At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July, 2014.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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JOSE FERNANDEZ,
Plaintiff,

- against -

Index No. 505243/13

THE CITY OF NEW YORK,
Defendant.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7, 8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant the City of New York (City) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint for failing to state a cause of action. Plaintiff Jose Fernandez cross moves for an order, pursuant to CPLR 3025, granting plaintiff leave to file an amended complaint.

Defendant's motion is granted and the complaint is dismissed. Plaintiff's cross-motion is denied.

Plaintiff alleges that he was injured on June 14, 2012, while working on a heavy steel pipe valve, when a chain fall device failed causing the disc and stem to fall into the body of the valve onto plaintiff's right hand. The valve was a component of the TS Kennedy, a ship owned by the United States of America (United States) that was undergoing repairs in a shipyard operated by GMD Shipyard Corp (GMD) located in the Brooklyn Navy Yard (Navy Yard). GMD leased its facilities in the Navy Yard from Brooklyn Navy Yard Development Corporation, which in turn leased the property from the City, the owner of the Navy Yard. Prior to the accident, the United States had contracted with GMD to perform ship repair work on the TS Kennedy, and GMD had subcontracted the ship repair work to plaintiff's employer Jen-Mar Electric Service Corp. (Jen-Mar).

As part of the repair work, Jen-Mar had removed the valve from the TS Kennedy, which was sitting in dry dock at the shipyard, and moved the valve to GMD's work shop (Complaint ¶ 26; Proposed Amended Complaint ¶ 33). The body of the valve was placed on the floor of the work shop and the stem and disc components were suspended above the valve by a tripod chain fall device (Plaintiff's Affidavit in Support of Motion to Amend the Complaint dated March 3, 2014 ¶ 6). Plaintiff, who was working with his hand in the valve, suffered injury when the chain fall, which was under the control of co-workers, failed in some manner, causing the disc and stem to fall into the valve and crush plaintiff's hand

(Plaintiff's Affidavit in Support of Motion to Amend the Complaint dated March 3, 2014 ¶ 6; Complaint ¶ 30; Proposed Amended Complaint ¶ 37).

In March 2013, plaintiff applied, pursuant to General Municipal Law § 50-e (5), for leave to serve a late notice of claim on the City (Supreme Court, Kings County Index No. 501331/13). By order, dated June 17, 2013, the court (Landicino, J.), denied plaintiff's application, finding that the application failed to show that the City had actual knowledge of the essential facts of the claim within 90 days of the incident or a reasonable time thereafter, that plaintiff had a reasonable excuse for his delay in filing the notice of claim and that the City would not be prejudiced by the delay.

Plaintiff commenced this action on September 5, 2013 by filing a summons and complaint with the court. In the complaint, plaintiff alleged causes of action premised on common-law negligence and Labor Law §§ 200, 240 and 241. Before the court are defendant's motion to dismiss the complaint on the ground that the complaint fails to state a cause of action in light of plaintiff's failure to timely serve notice of claim and plaintiff's cross-motion to amend the complaint.

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v*

Martinez, 84 NY2d 83, 87-88 [1995]). The court, in assessing the motion, "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion [then becomes] whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]). Similarly, in assessing a motion to amend the complaint pursuant to CPLR 3025, the court can deny the motion where the proposed amendment is palpably insufficient to state a cause of action or defense, or is patently devoid of merit (*see Lucido v Mancuso*, 49 AD3d 220, 226-229 [2d Dept 2008]).[1]

Turning to the issues here, timely service of a notice of claim is a condition precedent to any tort action against a municipality (*Stiff v City of New York*, 114 AD3d 843, 843 [2d Dept 2014]; General Municipal Law §§ 50-e [1] and 50-i [1]). As such, a plaintiff who fails to timely serve a notice of claim or fails to obtain leave to serve a late notice of claim on a municipality fails to state a tort cause of action against the municipality (*see Singh v City of New York*, 88 AD3d 864, 865 [2d Dept 2011]; *Dorce v United Rentals North America*, 78 AD3d 1110, 1112 [2d Dept 2010], *lv denied* 18 NY3d 807 [2012]). Plaintiff does not dispute these rules of law. In opposing the motion to dismiss and in moving to amend the complaint, however, plaintiff alleges that New York's notice of claim requirement is rendered

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[1] Given that defendant has not answered, it would appear that plaintiff could have amended the complaint as of right without need of a motion (CPLR 3025 [a]). Under such circumstances, however, the court would have deemed the motion to dismiss to be directed against the amended complaint (*Sobel v Ansanelli*, 98 AD3d 1020, 1022 [2d Dept 2012]; *Fownes Bros. & Co, Inc. v JP-Morgan Chase & Co.*, 92 AD3d 582, 582-583 [1st Dept 2012]).

unenforceable in this case because it is preempted by the statute of limitations applicable to a federal maritime tort cause of action.[2]

Plaintiff asserts he has a maritime tort claim because he applied for and was awarded benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA")(33 USC 901, et seq.).[3] The LHWCA provides workers' compensation to *land*-based maritime employees (*Stewart v Dutra Constr. Co.*, 543 US 481, 488 [2005]), and, to the extent that state law conflicts with its provisions, the state law is preempted (*see Lee v Astoria Generating Co., L.P.*, 13 NY3d 382, 391 [2009], *cert denied* ___ US ___, 131 SCt 215 [2010]). Among the LHWCA's provisions, is an election of remedies section that allows an employee to bring an action for damages against a non-employer third person (33 USC § 933 [a]), and a provision providing that:

> "Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six

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[2] Pursuant to the "savings to suitors" clause of the Federal Judiciary Act (28 USC 1333[1]), state courts share concurrent original jurisdiction of all in personam admiralty and maritime cases with Federal District Courts as long as they apply federal maritime law (*Offshore Logistics v Tallentire*, 477 US 207, 222-223 [1986]; *O'Hara v Bayliner*, 89 NY2d 636, 644-645 [1997], *cert denied* 522 US 822 [1997]; *Lerner v Karageorgis Lines, Inc.*, 66 NY2d 479, 484-485 [1985]).

[3] According to plaintiff's counsel, plaintiff's employer, Jen-Mar did not carry insurance required by the LHWCA. In the absence of such coverage, plaintiff obtained his LHWCA benefits through coverage provided by GMD Shipyard. GMD Shipyard is now deemed plaintiff's employer for purposes of the LHWCA (*see Durando v City of New York*, 105 AD3d 692, 695-696 [2d Dept 2013]).

> months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board" (33 USC 933 [b]).

Plaintiff argues that, since section 933 (b) expressly allows an employee to commence a negligence action within six months of acceptance of an award, and since the statute of limitations for a maritime tort is three years (46 USC § 30106), plaintiffs' rights under maritime law preempt application of the notice of claim provisions of the General Municipal Law.

Plaintiff's argument, however, is flawed in several respects. Initially, in this regard, 33 USC 933 (b) does not create any rights or remedies, but rather, merely "establishes procedures by which third-party claims are to be prosecuted in the context of a predicate LHWCA claim" (*Fontenot v Dual Drilling Co.*, 179 F3d 969, 976 [5th Cir 1999], *cert denied* 528 US 1062 [1999]; *see also McLaurin v Noble Drilling (US) Inc.*, 529 F3d 285, 292 [5th Cir 2008]; *Garvin v Alumax of S.C., Inc.*, 787 F2d 910, 917 [4th Cir 1986]).[4] As such, when a third-party claim prosecuted by a recipient of benefits under the LHWCA is founded on state law, the claim is a creature of state law and is governed by state law (*Fontenot*, 179 F3d

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[4] Of note, the time frames outlined in 33 USC 933 (b) do not extend the statute of limitations period or otherwise revive an untimely action (*see Woodard v Totem Ocean Trailer Express, Inc.*, 2000 WL 33128494 [WD Wash 2000]; *see also Webster v Clodfelter*, 130 F2d 434, 436-437 [DC Cir 1942], *cert denied* 317 US 689 [1942]).

at 976; *Garvin*, 787 F2d at 917-918; *cf. Ferri v Ackerman*, 444 US 193, 198 [1979]). Thus, plaintiff's New York based common-law negligence and Labor Law §§ 200, 240 and 241 causes of action are subject to the notice of claim requirements of the General Municipal Law and must be dismissed in light of plaintiff's failure to timely file a notice of claim (*see Meyer v County of Suffolk*, 90 AD3d 720, 721-722 [2d Dept 2011]; *Rowe v NYCPD*, 85 AD3d 1001, 1002 [2d Dept 2011]).

Even if this court accepts as true the allegations of plaintiff's pleadings and supplemental papers and affords plaintiff every favorable inference, plaintiff has also not shown that he has a maritime tort cause of action (*see Vasquez v Commercial Union Ins. Co.*, 367 F Supp2d 231, 237-238 [D Puerto Rico 2005]). Plaintiff argues that maritime law is applicable because he is the recipient of benefits under LHWCA and he was employed at the Navy Yard shipyard that has previously been found subject to maritime tort law (*see Durando v City of New York*, 105 AD3d 692, 695-696 [2d Dept 2013]; *McDonald v City of New York*, 231 AD2d 556, 557 [2d Dept 1996]).

The scope of maritime tort jurisdiction, however, is not coextensive with the coverage of an employee under the LHWCA. Historically, maritime tort jurisdiction was determined by the location of the accident, and an accident was only governed by maritime tort law if it occurred on the navigable waters of the United States (*Victory Carriers, Inc. v Law*, 404 US 202, 205 [1971]). Accordingly, an accident on land did not fall within maritime jurisdiction, nor did accidents on piers or wharves, which were seen as extensions of land (*id.* at 206-207;

T. Smith & Son, Inc. v Taylor, 276 US 179, 181-182 [1928]). With the Extension of Admiralty Jurisdiction Act of 1948, Congress extended maritime jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land" (46 USC § 740). Thus, under current law, "[a] court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." (*Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock*, 513 US 527, 534 [1995]).[5] Under former law, LHWCA coverage was co-extensive with maritime tort jurisdiction (*Victory Carriers, Inc.*, 404 US at 207-208; *New Orleans Depot Services, Inc. v Director, Office of Worker's Compensation Programs*, 718 F3d 384, 388-389 [5th Cir 2013]). In 1972 congress expanded LHWCA coverage to include "injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)" (33 USC 903 [a]; *New Orleans Depot Services, Inc.*, 718 F3d at 388-389). This expansion of LHWCA coverage to certain land-based areas adjoining navigable waters, however, did not in any way extend the scope of maritime tort jurisdiction to include a third-party action brought by a

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[5] Plaintiff's ship repair work would appear to satisfy the maritime connection or "nexus" test, the other component of maritime tort jurisdiction (*see Torres v City of New York*, 177 AD2d 97, 109-113 [2d Dept 1992], *lv denied* 80 NY2d 759 [1992], *cert denied* 507 US 986 [1993]; *see also Jerome B. Grubart, Inc.*, 513 US at 534).

covered employee injured on the land (*see Holland v Sea-Land Services, Inc.*, 655 F2d 556, 558-559 [4th Cir 1981], *cert denied* 455 US 919 [1982]; *see also Garvin*, 787 F2d at 917).

Here, while plaintiff alleged that the TS Kennedy was being repaired in drydock, he also alleged that the accident itself occurred in GMD's work shop. Nothing in this identification of the accident location as a work shop allows an inference that the work shop may be deemed to be on navigable waters, especially since other shipyard structures, such as docks, piers, wharves and boat ramps, are deemed to be land-based structures (*see Victory Carriers, Inc.*, 404 US at 423-424; *MLC Fishing, Inc. v Velez*, 667 F3d 140, 142 [2d Cir 2011]; *Scott v Trump Indiana, Inc.*, 337 F3d 939, 941-944 [7th Cir 2003], *cert denied sub nom Scott v Lola Crane Rental Co.*, 540 US 1075 [2003]; *Hastings v Mann*, 340 F2d 910, 911-912 [4th Cir 1965], *cert denied* 380 US 963 [1965]). This accident location distinguishes this case from other cases involving the same shipyard. In those cases, the courts found maritime tort jurisdiction based on accidents that occurred in the shipyard's dry dock or in or on a vessel located in the dry dock - locations that are deemed to be on navigable waters (*see McDonald*, 231 AD2d at 557; *Torres v City of New York*, 177 AD2d 97, 108 [2d Dept 1992], *lv denied* 80 NY2d 759 [1992], *cert denied* 507 US 986 [1993]; *Durando v City of New York*, 33 Misc 3d 1231 [A], 2011 NY Slip Op 52181 * 8 [U] [Sup Ct, Kings County 2011], *affd* 105 AD3d 692 [2d Dept 2013]; *Salazar-Torres v GMD Shipyard*, 22 Misc 3d 1139 [A], 2009 NY Slip Op 50512 * 4 [U] [Sup Ct, Kings County 2009]; *see also Vasquez v GMD Shipyard Corp.*, 582 F3d 293, 298-299 [2d Cir 2009]).

Plaintiff allegations also do not allow an inference that the accident was proximately caused by the TS Kennedy or an appurtenance of the TS Kennedy under the Extension of Admiralty Jurisdiction Act (*Grubert*, 513 US at 536; *Scott*, 337 F3d at 943). While the pump at issue may be deemed part of TS Kennedy's usual gear or equipment, the allegations here suggest that it may not deemed an appurtenance of the ship at the time of the accident. Namely, plaintiff has alleged that it had been removed from TS Kennedy, placed in the work shop and, at the time of the accident, was being repaired by Jen-Mar (*see Scott*, 337 F3d at 944). Plaintiff has alleged no facts suggesting that it was still under the control of the ship or its crew. In any event, even if the valve could be considered an appurtenance of the ship at the time of the accident, a defect with the valve was not the proximate cause of the injury, but rather, as plaintiff alleges, the accident was caused by a failure of the chain fall equipment, which was operated by his co-workers, to properly hoist or secure the stem and disc of the valve (*see Scott*, 337 F3d at 344-345; *see also Victory Carriers, Inc.*, 404 US at 213-214; *cf. Gutierrez v Waterman Steamship Corp.*, 373 US 206, 209-210 [1963]).

In sum, plaintiff's pleadings and his own affidavit do not allow an inference that the accident occurred on a maritime situs, a prerequisite for finding maritime tort jurisdiction (*see Jerome B. Grubart, Inc.*, 513 US at 534; *O'Hara v Bayliner*, 89 NY2d 636, 644-645 [1997], *cert denied* 522 US 822 [1997]; *Vazquez*, 367 F Supp2d 237-238). In the absence of maritime tort jurisdiction, the maritime tort statute of limitations is inapplicable (*Moya v Dr. Alfred Kahn, M.C.*, 225 F3d 659 [U] [6th Cir 2000]), and there is thus no federal

preemption of New York's notice of claim requirements.[6] Plaintiff's complaint must thus be dismissed (*see Vazquez*, 367 F Supp2d 237-238) and the cross-motion for leave to amend denied (*see Chrystel Clear Dev. v Devon Architects of N.Y., P.C*, 97 AD3d 716, 719 [2d Dept 2012]).

This constitutes the decision and order of the court.

E N T E R,

J. S. C.
Karen B. Rothenberg
Justice, Supreme Court

[6] If, contrary to this court's conclusion, plaintiff was correct that he had a maritime tort cause of action, it appears that supremacy clause principles would bar application of the notice of claim requirements of New York's General Municipal Law to such a cause of action (*see Scholl v Town of Babylon*, 95 AD2d 475, 483 [2d Dept 1983]; *see also Ward v Norfolk Shipbuilding & Drydock Corp.*, 770 F Supp 1118, 1122 [ED Va 1991]; *see also Felder v Casey*, 487 US 131 [1988]; *Rowe v NYCPD*, 85 AD3d 1001, 1002 [2d Dept 2011]). As discussed above, however, New York's notice of claim requirements would apply to and require dismissal of plaintiff's New York common law negligence and Labor Law causes of action, leaving only the maritime tort action. Nevertheless, assuming the maritime tort action was deemed properly pled, it is hard to see how plaintiff could be successful in such an action against the City, given that such a maritime tort action against a non-vessel is essentially the same as a land-based negligence action under the common law (*see In Re Great Lakes Dredge & Dock Co., LLC*, 624 F3d 201, 211 [5th Cir 2010]), and given that the City appears to be an out of possession landlord of the Navy Yard, without authority to supervise or control the work at issue (*see Durando*, 2011 NY Slip Op 52181 * 19; *see also Durando*, 105 AD3d at 696; *Wong v City of New York*, 65 AD3d 1000, 1001 [1st Dept 2009]).