

Ashkenazie v City of New York
2017 NY Slip Op 31769(U)
August 4, 2017
Supreme Court, Kings County
Docket Number: 502757/2017
Judge: Reginald A. Boddie
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At an I.A.S. Trial Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 4th day of August 2017.

PRESENT:

Honorable Reginald A. Boddie
Justice, Supreme Court

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YOLANDA ASHKENAZIE,
Petitioner,

Index No. 502757/2017
Cal. No. 8

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
Respondents.

DECISION AND ORDER

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Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Petition & Annexed Affirmation/Affidavits	1-2
Affirmation in Opposition	3
Reply	4

Upon the foregoing cited papers, and after oral argument, the decision and order on plaintiff's petition for leave to file a late notice of claim is as follows:

Petitioner seeks to recover for personal injuries allegedly sustained in a trip and fall on a public sidewalk known as The Ocean Parkway Malls in Brooklyn on January 13, 2016. A notice of claim, dated and verified by petitioner on April 11, 2016, was served on the City on April 13, 2016, 91 days after the date of accident. On May 5, 2016, the City served petitioner a notice rejecting the untimely notice of claim. Petitioner avers she delayed initiating her lawsuit because she did not know of the severity of her injury until February 4, 2016, was involved with treating her condition through April 2016, and was debilitated and unable to attend to her needs as a result of her injuries, treatment, and determining whether surgery would be required.

Petitioner first presented to Dr. Ramesh Gidumal, an orthopedic surgeon, on February 4,

2016, and was x-rayed and diagnosed with a tuberosity fracture and proximal humerus fracture of the right arm due to the accident. Petitioner's arm was put in a sling and plaintiff commenced physical therapy. Between February 4 and March 14, 2016, petitioner had about five sessions of physical therapy. On March 14, 2016, Dr. Gidumal reported that petitioner had made some improvement, her pain was reduced and she was no longer taking medications for pain. The x-rays taken on March 14, 2016, revealed a healing proximal humerus fracture. Dr. Gidumal opines that petitioner's injuries arose as a result of her accident.

“Under General Municipal Law § 50-e (5), a court considering a petition for leave to serve a late notice of claim upon a public corporation must consider various factors, of which the ‘most important, based on its placement in the statute and its relation to other relevant factors’ (*Matter of Katsiouras v City of New York*, 106 AD3d 916, 917 [2d Dept 2013], quoting *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147 [2008]), is whether the public corporation acquired actual [knowledge] of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter” (*Katsiouras*, 106 AD3d at 917, quoting *Matter of Jackson v Newburgh Enlarged City School Dist.*, 85 AD3d 1031, 1031 [2011]). Additionally, the Court must consider whether there is a reasonable excuse for the delay and whether defendant is substantially prejudiced in its ability to maintain a defense (General Municipal Law § 50-e [5]; *Katsiouras* at 917).

A timely notice of claim is condition precedent to suit (General Municipal Law § 50-e [a]). Service of a notice of claim beyond the 90-day statutory period is a nullity when made without leave of court and does not provide the City with actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter (*Katsiouras* at 918, citing *see Decoteau v City of New York*, 97 AD3d 527 [2012]; *Browne v New*

York City Tr. Auth., 90 AD3d 965 [2011]; *Nappi v County of Suffolk*, 79 AD3d 990, 991 [2010]; *Laroc v City of New York*, 46 AD3d 760, 761 [2007]; *Matter of White v New York City Hous. Auth.*, 38 AD3d 675 [2007]; *Maxwell v City of New York*, 29 AD3d 540, 541 [2006]; *Mack v City of New York*, 265 AD2d 308, 309 [1999]).

Here, the notice of claim was served late without leave of court and is therefore a nullity. Therefore, the untimely notice of claim that was rejected by the City on May 5, 2016, did not itself provide the City with actual knowledge of the essential facts constituting the claim within the statutory period (*Katsiouras* at 918), and petitioner failed to establish with any proof that the City had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

The papers also fail to establish a reasonable excuse for the delay. Excuses for failing to timely serve a notice of claim based on the injuries, medical condition, or incapacity of plaintiff require more than conclusory allegations by petitioner or petitioner's counsel (*See Matter of Papayannakos v Levittown Mem. Special Educ. Ctr.*, 38 AD3d 902 [2d Dept 2007], citing *see Matter of Aliberti v City of Yonkers*, 302 AD2d 456 [2003]; *Robertson v New York City Hous. Auth.*, 237 AD2d 501 [1997]; *Matter of Caruso v County of Westchester*, 220 AD2d 746 [1995]). Here, the affirmation of Dr. Gidumal establishes that by March 14, 2016, plaintiff had improved and was no longer in pain or taking pain medications. Moreover, contrary to counsel's assertion that petitioner was undergoing rigorous physical therapy, Dr. Gidumal's affirmation indicates that petitioner only had five physical therapy treatments between February 4 and March 14. Therefore, the Court finds the petition fails to establish a reasonable excuse for failing to timely file the notice of claim.

Moreover, the petition fails to address why the notice of claim, dated and verified April

11, 2016, was not filed on or before April 12, 2016, when it was known on April 11 that the time under General Municipal Law § 50-e was about to run. The Court notes that counsel's affirmation asserted that petitioner sought counsel on April 11, 2016, and a notice of claim was filed the same day. However, no proof of such is attached.

Although the lack of a reasonable excuse is not necessarily fatal to the granting of leave to serve a late notice of claim, where, as here, there is also a lack of actual notice, it is an improvident exercise of the Court's discretion to grant the petition (62A NY Jur 2d, Government Tort Liability § 440, citing *Hunt v City of New Rochelle*, 223 AD2d 643 [2d Dept 1996]; *Matter of Martin*, 100 AD2d 879 [2d Dept 1984]).

The Court further notes that no explanation has been proffered as to why petitioner waited until February 2017 to seek leave to file a late notice of claim when petitioner was aware on April 13, 2016, that the notice of claim was untimely and, on May 5, 2016, that the untimely notice of claim had been rejected. The City does not argue that it would be prejudiced by this delay, but that petitioner failed to carry her initial burden of showing that the City was not prejudiced (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016], holding "that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice."). Here, petitioner failed to provide any evidence or argument that respondent would not be substantially prejudiced. Accordingly, the petition is denied.

Dated: August 4, 2017

E N T E R: **HON. REGINALD A. BOODIE**
RAB
J.S.C.
Hon. Reginald A. Boddie
Justice, Supreme Court