Kevan v City of New York
2020 NY Slip Op 34162(U)
December 15, 2020
Supreme Court, New York County
Docket Number: 153965/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. DAKOTA D. RAMSEUR, Justice	PART	IAS MOTION 5
		INDEX NO.	153965/2020
		MOTION DATE	12/1/2020
		MOTION SEQ. NO.	001

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BRIAN KEVAN,
Petitioner,

- v -

THE CITY OF NEW YORK,
Respondent.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this petition for leave to file a late notice of claim (sequence 001): 4, 14, 15, 16, 19-32.

Petitioner Brian Kevan, an FDNY firefighter who worked at the post-9/11 World Trade Center site, seeks leave to file a late notice of claim asserting injuries, including lymphoma diagnosed in June of 2019, sustained as the result of exposure to toxins and contaminants without the aid of proper protective equipment, allegedly due to Respondent City of New York (the "City")'s negligence. The City opposes. For the following reasons, the Court denies the Petition.

BACKGROUND

The relevant facts are not in dispute. Immediately following the terrorist attacks on September 11, 2001, the City assumed control of the World Trade Center site through the New York City Office of emergency Management (*NYSCEF 1/Petition* ¶ 10). Petitioner worked at the World Trade Center site for several months afterwards, after which time Petitioner developed epigastric and left upper quadrant pain (*Petition* ¶ 8). Petitioner claims that he did not become aware that his work at the World Trade Center site had caused lymphoma until June 19, 2019, upon the results of a pathology report (*Pet'r Aff* ¶ 6). This Petition was not filed until June 15, 2020; according to counsel, Petitioner came into counsel's office only "shortly before" the filing (*Petition* ¶ 13).

DISCUSSION

General Municipal Law (GML) § 50-e(5) provides that a court may extend the 90-day notice of claim filling deadline up to the expiration of the 1-year and 90-day statute of limitations for claims against the City (*Plaza v NY Health & Hosps. Corp. (Jacobi Med. Ctr.),* 97 AD3d 466, 467 [1st Dept 2012] [The failure to seek a court order excusing an untimely notice of claim within one year and 90 days after accrual of the claim requires dismissal of the action]). "In deciding whether a notice of claim should be deemed timely served under deemed timely served under [GML] § 50-e (5), the key factors considered 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.

Moreover, the presence or absence of any one factor is not determinative" (*Plaza v NY Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 467 [1st Dept 2012]). Similarly, "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Matter of Ansong v City of New York*, 308 AD2d 333 [1st Dept 2003]). "The statute is remedial in nature, and therefore should be liberally construed" (*Matter of Grajko v City of NY*, 150 AD3d 595, 597 [1st Dept 2017]).

As an initial matter, Petitioner has demonstrated a lack of prejudice to the City. "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" (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016]). "[T]he mere passage of time normally will not constitute substantial prejudice in the absence of some showing of actual injury" (*id.*). Here, Petitioner again cites numerous older cases decided a few years after 9/11 which found a lack of prejudice based on the City's extensive investigation. As the City argues in opposition, however, mere reference to voluminous records "that purportedly could be examined," without more, is insufficient to demonstrate a lack of prejudice (*Matter of Grajko v City of NY*, 150 AD3d 595, 596 [1st Dept 2017]). Nevertheless, as Petitioner argued initially and bolstered in reply, there is no prejudice to the City because "[a]lmost all of the generic fact discovery is completed whereby millions of pages of documents have been produced and hundreds of depositions have previously been held," and all of that discovery ostensibly preserved (*Pet'r Reply* p 26).

With respect to the other factors, Petitioner argues that precedent dictates that leave to file late notices of claim should be freely granted, that toxic tort cases accrue when a petitioner discovered an injury, or should have discovered it through the exercise of reasonable diligence, and that this Court has repeatedly granted similarly situated petitions. The City acknowledges these standards and indeed does not, and cannot, dispute that such petitions were regularly granted in the years immediately following 9/11 (*see e.g. O'Halloran v City of NY*, 1 Misc 3d 568, 570 [Sup Ct, NY County 2003, Stallman, J.]; *Blake v City of NY*, 2003 NY Slip Op 51084[U], *8 [Sup Ct, NY County 2003, Stallman, J.]). Of course, those cases were only a few years removed, a time at which "the slow manifestation of various symptoms and the diagnosis of various conditions among workers at and around the World Trade Center site" were just beginning (*O'Halloran*, 1 Misc 3d at 570, n 3 [discussing "'World Trade Center cough,' a recurrent cough, characteristic among site workers, that sometimes did not resolve, and was followed later, in some cases, by a diagnosis of a respiratory condition."]). Petitioner essentially argues that the City, through its intensive involvement in the post-9/11 cleanup and mitigation efforts, together with numerous subsequent reports about the dangers of the World Trade Center site, "must be held to have been well aware of the hazards" (*Pet'r memo* p 22).

However, as the City argues in opposition, there is no indication that the City learned of *Petitioner's* illness within 90 days or a reasonable time thereafter (*Blaze v NY City Dept. of Educ.*, 112 AD3d 428, 428 [1st Dept 2013] ["Knowledge of the facts underlying an occurrence

does not constitute knowledge of the claim. What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of the claim."]; *Wally G. v NY City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672, 677 [2016] [medical records will not establish actual knowledge unless records evince that medical provider inflicted injury]). Even fixing the initial accrual date at June 19, 2019, the date of Petitioner's diagnosis, and even factoring in the beginning of the Covid-19 pandemic and first emergency Executive Order by Governor Cuomo freezing statutes of limitations on March 7, 2020 (Executive Order 202), Petitioner nevertheless waited at least 9 months (and in absolute terms, over a year) to file this Petition. Thus, it cannot be said that the City gained actual knowledge of Plaintiff's specific claim within 90 days or a reasonable time thereafter.

Moreover, as the City also argues in opposition, a more recent First Department case relating to a similar post-9/11 petition for leave to file a late notice of claim held that a diagnosis date, without more, is insufficient to support a finding of timeliness, and denied an application made one year and 80 days after the alleged manifestation of injuries (*Matter of Felder v City of NY*, 53 AD3d 401, 402-403 [1st Dept 2008] [a "factually unsupported, conclusory assertion that the injured petitioner's respiratory illness did not become apparent to him or his physicians until he was diagnosed with such illness lacks probative value as to when such illness should have been discovered i.e., when petitioner first became aware of the 'manifestations or symptoms of the latent disease' as opposed to its 'nonorganic etiology'"], citing CPLR 214-c [3]; *see Matter of Goffredo v City of New York,* 33 AD3d 346, 347, 830 NYS2d 11 [2006] [claim time-barred where medical records demonstrated that symptoms of petitioner's respiratory disease "manifested themselves" some 14 months before the diagnosis]). Indeed, Justice Stallman, the author of many of the earlier decisions cited by Petitioner in support, recognized *Felder's* impact (*Matter of Crowley v City of NY*, 2008 NY Slip Op 33429[U], *6 [Sup Ct, NY County 2008] [granting motions to renew based on *Felder* and the fact that "The City opposed each petition on the ground that petitioner had submitted neither an affidavit nor medical records..."]). Thus, as the City argues, Petitioner's failure to include any medical records related either to Petitioner's earliest symptoms in 2002 or 2019 lymphoma diagnosis, merits denial of the petition.

In reply, Petitioner attempts to distinguish *Felder* on the basis that the *Felder* petitioner, unlike this Petitioner, "was not claiming a latent cancer injury as a result of his exposure to the World Trade Center dust, ... but was claiming much less severe respiratory symptoms only without ever being diagnosed with a respiratory illness" (*NYSCEEF 26* p 10). This contradicts the plain language of *Felder*, which explicitly mentions a diagnosed respiratory illness (*Matter of Felder v City of NY*, 53 AD3d 401, 403 [1st Dept 2008] ["...until he was diagnosed with such illness..."]). More importantly, this argument misapprehends the key holding of *Felder*: that the petitioner's awareness of the manifestation or symptoms of the latent disease, not the ultimate diagnosis, starts the clock (*id.*).

Thus, Petitioner's inclusion, in reply, of the diagnostic tests and New York City Fire Pension Fund Medical Board ("Board") recommendation confirming Petitioner's lymphoma diagnosis is similarly unavailing, as they are significant for what they lack: any prior medical history discussing symptoms which would be probative of when Petitioner's illness should, for limitations purposes, have been discovered. To the extent that Petitioner argues that the June 19, 2019 diagnosis was also the first instance of "related symptoms," Petitioner elsewhere

acknowledges that he "may have had subjective symptoms prior to his diagnosis of Lymphoma," though argues—without further explanation—that "such earlier symptoms are speculative and separate injuries from Petitioner's Lymphoma claim" (*Pet'r Reply* pp 11, 13). Significantly, Petitioner's diagnosis came as the result of a bone marrow biopsy, which is not a routine procedure performed without cause. [1] Indeed, the Board recommendation mentions numerous visits as early as May 11, 2019 and earlier blood history reports (*NYSCEF 29* ¶¶ 4, 43). There is also no explanation of the connection, if any, of the earliest of Petitioner's symptoms in 2002 to the ultimate diagnosis.

Even if the June 19, 2019 diagnosis date also marked the onset of symptoms, Petitioner still fails to assert a reasonable excuse for waiting about a year to file the Petition, even factoring in the Covid-19 pandemic. Petitioner argues that he "relied on the assertions and assurances made by the Respondent that the atmosphere at Ground Zero was safe for human exposure, ... relied on the assertions made by [the City] that any health symptoms [he] experienced, or would experience would be acute, would soon resolve, and would not pose any chronic health risks" (*Pet'r Memo* p 17). These arguments relate to the underlying allegations, however, not any representations made by the City after (or at any time close to) Petitioner's diagnosis. Accordingly, the Court does not find that Petitioner has demonstrated either that the City acquired actual notice of Petitioner's claim within 90 days or a reasonable time thereafter, or demonstrated a reasonable excuse for the failure to timely file. Though Petitioner has demonstrated a lack of prejudice to the City, the Court is persuaded that the other factors—particularly Petitioner's failure to allege or document the onset of the symptoms of his illness—merit denial of the Petition.

Finally, to the extent that Petitioner makes numerous federal preemption arguments, the Court need not address them in detail here. It appears, as the City highlights and as Petitioner fails to address in reply, that Petitioner's memorandum of law is either re-used or a template brief, as the relationship of the preemption issues to this petition is unclear, and the memorandum is peppered with gender placeholders (*NYSCEF 21/City memo* p 6; *see e.g. Pet'r memo* p 7 ["When Petitioner...became aware that his/her injuries...," p 17 ["Petitioner offers a reasonable excuse for his/her delay..."]). In any event, it is unclear whether such arguments will ultimately be successful (*see e.g. Matter of Felder,* 53 AD3d at 402 [1st Dept 2008] ["Inasmuch as the requirements relating to notices of claim are in the nature of conditions precedent to the right to bring suit, it does not clearly appear that the requirements relating to notice of claim present an 'insurmountable' barrier to relief under Air Transportation Safety and System Stabilization Act of 2001, which created a federal cause of action as the exclusive judicial remedy for damages arising out of the 9/11 attacks"]).

CONCLUSION/ORDER

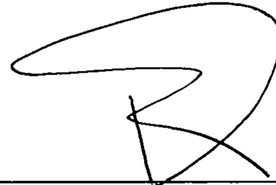
For the reasons above, it is

ORDERED and **ADJUDGED** that the Petition is **DENIED**; and it is further

[1] With the Court's approval, Petitioner also submitted a June 18, 2019 pathology report after argument. This report merely confirms the Court's conclusion: that Petitioner showed *objective* symptoms well before diagnosis. For example, the report confirms a May 14, 2019 PET/CT scan—again, not a routine procedure.

ORDERED that Respondent shall, within 30 days, e-file and serve upon Petitioner a copy of this decision with notice of entry.

This constitutes the decision and order of the Court.



12/15/2020
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE