

**Joseph v City of New York**

2019 NY Slip Op 30430(U)

February 25, 2019

Supreme Court, New York County

Docket Number: 150165/2019

Judge: Julio Rodriguez

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM**

*Justice*

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PATRICK JOSEPH

Petitioner,

- v -

THE CITY OF NEW YORK,

Respondent.

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INDEX NO. 150165/2019  
MOTION DATE 02/07/2019  
MOTION SEQ. NO. 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 6, 7, 8, 10, 11, 12, 13, 14

were read on this motion to/for LEAVE TO FILE LATE NOTICE OF CLAIM

Upon the foregoing papers, petitioner’s application pursuant to *General Municipal Law (GML) § 50-(e)* seeking leave to file a late notice of claim, *nunc pro tunc*, is hereby granted.

This action arises from a motor vehicle accident that occurred on January 13, 2018, at the intersection of Park Avenue and East 79<sup>th</sup> Street, New York, New York. Petitioner alleges that at the time of the accident, the traffic lights at the intersection were not working. Petitioner concedes that he failed to serve a notice of claim on the City of New York (hereinafter “the City”) before the expiration of the ninety-day period. Therefore, petitioner now seeks leave to file a late notice of claim. Respondent opposes petitioner’s order to show cause. On February 7, 2019, this Court heard oral arguments on the record regarding the instant application.

Pursuant to GML § 50-i (1), service of a notice of claim is a condition precedent to filing a claim against “a city, county, town, village, fire district or school district.” Said notice of claim must be filed within ninety days after the claim arises. (*GML* § 50-i). However, upon application, the court, in its discretion, may extend the time to serve a notice of claim, provided that the extension does not exceed the statute of limitation applicable to actions against a public corporation. (*GML* § 50-e[5]). A court considering a motion 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” is whether the

public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days of the accrual of the claim or a reasonable time thereafter. (*Andrews v Long Is. R.R.*, 110 AD3d 653, 653 [2d Dept 2013] citing to *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 147, 851 N.Y.S.2d 218; see *GML* § 50-e[5]). The Court shall also consider whether the claimant made an excusable error concerning the identity of the public corporation; whether the delay would substantially prejudice the public corporation in its defense; and whether the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim. (*Id.*) “A court’s decision to grant or deny a motion to serve a late notice of claim is ‘purely a discretionary one.’” (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 465 [2016] citing *Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 265 [1980]).

Given that the subject accident occurred on January 13, 2018, petitioner had until April 13, 2018, to file his notice of claim. However, petitioner failed to timely do so. Petitioner filed the instant proceeding on January 8, 2019, approximately one year after the alleged accident. Petitioner’s counsel affirms that the failure to timely serve a notice of claim is attributable to an “office clerical and filing error.” (Petitioner’s verified petition, pg. 4). However, law office failure “is not a reasonable excuse for failing to timely serve a notice of claim” (*Colarossi v City of New York*, 118 AD3d 612, 612 [1st Dept 2014]). Nonetheless, the failure to assert a reasonable excuse, alone, is not fatal to the application. (*Velazquez v City of N.Y. Health and Hosps. Corp.*, 69 AD3d 441, 442 [1st Dept 2010], citing *Ansong v City of NY*, 308 AD2d 333 [1st Dept 2003]).

In further support of his application, petitioner argues that the City acquired actual knowledge of the essential facts constituting the claim shortly after the accident. Specifically, petitioner argues that actual notice is established by the police report prepared by the New York Police Department, which identifies and refers to code 68 – “Traffic Control Device Improper/Non-Working”- as a contributing factor in causing the accident. Additionally, petitioner avers that the City would not be prejudiced given that the City was on notice that the traffic lights at the intersection were not working at the time of the accident and therefore had the opportunity to investigate the matter. In opposition, the City argues, in essence, that petitioner’s application should be denied because (1) petitioner has failed to demonstrate a reasonable excuse

for failure to serve a timely notice of claim; (2) the police report made in this matter did not provide the City with actual knowledge of the essential facts constituting the claim; and (3) petitioner has failed to demonstrate that the City is not prejudiced by the delay.

Contrary to respondent's contentions, this Court finds that the police report did apprise the City of the essential facts constituting the claim herein. Unlike in *Pineda v City of New York*, 305 AD2d 294 [1st Dept 2003] and *Mateo v City of New York*, 245 AD2d 25 [1st Dept 1997], the contemporaneous police report herein did connect petitioner's accident with the alleged negligence claim against the City. The police report specifically states that both petitioner and the driver of the second vehicle involved in the subject accident claimed that the traffic lights were out of order at the time of the collision. Accordingly, this Court finds that the City was aware of a potential claim against it and the essential facts forming the basis of the claim.

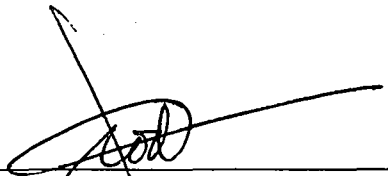
With respect to prejudice, "[t]he burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice... Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed." (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 465 [2016]). While the instant application was filed approximately one year after the accident, this Court finds that the City will not be substantially prejudiced by the delay. The alleged negligence on behalf of the City involves inoperative traffic lights, of which the City had knowledge of. Therefore, it is plausible, as argued by petitioner, that the City would have indeed completed an investigation of the circumstances surrounding the non-working traffic lights. In its opposition papers, the City failed to respond with a particularized showing that it will be substantially prejudiced if the late notice is allowed.

In light of this Court's determination that the City had actual knowledge of the essential facts constituting the claim within ninety days of the accrual of the claim, coupled with the absence of any evidence showing that the City will be substantially prejudiced, it is hereby

ORDERED that petitioner's motion seeking leave to file a late notice of claim is granted; and it is further

ORDERED that petitioner's late Notice of Claim, as annexed to the underlying petition, is deemed served and filed *nunc pro tunc*. Petitioner shall appear for a hearing pursuant to General Municipal Law §50(h) upon notice.

February 25, 2019

  
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HON. JULIO RODRIGUEZ, JSC

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: