

Matter of Banks v MTA Bus Co.
2019 NY Slip Op 32842(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 153563/2019
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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In the Matter of
Damon Banks,

Petitioner,

DECISION AND ORDER

-against-

Index No.: 153563/2019

**The MTA Bus Company and
Metropolitan Transportation Authority,**

Mot. Seq. 1

Respondents.

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

Paper	Numbered	NYCEF #
Petitioner's Motion/ Affirmation/Memo of Law	<u>1</u>	1-8, 11-13
Respondent's Cross-Motion/ Affirmation/Memo of Law	<u>2</u>	14-15
Petitioner's Opposition to Cross-Motion & Reply to Opposition/Memo of Law	<u>3</u>	19
Respondent's Affirmation in Reply/Memo of Law	<u>4</u>	23-24

Petitioner Damon Banks seeks an order deeming a notice of claim timely served on New York City Transit Authority as timely served on Respondent MTA Bus Company *nunc pro tunc* or granting leave to file a late notice of claim on MTA Bus Company pursuant to General Municipal Law § 50-e(5). For the reasons that follow, the petition is granted.

Petitioner was allegedly injured on June 13, 2018 in a motor vehicle accident when Petitioner's vehicle was side-swiped by Respondent's bus. According to the police report, the accident occurred at the intersection of Second Avenue and E 125th street in New York.

Petitioner served New York City Transit Authority with a notice of claim within 37 days of the incident. Shortly after consulting with another attorney, Petitioner's counsel learned that MTA Bus Company is a separate public benefit corporation from the New

York City Transit Authority, which he mistakenly believed was the operator of all New York City buses, despite the fact that the registrant information for the bus was listed on the police accident report. Subsequently, a registration search confirmed that the bus was owned by MTA Bus Company. A proposed notice of claim was served on MTA Bus Company on January 2019, four months after the expiration of the 90-day period from the date of the accident.

General Municipal Law (GML) § 50-e (1)(a) requires that a notice of claim be served on a public corporation like MTA Bus Company within 90 days after the claim arises (*Newcomb v Middle County Cent. Sc. Dist.*, 28 NY3d 455, 460 [2016]). A court, in its discretion, may extend the time for a petitioner to serve a notice of claim, not to exceed one year and 90 days (GML § 50-e [5]; *Asaro v City of New York*, 167 AD2d 130 [1st Dept 1990]). The key factors the court must consider in determining whether leave should be granted are whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense (*Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]). The presence or absence of any one of the foregoing factors is not determinative, and the absence of a reasonable excuse is not, standing alone, fatal to the application (*Id.*). The burden of proof as to those factors rests on the petitioner, as the party seeking leave to file a late notice of claim (*Grajko v City of New York*, 150 AD3d 595 [1st Dept 2017]).

The instant application for leave to file a late notice of claim was made five months before the expiration of the one-year-and-90-day period of limitations. Petitioner claims that he did not know the difference between MTA Bus Company and New York City Transit Authority and thought they were the same entity. He does not explain the reason for the delay in conducting a registration search for the owner of the bus which, as Respondent argues, could be viewed as law office failure. Although law office failure is an insufficient excuse for untimely service (*Seif v City of New York*, 218 AD2d 595, 596 [1st Dept 2005]), the absence of a reasonable excuse is not fatal to the application (*Richardson v New York City Housing Authority*, 136 AD3d 484 [1st Dept 2016]). Further, in *Seif*, there was no indication that the Respondent received any type of notice, except to an unknown employee. Here, Petitioner contends that Respondents had actual knowledge of the facts underlying the claim since the bus driver involved in the accident was an employee of the MTA Bus Company and provided his information to the police who investigated and issued a police accident report.

Respondent MTA Bus Company counters that even if it was aware of the accident, it lacked notice of the specific claims made by Petitioner and, relying on *Humsted v New York City Health & Hosps. Corp.*, 142 AD3d 1139, 1140 (2016), argues that the contention that it acquired timely actual knowledge of the essential facts through the content of the police report is insufficient. In *Humsted*, however, the plaintiff provided only her own unsubstantiated contentions regarding the contents of a police report. Respondent also argues that the fact that the police department had actual knowledge of the accident, without more, cannot be considered actual knowledge of the essential facts underlying the claim, citing *Cruz v Transdev Services, Inc.*, 160 AD3d 729 (2d Dept 2018). Another

Second Department case makes clear, however, that a municipal entity acquires actual knowledge of the essential facts constituting the claim within 90 days of the accident, when its employees are directly involved in the accident, and the police accident report gives reasonable notice from which it may be inferred that a potentially actionable wrong had been committed by the municipal entity (*Cruz v City of New York*, 149 AD3d 835 [2nd Dept 2017]), as is the case here.

Finally, as to the issue of substantial prejudice, Petitioner has the burden, initially, to show that the late notice will not substantially prejudice Respondents (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455 [2016]). The "showing need not be extensive, but the Petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice" (*Id.* at 466). Petitioner contends that Respondents will not be prejudiced because the physical attributes of the incident location have not changed and the action is not based on the existence of a dangerous condition or a transient weather event. Nor is mere passage of time sufficient to warrant denial of the application (*Richardson v New York City Housing Authority*, 136 AD3d 484, 485 [1st Dept 2016]). Significantly, the bus driver involved in the accident continues to be employed by the MTA Bus Company and is therefore available to provide a detailed account of the accident. Moreover, Respondents fail to identify any step they would have taken to investigate this claim that they have not or cannot now take.

The notice of claim requirement is not intended to operate as a device to frustrate the rights of individuals with legitimate claims, but to protect the public corporation from unfounded claims and ensure that it has an adequate opportunity to explore the merits of the claim while information is still readily available (*Id.*) (internal citations omitted). Since

Petitioner has demonstrated that Respondent acquired actual knowledge of the essential facts of the incident and would not be substantially prejudiced by the delay, the court grants leave to serve a late notice of claim against Respondents.

The notice of claim may not be deemed timely served on Respondent *nunc pro tunc* insofar as the bus was registered to MTA Bus Company, and while MTA Bus Company and New York City Transit Authority are both MTA-affiliated, they are separate public benefit corporations with different functions (*Fridman v New York City Transit Authority*, 131 AD3d 1202 [2nd Dept 2015]).

Accordingly, it is

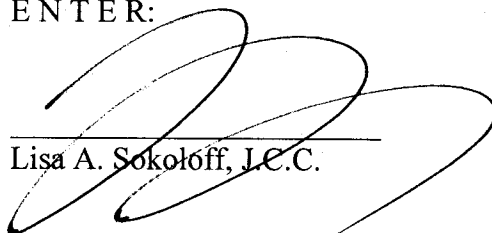
ORDERED that the petition for leave to serve a late notice of claim is granted and Respondent's cross-motion is denied.

ORDERED that Petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

Dated: September 20 , 2019
New York, New York

ENTER:



Lisa A. Sokoloff, J.C.C.

HON. LISA A. SOKOLOFF
J.S.C.