

Caccamo v City of New York
2020 NY Slip Op 32685(U)
June 18, 2020
Supreme Court, New York County
Docket Number: 151552/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

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JOHN CACCAMO,

Petitioner,

- v -

THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY, JACOBS CIVIL CONSULTANTS, INC

Respondent.

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INDEX NO. 151552/2020
MOTION DATE N/A
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for ORDER/JUDGMENT NUNC PRO TUNC.

Upon the foregoing documents, petitioner's petition for leave to serve a late notice of claim (see, General Municipal Law §50-e[5]) is decided as follows:

As described in the proposed Notice of Claim and Petitioner's affidavit, Petitioner was working on the "Canarsie Tunnel rehabilitation project," under the direction of his employer, OHL USA, INC./Judlau Contracting. The owner(s) and employer of the project were allegedly The City of New York and the MTA. On December 28, 2018, Mr. Caccamo was working on the job site located on East 14th Street between Avenue A and Avenue when he attempted to climb a series of steps to get into a "Caterpillar 316 Backhoe Loader" machine. Upon stepping onto the first step, Mr. Caccamo's feet slipped and he grabbed a handle on the machine to prevent from falling. In the process, Mr. Caccamo injured his right arm and right shoulder. Allegedly, a subcontractor on site failed to properly clean up at the conclusion of its work and left overflow grout on the ground, which became stuck in Mr. Caccamo's boots resulting in his slip Mr. Caccamo further alleges that he did not initially realize or appreciate the extent of his injuries, believing that he had likely just

pulled a muscle that would heal on its own. As the pain continued, however, Mr. Caccamo reported the incident to his employer, several days later. He was subsequently referred by workmen's compensation to Dr. Steven Nicholas, who administered an MRI and recommended surgery. Mr. Caccamo underwent a surgery on March 8, 2019 on his right shoulder and biceps. Thereafter, he began regularly attending physical therapy. Despite these remedial measures, Mr. Caccamo was still experiencing sharp pain in his neck and right shoulder, a loss of feeling, and a loss of full range of motion on his ring and pinky finger on his right hand. Mr. Caccamo then sought a second opinion in August 2019 and was examined by Dr. Brett Gertsman, MD. Dr. Gertsman sent Mr. Caccamo for an EMG, and a magnetic resonance neurography test. Dr. Gertsman concluded that the tests confirmed a 50% loss of feeling in Mr. Caccamo's right arm and right hand. Based upon petitioner's delay in discovering the full extent of his injuries, he now seeks leave to serve a late Notice of Claim upon the City and MTA.

The Court notes that this is Petitioner's fourth Order to Show Cause seeking the same relief. Petitioner previously filed an OSC under the instant index number on February 13, 2020, which was withdrawn. Petitioner also filed two functionally identical Orders to Show Cause under index number 162309/2019, the first of which was filed on December 23, 2019, withdrawn on February 26, 2020, re-filed on February 28, 2020 and remains pending before Justice Adams. As there is a prior action pending, the instant OSC should be denied based on that alone.

It is within the Court's discretion to extend the time to serve a Notice of Claim (In the Matter of Nahema Canty v. City of New York, 273 AD2d 467 [2d Dept 2000]). "The key factors to be considered in determining whether to grant an application to serve a late Notice of Claim are whether the [governmental unit or its attorneys or its insurance carrier] acquired actual knowledge of the essential facts of the claim within the statutory 90 day period, whether the petitioners had a

reasonable excuse for the delay, and whether the delay would substantially prejudice the [governmental unit or its attorneys or its insurance carrier] in its defense on the merits." (Matter of "Jane Doe" v. Hicksville Union Free School District, 24 AD3d 666 [2d Dept 2005]; General Municipal Law §50 e[5]; Fox v. City of New York, 91 AD2d 624 [2d Dept 1982]).

Pursuant to General Municipal Law § 50 e, petitioner's time to file a Notice of Claim expired 90 days after December 28, 2018 (March 28, 2019). Petitioner served the instant petition on the respondents on February, 28 2020. In support of his petition, petitioner cites *Hursula v Seaford Middle School*, 46 AD3d 892 (2d Dept. 2007) where a late notice of claim was allowed to be served where the petitioner demonstrated that she was unaware of the severity of the injury to her right ankle until eight months after the accident, See also, *Monroe v New York City Housing Authority*, 201 AD2d 737 (2d Dept. 1994); *Funkhouser v Middle Country Cent. School Dist.*, 102 AD3d 689 (2d Dept. 2013); *Kranick v Niskayuna Cent. School Dist.*, 15 1 AD3d 1262 (3rd 2017) (holding that the petitioner did not discover the extent of his injuries until after his MRI); *Lacey v Village of Lake Placid*, 280 AD2d 863 (3rd Dept. 2001); *Bowman v Capital Dist. Transp. Authority*, 244 AD2d 638. Said cases are distinguishable from the facts of the instant case. Here, petitioner provides no excuse for not seeking leave to file a late notice of claim immediately after his first meeting with Dr. Nicholas, provides no excuse for not moving after his surgery in March, 2019 and provides no excuse for not moving within a reasonable time of meeting with Dr. Gertsman in August, 2019.

Further, petitioner has failed to establish that the respondents had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or a reasonable time thereafter, as the MTA did not even receive an incident report from plaintiff's employer until January 20, 2020. Petitioner has also failed to establish that the City would not be substantially

prejudiced in defending the claim on the merits. (see, Evers v. City of New York, 90 AD2d 786, 787 [2d Dept 1982]). Petitioner’s delay in filing a Notice of Claim has effectively denied respondents the ability to investigate the alleged incident.

Accordingly, petitioner’s petition is hereby denied and dismissed in its entirety.



6/18/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE