

Matter of Abdelghany v City of New York
2018 NY Slip Op 32955(U)
November 19, 2018
Supreme Court, Kings County
Docket Number: 513074/2015
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 19th day of November 2018.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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In the matter of the Application of FATMA ADBELGHANY, Individually and as Mother and NATURAL GUARDIAN of M.I., for leave to file a Late Notice of Claim and for said claim to be deemed timely served, Nunc Pro Tunc,

Index No.: 513074/2015

DECISION & ORDER

Petitioner,

-against-

CITY OF NEW YORK and FIRE DEPARTMENT OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT,

Respondents.

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

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	33, 35-52
Opposing Affidavits (Affirmations) _____	54-63
Reply Affidavits (Affirmations) _____	64-66
<u>Other Papers: Petitioner's Memorandum of Law in Support</u> _____	<u>34</u>

Introduction

Petitioner, Fatma Abdelghany individually and as mother and natural guardian of M.I., moves by notice of motion, sequence number three, (1) pursuant to CPLR § 2221(e)(2)-(3) granting leave to renew the decision and order dated August 12, 2016; (2)

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upon renewal, modifying the prior decision and order so as to grant leave to deem the notice of clam timely filed *nunc pro tunc*; (3) to vacate the prior decision and order based upon fraud misrepresentation, “or other misconduct of the Respondents”; (4)

“pursuant to CPLR § 3101(a),(h) and (i) and CPLR § 3126(1), (2) or (3) for the Respondents’ willful and contumacious withholding of key evidence from the Petitioners and the Court granting Petitioners’ application for leave to file Late Notice of Claim, on default against the Respondents (CPLR § 3126(3)); or , in the alternative, preventing the Respondents from opposing the claims of the Petitioners, and upon review by this Court of the evidence submitted herewith, without opposition, granting the application of the Petitioners for leave to file Late Notice of Claim, on the merits (CPLR § 3126(2)); or, in the alternative, simply resolving the issues pertaining to the subject matter of this motion, in accordance with the claims of the Petitioners, and granting Petitioners’ application for leave to file Late Notice of Claim, on the merits (CPLR § 3126(1));”

(Notice of Motion, NYSCEF Doc. # 33 at p 2).

(5) granting petitioner’s application for leave to file a late notice of claim, on default “pursuant to the Court’s ‘inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice’ (CDR Créances S.A.S. v. Cohen, 23 N.Y.3d 307 (2014)), for Respondent’s fraud on the Court” (Notice of Motion, NYSCEF Doc. # 33 at p 2); (6) pursuant to 22 NYCRR 130.1 awarding costs and sanctions; (7) pursuant to CPLR § 2218, setting this matter down for a hearing prior to a final determination, and granting petitioner the opportunity to obtain discovery necessary to determine the issues of knowledge or prejudice; and (8) for such other and further relief as the court deems just and proper.

Respondents, the City of New York, and the New York City Fire Department oppose this application.

Background & Procedural History

Motion for Leave to File a Late Notice of Claim

On July 28, 2014, at approximately 6:00 p.m., the petitioner M.I. sustained brain injuries when she fell into a backyard pool while visiting the residence of family friend Ashraf Salem, located at 2260 East 65th Street in Brooklyn, New York. The infant, who was four years old at the time, was found floating unconscious. It is unclear how long the child was in the pool before she was discovered. Her father, an emergency room physician, was present at the scene and attempted to revive the infant by performing cardio pulmonary resuscitation (CPR). Others in attendance called 911, however petitioner contends that there was an approximately fifteen-minute delay in the arrival of proper emergency response units (*see* Affidavit of Fatma Abdelghany, NYSCEF Doc. # 35 at ¶ 4).

Petitioner retained counsel and commenced the instant proceeding on October 26, 2015, by filing an order to show cause for leave to serve a late notice of claim (*see* NYSCEF doc. # 3). Annexed thereto was a notice of claim, a summons and complaint and medical records (*see* NYSCEF docs. ## 5-7).¹ Petitioner claims that the City was negligent in its failure to properly respond and dispatch emergency services to the

¹ As stated in this Court's prior decision, petitioner's first order to show cause was "returned to movant" by the Hon. Johnny Lee Baynes on November 9, 2015, and a second order to show cause was filed on November 20, 2015. A search of the court file demonstrates that petitioner's second proposed order to show cause was not e-filed until December 9, 2015. However, petitioner annexed a signed copy of the order to show cause to her prior application, dated November 23, 2015 (*see* NYSCEF doc # 12).

location (*see* Notice of Claim, NYSCEF doc. # 5). Petitioner stated, in her affidavit annexed to the underlying application,

Despite numerous 911 calls, including a 911 call immediately made by me and several other guests to the defendants', [*sic*] 911 dispatchers, there was a significant delay in emergency response time, as well as lack of proper emergency response units... Several 911 calls resulted in an approximate 15 minute delay of emergency response teams with arrivals in the following sequence: Fire Department; within several minutes thereafter the arrival of a Basic Life Support Ambulance ("BLS") not equipped for this type of an emergency (defendants' 911 dispatcher were advised that CPR did not revive the infant-plaintiff); within several minutes of the first BLS, arrival of a second BLS, similarly not equipped for this type of emergency; thereafter followed by an Advanced Life Support Ambulance (ALS), which arrived too late for this emergency.

(Affidavit of Fatma Adbelghany, NYSCEF Doc. # 35 at ¶¶ 3-4).

In the underlying application for leave to file a late notice of claim, petitioner contended, *inter alia*, that respondents, the City of New York and the New York City Fire Department (the City) had actual knowledge because the incident was well documented in the 911 records and the incident directly involved city employees. Similarly, petitioner argued that the City would not be prejudiced because the incident was well documented and as a result, the City retains its ability to investigate. This Court notes that petitioner provided no documents to support these assertions.

In opposition, the City argued, *inter alia*, that they did not have actual knowledge and that they would be significantly prejudiced by the delay. The City stated that "[w]hile the order to show cause was pending, respondents conducted a cursory investigation into the matter and learned that the audiotape of the initial conversation

between the 911 operator and the caller had been deleted, consistent with NYPD [(New York City Police Department)] protocol on January 25, 2015... It is NYPD policy to delete the audiotape of the 911 call after 180 days” (Affirmation in Opposition to underlying motion, NYSCEF Doc. # 48 at ¶ 48). They argued that “[w]ere this application to be granted, respondents would be required to defend a multi-million dollar lawsuit of a brain-damaged infant without the benefit of an early investigation and without access to crucial records such as the 911 audiotape” (*id.* at ¶ 49). In support, the City provided a NYPD Sprint Report, an New York City Fire Department (FDNY) Computer Aided Dispatch (CAD) report, the BLS ambulance’s pre-hospital care report and an e911 Police Department request form. The City further provided an affidavit from Janice Olszewski, FDNY deputy assistant chief of emergency medical services, stating that the incident generated no “unusual occurrence reports”. The NYPD Sprint Report shows that the call was initiated at 6:58 p.m. The NYPD Sprint Report and FDNY CAD report show that the location, 2660 East 65th Street, was corrected to 2260 East 65th Street, at 7:14 p.m.

After oral argument, this Court denied petitioner’s application. As stated in the decision and order of this Court, dated August 12, 2016, although this Court found the application to be timely made and found that petitioner cited a reasonable excuse for the delay, they failed to establish that the City acquired actual knowledge of the essential facts constituting the claim. Specifically, this Court held that the EMS reports provided “fail[ed] to evince a connection between the petitioners’ injuries and the negligent conduct alleged by petitioners” in that the reports demonstrate a 15-minute delay, but do

not clarify the reason for the delay. It was unclear from the reports, alone, whether the location was incorrect as a result of some negligence by the 911 operator. Further, this Court held that petitioner failed to meet her burden and rebut the presumption that the City would be substantially prejudiced by the delay.

Motion to Renew

Petitioner now moves, *inter alia*, to renew the motion for leave to file a late notice of claim. Petitioner seeks to renew based upon “newly obtained evidence”, which includes an audio recording of the FDNY portion of the 911 call, as well as audio of multiple calls between the emergency response units from the date of the accident. Petitioner further seeks to renew based on the New York State Court of Appeals decision in *Newcomb v. Middle County Cent. School Dist.* (28 N.Y.3d 455, 45 N.Y.S.3d 895 [2016]). Petitioners contend that based on *Newcomb*, there is a change in the law which would change the prior determination.

911 Audio Recordings

Petitioner made a Freedom of Information Law (FOIL) request on October 6, 2017, seeking disclosure of the 911 audio recording (*see* Memorandum of Law in Support, NYSCEF Doc. # 34 at p 6; *see also* FOIL Request, NYSCEF Doc. # 39). By letter dated October 16, 2017, Richard Mantellino, Lieutenant Records Access Officer, denied the FOIL request based on Public Officers Law § 87(2)(b) (*see* Denial, NYSCEF Doc. # 40). Petitioner appealed the denial on November 14, 2017 (*see* Appeal of Denial, NYSCEF Doc. # 41). In a letter dated November 15, 2017, Jordan S. Mazur, Sergeant Records Access Appeals Officer denied the appeal, stating that “[a]udio recordings of

911 calls are only maintained for a period one (1) year; therefore, the records that you seek from July 28, 2014 are beyond the retention period and have since been deleted” (Letter FOIL, NYSCEF Doc. # 42).

In light of this, petitioner consulted with Frankie Aviles, a former emergency medical technician (EMT) dispatcher, emergency medical haz-tac technician, City Wide Resource Coordinator and 30-year FDNY veteran (*see generally*, Aviles Affidavit, NYSCEF Doc. # 43). Mr. Aviles explains that a 911 call is routed to the NYPD operator (*see id.* at ¶ 6). The NYPD operator determines whether the caller requires medical or police assistance (*see id.* at ¶ 7). When the NYPD operator determines that medical assistance is required, the call is immediately transferred to the FDNY emergency operator (*see id.* at ¶ 9). Thereafter, the FDNY operator confirms, collects or notates any relevant information, including the address of the emergency (*see id.* at ¶ 10).

Mr. Aviles further states that “[t]he policy, procedure, custom and practice of the Respondents, during this relevant time period, was to record, store and archive...the ENTIRE 911 Audio Call; that is, both the conversation between the NYPD operator/dispatcher and the caller, AND the conversation between the FDNY operator/dispatcher and the caller” (*id.* at ¶ 12). Mr. Aviles states that there is no written policy that a 911 audio call is to be deleted after either 180 days or one year (*see id.* at ¶ 15). In fact, they are required to be maintained for seven years. The recordings are archived at 9 MetroTech Center in Brooklyn, New York for three years, and thereafter, are archived at 11 MetroTech Center with the New York City Department of Information Technology and Telecommunications (DoITT), who maintains the ability to pull the

archived records (*see id.* at ¶ 16-17). “911 call recordings can be pulled ad infinitum, in perpetuity, and are stored without the ability to purge” (*id.* at ¶ 19).

After receiving this information from Mr. Aviles, petitioner obtained a copy of the FDNY portion of the 911 audio. It is unclear when and how petitioner finally obtained copies of the audio recordings. Although multiple calls were placed to 911, petitioner obtained the audio recording of a call placed at 7:00:11 p.m. on July 28, 2014, by Kamel Salem and Marcela Correa, who were present on the scene of the incident (*see* Affidavit of Kamel Salem, NYSCEF Doc. # 36; *see also* Affidavit of Marcela Correa, NYSCEF Doc. # 37). The 911 call provides, as follows:

EMS: EMS 0701.

NYPD: 0701 0125 verified in Brooklyn. Caller is on the line.

Operator: Thank you. Hello caller? Hello?

Salem: Yes.

Operator: Hi. You calling for yourself or somebody else?

Salem: Wha- [inaudible]

Operator: Are you the person that needs to go to the hospital or does somebody else?

Salem: [Screaming in the background]

Operator: What's the emergency?

Salem: [Screaming in the background]

Operator: What is the emergency, sir? Is it-

Salem: [inaudible]... sink in the pool and she is not breathing.

Operator: She-how old is she?

Salem: [Screaming in the background]

Operator: How old is she?

Salem: How old is she?

Operator: Yes. How old is the person that's not breathing?

Salem: Ten. Ten years.

Operator: Ten years old and she is not breathing?

Salem: [Background noise]

Operator: She's not breathing?

Salem: No.

Operator: Okay, 2 6 6 0 East 65th Street in Brooklyn?

Salem: Yes.

Operator: East 6-5 Street? 2-6-6-0 East 6-5 Street?

Salem: [inaudible] Yes

Operator: Is there an apartment number or private house?

Salem: Yes.

Operator: Yes, what? Is there an apartment number or private house?

Salem: It's a private house.

Operator: Okay. Between Mayfair Drive South and 52nd Drive?

Salem: Uh, one second. Let me-

Operator: Sir, hello?

Salem: [inaudible]

Operator: It's the ten-year-old that's not breathing?

Correa: No. She's four. She's not ten.

Operator: Oh okay. He says ten. And she is not breathing?

Correa: No. She is not breathing.

Operator: Okay-

Correa: My husband is a physician. He is giving her CR and-

Operator: He is doing CPR?

Correa: [inaudible] Yes

Operator: Okay. EMS is responding. 26 60 East 65th Street in Brooklyn. Your number is 347-

Correa: W-

Operator: 756-

Correa: two

Operator: 1027. Correct?

Correa: 22 60 East 65th Street.

Unknown: How old is she?

Operator: 2 6 6 0 East 6-5 street.

Correa: Four.

Operator: Four, right? And she is not breathing, and CPR is started?

Correa: She is not breathing. She is not breathing and-

Operator: Okay.

Correa: My husband ER doctor and gave

Operator: EMS is c-

[Inaudible speaker in background]

Correa: She has a very very very very light pulse.

Operator: Okay. EMS is on it-

Correa: Very very very very light.

Operator: EMS is on their way. Okay?

Correa: Okay.

Operator: Okay

Correa: 22 60 East 65th
Operator: 2 6 6 0 East 6 5 street in Brooklyn and CPR is started, right?
Correa: Yes.
Operator: Okay-
Correa: Okay.
Operator: and he is a physician?
Correa: Yes.
Operator: Okay. They are coming to help, okay?
Correa: Okay. Thank you.
Operator: Okay, bye bye.
Correa: Bye bye.

(CD1 – EMD Logging Recording 16-135 (EMD 15- 135)_Distribution, NYSCEF Doc. # 44, Audio_78033; *see also* Certified Transcript of EMS Audio, NYSCEF Doc. # 61).²

Petitioner further obtained audio recordings of numerous radio calls between those units responding to the scene after the initial 911 call.³ These recordings are transcribed by the court as follows, in chronological order:

Caller 1: [inaudible] we have a 404 to 660, private house.
Nobody answering the door.
Caller 2: Okay. All units synchronize your watches. Time now 7:06 [inaudible] 691. Which unit needs assistance?
Caller 1: [inaudible] 84 the cardiac arrest. 2 6 6 0 East 6 5.
Nobody answering the door. Call back please.

² This Court notes that the certified transcript provided by the City differs slightly from the audio recording provided to the court by petitioners. The transcript above is what is discernible from the audio file annexed herein.

³ Petitioners provided as an exhibit to their motion, two compact discs (*see generally* NYSCEF Doc. # 44; Notice of Motion, Exhibit 11). The following is handwritten on the first disc: “Adbelghany, Fatma, 2015-054402, EMS Audio Recording, Source: # 1CAD 3242 072814.wav”. This disc contains one audio file: the FDNY recording of the 911 call. The following is written on the second disc provided herein: “Imam Recordings Copy # 1”. This disc contains two file folders. In the folder entitled “CD1 – EMD Logging Recording 16-135 (EMD 16-135) Distribution”, there are 21 audio files, a JPG file of the company logo, and a shortcut to a website which includes the audio files, distribution and incident details for the disc contents, as well as reference numbers and descriptions of the files. The descriptions include the date and time of each call. The second folder, entitled “CD2” contains two folders, with three audio files total, the same logo, website shortcut and descriptions.

(Recording, NYSCEF Doc. # 44, CD1 – EMD Logging Recording 16-135 (EMD 16-135) Distribution, Audio_78034, 7:06:28 p.m.).

Caller 1: 3 3 Union. Imma try to call back. Is FD with [inaudible].

Caller 2: We're at East 6 5 correct? Not 65th. East 6 5.

Caller 1: Okay, um, as far as the location I have 26-- 2 6 6 0 East 6 5. That's what I have.

Caller 2: [inaudible]

(*id.*, Audio_78036, 7:07:05 p.m.).

Caller: 3 3 U, maybe it's a bad address. Maybe its 65th street, not East 65th.

(*id.*, Audio_78035, 7:07:46 p.m.).

Caller 1: ALS unit, what did you say the suggested location might have been?

Caller 2: Maybe it's 65th Street. Not East 65th.

(*id.*, Audio_78037, 7:08:15 p.m.).

Caller 1: Stand by 3 3 U.

Caller 2: EMS 0 7 2 3.

Caller 1: Hi. This is uh- This is Barrell in – uh – Brooklyn.

Caller 2: What's up?

Caller 1: What's up? Who am I talking to?

Caller 2: Bobbi Jill.

Caller 1: Oh. What's up? Listen, uh job – 3 3 Union's job which is – um.

Caller 2: 3 2 4 2?

Caller 1: Yeah 3 2 4 2.

Caller 2: Yeah?

Caller 1: Do you know what location they are doing CPR on? Because my address is bad.

Caller 2: Oh God.

Caller 1: Mmhmm.

Caller 2: [Long Sigh]

Caller 1: and then just tell that, you know, tell the dispatcher she can just supplement it. Well no, she can't actually. She can't supplement it.

Caller 3: I think we don't have the same system.

Caller 2: Alright let me just call them.

Caller 1: Okay, no problem.

Caller 2: Bye.

Caller 1: Thank you.

(*id.*, Audio_78040, 7:09:55 p.m.).

[Dial Tone]

[Phone Ringing]

Caller 1: Brooklyn 2 7 8.

Caller 2: Hi, this is 0 7 2 3.

Caller 1: Mhmm.

Caller 2: The job, 32 42, the cardiac arrest, the 4-year-old, they're doing CPR on.

Caller 1: Yes.

Caller 2: What is the correct address?

Caller 1: Hold on one second. [Pause] Hey, George. [Long Pause] Give me one second, hold on. [Pause]

[Inaudible Background Conversation]

Caller 2: [Sigh]

Caller 1: [inaudible] East 6 5 is no good?

Caller 2: There-- I have uh, EMS at that-- 26 60 East 65th Street and they don't see anything.

Caller 1: Okay hold on.

[Long Pause] [Background noise audible]

Caller 1: Alright, the bus just found them, they said.

Caller 2: They have- they're there? What is the address? Do you know?

Caller 1: Uh, no. They didn't give us the address.

Caller 2: Alright, thanks.

Caller 1: Alright.

(*id.*, Audio_78043, 7:10:42 p.m.).

Caller 1: 44 Eddy- 4 Eddy.

[Long Pause]

Caller 1: 4 Eddy I have an address change. 4 4 Eddy.

(*id.*, Audio_78041, 7:12:53 p.m.).

Caller 1: Come in 5 8.

Caller 2: This is 5 8.

Caller 1: I gotta confirm the rush. Has BLS [inaudible]?

Caller 2: 3 3 -- 3 3 Union couldn't find the address. We just got the address changed. You're at 2260, right?

Caller 1: [inaudible]

Caller 2: Is 4 Eddy with you?

Caller 1: On scene.

Caller 2: 3 3 Union coming.

(*id.*, Audio_78044, 7:13:13 p.m.).

Caller 1: Uh 3 3 Union on the air. 3 3 U?

Caller 2: Union.

Caller 1: 2 2 6 0 East 65 Street. 2 2 6 0 East 65 Street. That's for FD.

(*id.*, Audio_78042, 7:13:13 p.m.).

Caller 1: 3—[pause] 3 3 Union. Be advised. 4 4 Eddy and [inaudible] 5 8 are at 2 6 6 0 already.

Caller 2: 3 U. Ten-four.

(*id.*, Audio_78045, 7:13:46 p.m.).

According to Eva Wilson, FDNY Emergency Medical Technician – Defibrillator, who is employed by the Emergency Medical Services (EMS) Communications Bureau as an Emergency Medical Dispatch Instructor,

when a caller dials 911 for emergency assistance, the call is initially answered by the New York City Police Department (“NYPD”). If the caller reports a medical emergency, the NYPD call-taker will then conference in an assignment receiving dispatcher (“ARD”) at the FDNY’s Emergency Medical Dispatch Center. The information input by the NYPD call-taker is automatically routed to FDNY’s Emergency Medical Dispatch Center. The ARD’s computer screen therefore shows the call information obtained by NYPD, which includes the address of the medical emergency and a brief description of the medical condition if given by the caller.

(Affidavit of Eva Wilson, NYSCEF Doc. # 58 at ¶ 4).

Ms. Wilson reviewed the CAD for call number 3242 which shows that the NYPD call taker input the address of 2660 East 65th Street, which was routed to EMS.

NYPD Lieutenant Peter Brower is the commanding officer of the NYPD's Tape and Records Unit, which is part of the Communications Division of the Information Technology Bureau (*see* Affidavit of Lieutenant Brower, NYSCEF Doc. # 56).

Lieutenant Brower conducted a search for the 911 audio in the NYPD database, which yielded no results. The files were automatically deleted on January 25, 2015 (*see id.* at ¶ 7). According to Lieutenant Brower, “[p]rior to March 1, 2016, the NYPD’s audio retention policy for all audio recordings of 911 calls was 180 days from the date the recording was made” (Affidavit of Lieutenant Brower, NYSCEF Doc. # 56 at ¶ 3). On the 180th day the files automatically deleted. This deletion cannot be manually overridden. In order to retain the tapes, the unit must have received a notice to preserve or produce a recording before that recording was deleted (*see id.*). These files are maintained in a closed network that is not accessible by other agencies, including the New York City Department of Information Technology and Telecommunication (*see id.* at ¶ 5). Lieutenant Brower states that the only existing record is a printed ICAD report (*see id.* at ¶ 8).

Unusual Occurrence Reports

Petitioner’s expert Mr. Aviles opined, in his affidavit, that based on his review of the Sprint, CAD and FDNY audio, “there were significant errors in the dispatch of emergency medical response to the correct location, 2260 E. 65th Street” (Aviles Affidavit, NYSCEF Doc. # 43 at ¶ 21). Aviles opines that incorrect codes were entered

by the dispatchers (*see id.* at ¶ 25). Further, Aviles opined that the NYPD did not transmit the correct address until 7:14:37 p.m. (*see id.* at ¶¶ 29-30). He opines that the infant petitioner was not provided with “the life -saving methods for which ALS is equipped” for 30 minutes after the call came in at 6:58 p.m. (*see id.* at ¶ 32).

Aviles further opined that the incident is an “unusual occurrence” should have resulted in an “Incident Situation Reports Log” because of the presence of FDNY Doctor, Dr. Kaufman on scene (*see id.* at ¶¶ 34-35). Aviles avers that “this matter was such an incredible incident situation that the 911 calls at issue herein, and the errors further described below, actually changed how 911 dispatchers are instructed and trained to handle calls, revamping the 911 system as a result” (*id.* at ¶ 37). This opinion is based on a 2016 memorandum to dispatchers (*see id.* at ¶ 38; *see also id.* at Emergency Medical Dispatch Order).

According to Janice Olszewski, Deputy Assistant Chief of Emergency Medical Services, “[a]n unusual occurrence is any situation which interferes with patient care or with the performance of a member’s duties or which could potentially impact the routine operation of the Bureau of EMS. Such events or occurrences are documented on an ‘Unusual Occurrence Report’” (Affidavit of Janice Olszewski, NYSCEF Doc. # 60 at ¶ 3). Olszewski conducted a search of all computerized databases for any Unusual Occurrence Reports and Incident Situation Reports related to call #3242. Her search yielded no results (*see id.* ¶ 5). She also searched EMS Division records for any other records or documents related to call #3242, which yielded no results (*see id.* at ¶ 6).

Dr. Bradley Kaufman, First Deputy Medical Director at FDNY, stated in an affirmation that he is “out in the field” responding to emergency calls in two situations. First, he alternates with other physicians to serve as the “on-call” physician for the day and can respond to a four-alarm or greater fire, evacuation of a medical facility, mass casualty incident or multiple casualty incident (Affirmation of Bradley Kaufman, M.D., NYSCEF Doc. # 55). The second situation is for field quality assurance and improvement, where he travels in an FDNY vehicle and monitors the calls coming in through the 911 system (*see id.* at ¶ 4). Dr. Kaufman has no recollection of the day in question, but based on his review of the CAD, opines that he was likely on scene for routine field quality assurance and he likely had no interaction with the patient or the medical personnel involved in the incident (*see id.* at ¶¶ 2 and 5).

Discussion

Motion to Renew and Reargue

Plaintiff moved pursuant to CPLR § 2221 to renew the order of this Court dated August 12, 2016. As an initial matter, petitioner contends that there is a change in the law which warrants renewal, after the New York State Court of Appeals’ decision in *Newcomb* (28 N.Y.3d 455, *supra*); *see* Affirmation in Support, NYSCEF Doc. # 50 at ¶¶ 9-11; Memorandum of Law in Support, NYSCEF Doc. # 34 at pp 17-18). Petitioner further avers that the motion should be renewed based upon new facts, not offered on the prior motion, which would change the determination. Specifically, the court should consider “the FDNY audio recordings, Petitioner’s FOIL request and appeal together with the Respondents’ responses thereto, as well as the facts recited in the Affidavit of

Frankie Aviles, together with the statements made by Respondents for the first time in their Respondents' Brief on appeal" (Memorandum of Law in Support, NYSCEF Doc. # 34 at p 18).

Petitioner avers that the City had an obligation to disclose the FDNY 911 recording in the underlying motion (*see id.* at p 19). Petitioner maintains that "the fact that Petitioners were not in possession of the FDNY audio recordings (but the Respondents were), and the remainder of Petitioners' new evidence did not exist at the time the Petitioners' Order to Show Cause was filed, provides a reasonable justification for not presenting such facts on the prior motion" (*see id.* at pp 18-19).

The City avers that *Newcomb* is not a change in controlling law sufficient to merit renewal of the underlying motion. The City maintains that a *Newcomb* analysis would still demonstrate prejudice against the City. Further, the City avers that the 911 audio does not warrant renewal because it is not a new fact or new discovery, as it existed at the time the initial application was made, and petitioner failed to provide reasonable justification as to why petitioner did not offer these facts in the underlying motion. The City further avers that the Salem and Correa affidavits were available to petitioners at the time of the initial application and cannot use them as a basis for renewal (*see id.* at ¶¶ 25-26). Petitioner did not make their FOIL request immediately after filing the late notice of claim, nor did they commence a proceeding for pre-action discovery (*see* Affirmation in Opposition, NYSCEF Doc. # 54 at ¶ 27). "Additionally, petitioners' assertion that the City was obligated to disclose the EMS Audio in response to their late notice of claim application is plainly incorrect. Caselaw clearly holds that a party seeking leave to file a

late notice of claim bears the burden of demonstrating that the respondent had actual knowledge” (*id.* at ¶ 28).

“A motion for leave to renew ‘shall be based upon new facts not offered on the prior motion that would change the prior determination’ (CPLR 2221[e] [2]) and ‘shall contain reasonable justification for the failure to present such facts on the prior motion’ (CPLR 2221[e][3])” (*Dupree v. Westchester Cty. Health Care Corp.*, 164 A.D.3d 1211, - -- N.Y.S.3d -- [2 Dept., 2018]).

“The new or additional facts either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion” (*Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d at 586, 953 N.Y.S.2d 301; *see Cioffi v. S.M. Foods, Inc.*, 129 A.D.3d 888, 891, 10 N.Y.S.3d 620). “However, in either instance, a ‘reasonable justification’ for the failure to present such facts on the original motion must be presented” (*Rowe v. NYCPD*, 85 A.D.3d 1001, 1003, 926 N.Y.S.2d 121, quoting CPLR 2221[e][3]; *see Cioffi v. S.M. Foods, Inc.*, 129 A.D.3d at 891, 10 N.Y.S.3d 620; *Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d at 586, 953 N.Y.S.2d 301).

(*Braxton v. Plaza Hous. Dev. Fund Co., Inc.*, 163 A.D.3d 756, 82 N.Y.S.3d 58, [2 Dept., 2018]).

“While it may be within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the prior motion, a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Dupree v. Westchester Cty. Health Care Corp.*, 164 A.D.3d 1211, *supra*, quoting *Byun Sik Chu v. Kerrigan*, 154 A.D.3d 731, 62 N.Y.S.3d 161 [2 Dept., 2017]).

In the instant case, petitioner moves to renew based on the newly obtained FDNY 911 audio recordings. Petitioners maintain that these audio recordings demonstrate that the FDNY 911 operator had the incorrect address of 2660 East 65th street during the 911 call, and did not immediately correct this error, despite the caller repeating the correct address, 2260 East 65th Street, twice during the initial call. Petitioner filed the underlying application for leave to serve a late notice of claim on October 26, 2015, the very same day that counsel was retained. However, petitioners first made a FOIL request for the 911 audio recording nearly two years later, on October 6, 2017.

In the instant case, although the FDNY audio recording is not a “new fact” and was available when the original motion was made, this Court, in its discretion, finds that petitioner offered reasonable justification for their failure to present these facts on the original motion. It is clear that petitioner did not know that any portion of the 911 audio was still available at the time the original motion was made. It is also clear that the petitioner interpreted the City’s representations, made in opposition to the underlying motion, to mean that the entire 911 audio was no longer available, rather than merely the NYPD portion of the audio recording. Frankly, this Court also interpreted the City’s arguments in opposition to the underlying motion to mean that the 911 audio file was unavailable, in its entirety.

The City stated, in opposition to the underlying motion, that its office looked for the 911 audio of the initial conversation between the 911 operator and caller, which had been deleted, consistent with NYPD protocol. The City argued that for this reason, they were prejudiced, but never clarified that the FDNY also records the call or that any

portion of the tapes remained available. They lamented that, should the application be granted, the City would be required to defend a multi-million-dollar lawsuit “without access to crucial records such as the 911 audiotape” (Memorandum of Law in Support, Exhibit C, NYSCEF Doc. # 48 at ¶ 49), which only buttressed this Court’s belief that the NYPD was the only recording of the 911 call. It was not until Petitioner’s FOIL request appeal was denied in November 2017 and petitioner consulted with retired EMT dispatcher Frankie Aviles, that it was understood that the FDNY portion of the audio was recorded on a separate system and it had a different retention policy from the NYPD portion. The City confirmed this in their brief dated April 5, 2018, submitted on the appeal of the underlying order. Based on the foregoing, petitioner’s motion to renew based on new facts is granted, with respect to the issues of “actual knowledge” and “substantial prejudice”.

Leave to file late notice of claim

Upon renewal, petitioner moves to modify the decision and order of this Court, dated August 12, 2016, so as to grant leave to deem the notice of clam timely filed *nunc pro tunc*. Petitioner contends that the renewed motion for leave to serve a late notice of claim should be granted inasmuch as the 911 audio tapes provide actual knowledge, and plaintiff has now demonstrated some evidence and a plausible argument to support a finding of no prejudice, as required by *Newcomb* (28 N.Y.3d 455, *supra*).

The City avers that the court should adhere to its original determination (*see* Affirmation in Opposition, NYSCEF Doc. # 54 at p 15). The FDNY portion of the 911 audio does not provide actual knowledge in that the caller did not make it clear that the

dispatcher was reciting the wrong address (*see id.* at ¶¶ 40-41). The pre-hospital reports do not provide actual knowledge because the cause of the injury predated the City's involvement, and the records demonstrate that emergency responders successfully resuscitated the infant and restored a heartbeat (*see id.* at ¶ 44).

The City contends that the first portion of the 911 audio, the initial conversation between the caller and the NYPD 911 operator, is only contained in the NYPD 911 audio. Since this portion is no longer available, and may not be retrieved, the City is prejudiced because there is no way to determine whether the address was initially entered incorrectly due to the caller's error or the NYPD operators (*see id.* at ¶ 9). As a result of this, "the circumstances are precisely as they were at the time of the Court's initial consideration" (*id.* at ¶ 48). "This irrefutably constitutes a particularized showing of substantial prejudice based on the evidence in the record before this Court" (*id.* at ¶ 49). The City further maintains that the affidavit of Frankie Aviles, relied upon by petitioner, is riddled with misinformation. Specifically, there was no unusual occurrence or situation which would warrant an additional report. Dr. Kaufman's presence at the scene is not unusual as he "was in the field conducting monitoring for quality assurance and improvement purposes" (*id.* at ¶ 16).

Actual Knowledge

"In determining whether to grant the extension, the court must consider whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after it arose or within a reasonable time thereafter" (*Murnane v. New York City Sch. Constr. Auth.*, 164 A.D.3d 506, 83 N.Y.S.3d 105, [2 Dept., 2018],

citing General Municipal Law § 50–e[5]). “Unsubstantiated contentions that the municipality acquired timely actual knowledge of the essential facts constituting the claim through the content of reports or other documentation are insufficient” (*Charles v. Cty. of Orange*, 164 A.D.3d 1232, 83 N.Y.S.3d 660 [2 Dept., 2018], citing *Matter of Ruiz v. City of New York*, 154 A.D.3d 945, 63 N.Y.S.3d 425 [2 Dept., 2017]).

It is clearly stated in this Court’s underlying decision that the involvement of municipal employees alone is not sufficient to provide the City with actual knowledge of the essential facts which constitute the claim (*see Shoen v. City of New York*, 86 A.D.3d 575, 926 N.Y.S.2d 907 [2 Dept., 2011]; *see also Klass v. City of New York*, 103 A.D.3d 800, 959 N.Y.S.2d 738 [2 Dept., 2013]). Something more is required, such as a report or record, which demonstrates that the respondent acquired actual knowledge (*see Thill v. N. Shore Cent. Sch. Dist.*, 128 A.D.3d 976, 10 N.Y.S.3d 144 [2 Dept., 2015], *lv. denied*, 26 N.Y.3d 914, 23 N.Y.S.3d 640 [2015]). “A report which describes the circumstances of the accident without making a connection between the petitioner’s injuries and negligent conduct on the part of the public corporation will not be sufficient to constitute actual notice of the essential facts constituting the claim” (*D’Agostino v. City of New York*, 146 A.D.3d 880, 46 N.Y.S.3d 635 [2 Dept., 2017], citing *Matter of Thill v. North Shore Cent. Sch. Dist.* 128 A.D.3d 976, *supra*). In the underlying motion, the CAD reports did not demonstrate a connection between petitioner’s injuries and any potentially negligent conduct of the municipal employees. Further, the City provided proof that no “unusual occurrence” reports were generated as a result of this 911 call. Based on the foregoing, this Court found that the City did not have actual knowledge.

Now, upon renewal, petitioner provided audio recordings of the FDNY portion of the 911 call, as well as multiple calls between response units who are trying to determine the correct location of the emergency. The City represents that the initial portion of the 911 audio was deleted pursuant to the NYPD retention policy, so it remains unclear whether the caller gave the incorrect address of 2660 East 65th Street or whether the operator transcribed the address incorrectly. However, the FDNY portion of the 911 call was provided herein. The 911 call clearly demonstrates that the operator has the incorrect address. The operator, in an apparent attempt to check the address, restates the incorrect address of 2660 East 65th Street. The second 911 caller repeats back to the operator a different address, of 2260 East 65th Street, twice. The 911 operator simply repeats back the incorrect address.

In addition, petitioner provided a number of other audio recordings of calls between the response units, which demonstrate that the City responded to 2660 East 65th Street, and it is the incorrect address. The timesheet for the audio recordings demonstrates that the initial 911 call was made at 7:00 p.m. A unit responded approximately six minutes later to 2660 East 65th Street (the wrong address). The audio shows that a call was placed at 7:06:28 p.m. wherein the caller stated that EMS responded to 2660 East 65th Street and no one answered the door. Approximately 10 of the 24 audio recordings placed amongst the various units and submitted herein indicate that EMS responded to the incorrect address. The last of these calls was placed at 7:13:46 p.m. Therefore, these records clearly show that there was at least a 7-minute delay in the City's response to the emergency as a result of this error. Here, inasmuch as

these audio recordings gave reasonable notice from which it can be inferred that a *potentially actionable wrong* was committed, the City had actual knowledge of the essential facts constituting the claim.

Substantial Prejudice

“The Court of Appeals endorsed a new rule establishing a shifting burden of proof in demonstrating that late service of a notice of claim substantially prejudices a municipality or public corporation” (*N. F. v. City of New York*, 161 A.D.3d 1046, 77 N.Y.S.3d 712 [2 Dept., 2018], citing *Newcomb*, 28 N.Y.3d 455, *supra*). “*Newcomb* does not change the long-standing law regarding the factors that courts are to consider in deciding whether to grant or deny leave to serve late notices of claim under General Municipal Law § 50-e(5). The import of *Newcomb* is limited to its clarification of the shifting burdens of proof when the substantial prejudice factor is addressed in the context of late notice of claim applications” (*Ruiz v. City of New York*, 154 A.D.3d 945, *supra*, citing *Newcomb*, 28 N.Y.3d 455, *supra*).

In *Newcomb*, the Court of Appeals held 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.... The rule we endorse today—requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence—strikes a fair balance.... Requiring the public corporation to come forward with a particularized showing is appropriate in this context given that the public corporation is in the best position to provide evidence as to whether the late notice has

substantially prejudiced its ability to defend the claim on the merits.

(28 N.Y.3d 455, *supra*, [internal citations omitted]).

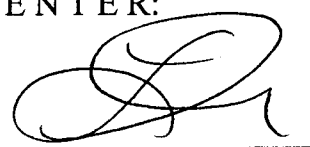
Here, petitioner met her burden and presented a plausible argument that the City will not be prejudiced because the FDNY and EMS audio recordings are available, and they can still conduct an investigation. In opposition, the City failed to make a particularized evidentiary showing that they would be prejudiced by the delay. “The municipality or public corporation is required to submit admissible evidence to meet its burden because it ‘is in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice’” (*N. F. v. City of New York*, 161 A.D.3d 1046, *supra*, quoting *Newcomb*, 28 N.Y.3d 455, *supra*). Here, the City provided no evidence that they can no longer investigate. Rather, the City merely argues that they are prejudiced because the NYPD portion of the audio is still unavailable and therefore the circumstances are the same now as they were when the initial motion was decided (*see* Affirmation in Opposition, NYSCEF Doc. # 54 at ¶ 48-49). This Court rejects the City’s contention. Although the City may be in the same position as they were when the initial motion was decided, this Court is not inasmuch as the FDNY audio recordings were now provided.

Conclusion

Accordingly, the petitioner's motion to renew is granted. Petitioner's renewed motion to deem the notice of claim dated October 26, 2015, timely filed *nunc pro tunc* is granted. The parties' remaining contentions are either without merit or need not be reached in light of this Court's determination.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

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