

<b>Marchetta v Hudson Riv. Park Trust</b>
2022 NY Slip Op 31832(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 153993/2022
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

-----X

JOHN MARCHETTA,

Petitioner,

- v -

HUDSON RIVER PARK TRUST,

Respondent.

-----X

INDEX NO. 153993/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-13, 16, 17, 18, 20, 21, 22, 23, 24, 25

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

The petition for leave to file a late notice of claim is denied.

**Background**

This proceeding arises out of petitioner’s purported trip and fall on black ice on a handicap ramp located at the Pier 40 parking garage in Manhattan. Counsel for petitioner alleges that she sent respondent a letter dated March 19, 2021 informing respondent of the firm’s representation of petition and instructing them to notify their insurance carrier.

Petitioner contends that he sent a FOIL request to respondent dated March 15, 2021 about the accident and that respondent acknowledged receipt of the FOIL request soon thereafter. He maintains that he did not know that a notice of claim had to be served on respondent. Petitioner insists that he should be permitted to file a late notice of claim because respondent acquired actual notice of the essential facts of the purported trip and fall and that respondent will suffer no prejudice.

In opposition, respondent points to a response sent from its counsel to petitioner’s attorney on March 30, 2021 in which it informed petitioner that a notice of claim had to be filed

in order to start a case against respondent and that the March 19, 2021 correspondence from petitioner's counsel was insufficient. It argues that because over 13 months have passed since counsel for petitioner was directly informed that a notice of claim had to be filed, the instant petition should be denied.

In reply, counsel for petitioner suggests she did not see the letter (sent via email) from respondent informing petitioner that it had not filed a proper notice of claim. Counsel alleges that "It should be noted that this purported correspondence was ONLY sent via email per the correspondence and was sent in the midst of the height of the pandemic" (NYSCEF Doc. No. 20, ¶ 3). Petitioner argues that the letter proves that respondent had actual knowledge of the facts concerning petitioner's claim. Petitioner insists that respondent investigated the issue and addressed the black ice after the accident. Counsel for petitioner maintains that her office was closed down due to COVID-19 and was forced to work from home.

In its sur-reply, respondent questions how sending the notice via email was improper given that counsel for petitioner admits the law firm's office was closed during the relevant time period (March 2021). Respondent insists that law office failure is not an excuse to justify filing a late notice of claim.

### **Discussion**

"In determining an application for leave to serve a late notice of claim (General Municipal Law § 50-e[5] ), the court must consider relevant factors and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the public corporation's defense on the merits would be substantially prejudiced by the delay" (*Kelley v New York City Health and*

*Hosps. Corp.*, 76 AD3d 824, 825, 907 NYS2d 11 [1st Dept 2010] [internal quotations and citations omitted]).

The question in this proceeding is how this Court should view a letter (NYSCEF Doc. No. 17) emailed to counsel for petitioner directly informing her that a notice of claim needed to be filed in connection with petitioner's accident. That email, which was undoubtedly sent to the correct email address, is dated a mere 11 days after petitioner's inquiry about the accident. As it considers the factors mentioned above, the Court finds that it cannot overlook the fact that respondent timely informed petitioner's counsel exactly how to proceed. "Law office failure . . . is not a sufficient excuse" for failure to file a timely notice of claim (*Matter of Smith v Baldwin Union Free School Dist.*, 63 AD3d 1078, 1079, 881 NYS2d 488 [2d Dept 2009]).

The fact is that the initial letter from petitioner to respondent is dated March 19, 2021 and, for some reason, petitioner waited until May 9, 2022 to file the instant petition. No sufficient reason is given for that significant delay. That counsel for petitioner points to the pandemic does not justify that long of delay especially because counsel for respondent emailed the letter concerning the need for a notice of claim. Petitioner's attorney's argument that the March 30, 2021 letter was only emailed (rather than mailed) makes little sense in light of her acknowledgement that the law office was closed during this time period. Besides, it is not respondent's attorney's obligation to notify petitioner that a notice of claim is necessary. Even if no email or letter went out, it is petitioner's attorney who must figure out when a notice of claim is necessary and to file it by the deadline.


The Court recognizes that respondent had knowledge about some of the facts surrounding the alleged accident but petitioner's delay has caused significant prejudice to respondent. One of the purposes of the notice of claim is to give notice to the respondent early on that there is a

claim; a letter does not provide that notice, and a mere letter, without the follow up notice of claim, gives every indication that the party decided not to make the claim. Should the Court grant the petition, it would force respondent to litigate a case about black ice from February 2021 even though petitioner knew or should have known that a notice of claim was required by well before the deadline to file it.

The Court cannot, under these circumstances, overlook the plethora of factors that favor respondent. The Court observes that petitioner’s initial March 19, 2021 did not mention the phrase “notice of claim” at all (NYSCEF Doc. No. 6). Nevertheless, the timely response from respondent told petitioner exactly how to proceed. In other words, instead of offering a vague response to an improper notice of claim, respondent disclosed exactly what petitioner needed to know. That response, combined with the unexplained delay from March 2021 to May 2022, compels the Court to deny the petition.

Accordingly, it is hereby

ORDERED that the petition for leave to file a late notice of claim is denied, this proceeding is dismissed and the Clerk is directed to enter judgment along with costs and disbursements accordingly upon presentation of proper papers therefor.

<u>6/9/2022</u> DATE					 ARLENE BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT