underlying the claim by way of the timely notices of claim served by passengers in the plaintiff's vehicle at the time of the accident who also allegedly sustained injuries in the accident]; see also *Gibbs v. City of New York*, 22 AD3d 717, 719 [2nd Dept 2005]; *Edwards v. City of New York*, 2 A.D.3d 110 [1st Dept 2003][holding that the City acquired actual knowledge of the essential facts constituting petitioner's claim as Sanitation Department had records establishing that it knew that the claimant had been exposed to asbestos].) LIPA's conclusory assertions, made solely by its attorney, that it was prejudiced by reason of the lengthy delay is insufficient to meet its burden of overcoming Petitioner's showing of lack of

prejudice. (*Viola v. Ronkonkoma Middle School*, 107 A.D.3d 1009 [2nd Dept 2013]; see *Rodriguez v. Woodhull School*, 105 A.D.3d 1050 [2nd Dept 2013]; see also *Gibbs v. City of New York*, 22 A.D.3d 717, supra.)

Finally, Petitioners established a reasonable excuse for their delay in bringing the within application. In the aftermath of Sandy, Petitioners were overwhelmed with Superstorm Sandy related claims and only first became aware of LIPA's potential liability in June of 2013. Furthermore, a petitioner's failure to offer a reasonable excuse for the delay in filing a notice of claim is not fatal where, as here, there was actual notice and no compelling showing of prejudice to the respondent. (*Matter of Sloan v County of Westchester*, 175 A.D.2d 838 [2nd Dept 1991; cf. *Martinez v. City of New York,* 63 A.D.3d 696 [2nd Dept 2009].)

Thus, balancing the factors that must be considered, Petitioners' motion for leave to serve a late notice of claim is granted. (*See Melissa G. v. North Babylon Union Free School Dist.*, 50 A.D.3d 901 [2nd Dept 2008].)

Conclusion

Petitioners' Order to Show Cause for an Order permitting the Petitioners leave to serve and file a Notice of Claim against Respondent pursuant to Municipal Law §50-e(5), and deeming the Notice of Claim annexed to the petition served upon LIPA as required under GML §50-e(5), effective the date of this Order is granted.

Dated: March 10, 2014

Bernice D. Siegal, J. S. C.