

Alam v City of New York
2022 NY Slip Op 31364(U)
April 27, 2022
Supreme Court, New York County
Docket Number: Index No. 151200/2022
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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MD ALAM

Petitioner,

- v -

THE CITY OF NEW YORK,

Respondent.

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INDEX NO. 151200/2022

MOTION DATE 02/08/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13 were read on this motion to/for LEAVE TO FILE.

Pending before this court is a petition in which petitioner seeks leave of court to serve a late Notice of Claim (“NOC”) upon respondent THE CITY OF NEW YORK (the “City”). The City opposes.

Arguments made by counsel

Petitioner argues that the NOC was only eight days late, which is a *de minimus* amount of time, and the late filing was due to petitioner’s counsel, Mr. Linder, being afflicted with Covid-19. Petitioner also argues that the City had actual notice of the facts underlying this action, as a City employee (i.e., a driver of a City Sanitation truck) was involved in the subject accident, and a City police officer responded to the scene. According to petitioner, the City police officer also provided petitioner with information for making a claim, and generated a police accident report wherein petitioner alleged that he was “hit from behind” by the City Sanitation vehicle.

The City argues that petitioner failed to meet his burden in establishing a reasonable excuse for the failure to serve a timely NOC, as petitioner does not provide any explanation as to why the NOC was not filed before Mr. Linder contracted COVID-19, and why the NOC was not simply filed by another member of the law firm. The City also argues that Mr. Linder admitted that he returned to the office sometime in the “first week of January,” which would have given him time to file the NOC before the deadline of January 11, 2022.

The City also argues that petitioner failed to meet his burden in establishing that the City had acquired actual knowledge of the essential facts constituting the claim within ninety days after it arose, or a reasonable time thereafter. Specifically, the City argues that even if it had notice that the accident occurred, the City had no notice that a lawsuit would be filed based on the accident.

Finally, the City argues that petitioner has the burden to establish that the delay would not substantially prejudice the municipality in maintaining its defense on the merits, and petitioner failed to meet such burden.

Analysis and Conclusions of Law

“General Municipal Law § 50–e(5) confers upon the court ‘the discretion to determine whether to grant or deny leave to serve a late notice of claim within certain parameters.’ The statute provides, in pertinent part, that in determining whether to grant an extension of time to serve a notice of claim, a court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90–day period specified in § 50–e(1) ‘or within a reasonable time thereafter’ (§ 50–e[5]). Further, under the statute, the court must take into account all other relevant facts and circumstances, including, among other things, whether the petitioner offered a reasonable excuse for the late notice and whether the delay

substantially prejudiced the respondent's defense on the merits. The presence or absence of any one factor, however, is not determinative. Moreover, while the court has discretion in determining motions to file late notices of claim, the statute is remedial in nature, and therefore should be liberally construed [*internal citations omitted*]” (Thomas v City of New York, 118 AD3d 537 [Sup. Ct. App. Div. 1st Dept 2014]).

Here, with respect to whether the municipality acquired actual notice of the essential facts of the claim, the court notes that the thrust of petitioner’s allegation against the City is that petitioner’s vehicle was rear-ended by a City Sanitation vehicle. As petitioner properly argues, not only was vehicle a City vehicle, but a City police officer responded to the scene and generated a police accident report¹ wherein petitioner alleged the very facts that make up the instant claim. Therefore, this court finds that the City had acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter.

See also Mercedes v City of New York, 169 AD3d 606 (Sup. Ct. App. Div. 1st Dept 2019) (“In support of his application, filed about three months after the 90-day statutory period elapsed, petitioner submitted an affidavit averring that he was injured by the sudden malfunction of weight lifting equipment in a recreation center owned by the City, and that an employee of the center assisted him and prepared an accident report, which petitioner signed [...] Here, petitioner’s affidavit stating that he signed an incident report prepared by respondent’s employee shortly after the accident, and that the weightlifting equipment was repaired a few months later, demonstrate *prima facie* that respondent received actual notice of the pertinent facts underlying his claim”);

¹ With respect to the City’s argument that petitioner failed to meet his burden by failing to attach the Police Accident Report to his initial motion, the court notes that petitioner conceded this oversight and attached the Report to his Reply. The court further notes that the Appellate Division, First Department has repeatedly held “[t]hat it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible and for that purpose a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues . . .” (38 Holding Corp. v. New York, 179 A.D.2d 486 [App. Div. 1st Dept. 1992]). Given this, the court has considered the arguments and evidence herein on the merits.

Orozco v City of New York, 200 AD3d 559 (Sup. Ct. App. Div. 1st Dept 2021) (“Respondent is deemed to have actual notice of the claim by virtue of the fact that its employees participated and were directly involved in the conduct giving rising to petitioner's claims and are in possession of records and documents relating to the incident [...] Under these circumstances, knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City”).

This court further finds that the delay of eight days² is *de minimus*, and that the City was not substantially prejudiced, particularly because the City had actual notice of the underlying facts of the claim. *See also*, Thomas, *supra*:

Order, Supreme Court, New York County [...] which denied petitioner's application for leave to file a late notice of claim, unanimously reversed, on the law, without costs, and the motion granted.

We find that the motion court improvidently exercised its discretion in denying petitioner's application. To begin, respondents had actual knowledge of the pertinent facts constituting the claim—namely, that a New York City Police Department vehicle had been involved in a traffic accident with petitioner's vehicle. Indeed, respondents' agent, a New York City police officer, was driving the police car involved in the accident.

In addition, petitioner attempted to serve the notice of claim only 30 days after expiration of the statutory 90–day period for filing a notice of claim against a municipality. This short delay does not prejudice respondents' ability to investigate and defend the claim, as such a short passage of time is unlikely to have affected witnesses' memories of the relevant events. Further, the police report attached to the notice of claim sets forth the name, rank and identity of the officer driving the police car. The brief delay also presents no issue with respect to preserving the condition of physical evidence. Petitioner does not, for example, allege that the traffic light malfunctioned; rather, petitioner simply alleges that the driver of the police vehicle acted negligently.

Finally, even assuming for the sake of argument that petitioner had no reasonable excuse for failing to timely serve the notice of claim, the absence of a reasonable excuse is not, standing alone, fatal to petitioner's claim.


² The NOC was to have been filed by January 11, 2022, but was actually filed on January 19, 2022.

Conclusion

Given the above, it is hereby:

ORDERED that this motion is GRANTED; and it is further

ORDERED that petitioner is granted leave of court to serve a late Notice of Claim upon Respondent THE CITY OF NEW YORK.

4/27/2022			
DATE		J. MACHELLE SWEETING, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE