

Lederman v City of New York
2022 NY Slip Op 32002(U)
June 24, 2022
Supreme Court, New York County
Docket Number: Index No. 154328/2021
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

INDEX NO. 154328/2021

DANA LEDERMAN,

MOTION DATE 09/03/2021

Petitioner,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, NYC DEPARTMENT OF
EDUCATION,

**DECISION + ORDER ON
MOTION**

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19

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

In this special proceeding, Petitioner Dana Lederman, pro se, seeks an order from this court deeming her December 22, 2020 Notice of Claim timely filed, nunc pro tunc.

As alleged in the Petition, Petitioner has been employed by Respondents as a speech therapist for over 32 years and identifies as disabled, as she was born with a congenitally defective right femur. (NYSCEF Doc No. 1, Petition, at ¶ 1.) On January 22, 2020, as she was exiting an elevator located within PS 46Q, she was struck in her right leg by a soccer ball kicked by a student, requiring her to seek medical treatment and take time off work. (*Id.* at ¶¶ 2-3.) She returned on February 3, 2020, seeking certain accommodations from the school principal such as an office located on the first floor and clearance to enter the building via an entrance that only required her to climb a single step. (*Id.* at ¶ 3.) These were denied, with the principal instructing Petitioner to access the building via the handicap wheelchair access ramp entrance, although she was not confined to a wheelchair. (*Id.*)

On February 6, 2020, an allegedly rainy morning, Petitioner attempted to access the building via the ramp entrance as instructed by the principal but had to wait for a school secretary to unlock the door. (*Id.* at ¶ 7.) Petitioner alleges that she was soaking wet by the time she entered the premises and that there was no doormat to wipe her shoes on. (*Id.* at ¶¶ 7-8.) Petitioner alleges that she fell to the ground after a student “darted out in front of her.” (*Id.*)

Petitioner filed her Notice of Claim with the assistance of counsel Dennis Ryan on December 22, 2020. (NYSCEF Doc No. 4.) Annexed to the Notice of Claim is a Comprehensive Injury Report (the “Report”) authored by Respondents, which consists of a fact sheet, a statement from Petitioner, and photographs of the accident location. (*Id.* at 8-13.)

Ryan resigned as Petitioner’s attorney via letter dated January 14, 2021 (NYSCEF Doc No. 2) and Petitioner commenced this proceeding by filing the Petition, pro se, on April 1, 2021. Petitioner also submits two assignment forms, dated January 27, 2020 and July 6, 2020, indicating that she assigned her right to collect payment to the City School District of New York during her leaves of absence. (NYSCEF Doc Nos. 6 and 7.)

Respondents oppose the application, arguing that “the 90-day period to timely file a notice of claim pursuant to GML § 50-e for negligence, taking into account the toll, expired on December 20, 2020.” (NYSCEF Doc No. 14, Opposition, at ¶ 2.) Respondents further argue that Petitioner fails to set forth a reasonable excuse for the delay, that the Report fails to demonstrate that Respondents had actual knowledge of the facts of the claim, and that Petitioner fails to demonstrate that Respondents are not prejudiced. (*Id.* at 3-18.)

Discussion

To commence a tort action against a municipality or a public corporation, the claimant is required to serve a notice of claim within 90 days of the alleged injury. (*See* GML § 50-e(1)(a);

Jordan v City of New York, 41 AD3d 658, 659 [2d Dept 2007].) Pursuant to General Municipal Law § 50-e (5) the court has discretion to determine whether to allow filing of a late notice of claim. In making this determination, the court must consider the factors set forth in the statute which include: (1) whether the claimant had a reasonable excuse for the failure to timely serve a notice of claim; (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter; and (3) whether the delay would substantially prejudice the public corporation in maintaining its defense on the merits. (GML§ 50-e(5); *see also Orozco v City of New York*, 200 AD3d 559-560 [1st Dept 2021]; *Perez ex rel. Torres v New York City Health and Hospitals Corp.*, 915 NYS2d 562 [1st Dept 2011]; *Acosta v City of New York*, 39 AD3d 629, 630 [2d Dept 2007]; *Schiffman v City of New York*, 19 AD3d 206, 207 [1st Dept 2005].)

In considering these factors, none is dispositive (*see Pearson v New York City Health and Hospitals Corp.*, 840 NYS2d 25 [1st Dept 2007]), and the court may consider all other relevant facts and circumstances. The presence or absence of any one factor is not determinative. (*Plaza v New York Health & Hospitals Corp.*, 949 NYS2d 25 [1st Dept 2012]; *Matter of Porcaro v City of New York*, 72d 450 [1st Dept 2005].)

Initially, the court notes that Petitioner has failed to establish a reasonable excuse for the delay in filing a timely notice of claim. Petitioner's lack of knowledge of the time requirements, concerns over COVID, and the prioritization of seeking medical treatment in lieu of legal advice are not sufficient to establish a reasonable excuse on this record.

It is well-settled that Petitioner's lack of knowledge of the time requirements of the notice of claim statute is an unacceptable excuse for failure to timely file a notice of claim. (*Casale v City of New York*, 95 AD3d 744 [1st Dept. 2012]; *Perez v New York City Housing Authority*, 156

AD2d 177 [1st Dept 1989].) Thus, the fact that Petitioner was allegedly unaware that the law imposed a requirement that a notice of claim be filed within 90 days of the date of the alleged accident is insufficient as a legal excuse.

Moreover, while the court is certainly sympathetic to the havoc wreaked by Covid-19, Petitioner did not attach any supporting medical records detailing medical appointments or treatments that would have prevented her from retaining counsel within 90 days of the alleged incident. Indeed, Petitioner does not claim that she was confined to any hospital or rehabilitation facility for any length of time following the alleged incident, or that she was confined to her home, or in any way incapable of communicating with an attorney at any point during the 90 days following the alleged incident. Thus, the pandemic alone does not excuse Petitioner's late filing.

However, GML § 50-e "is not intended to operate as a device to frustrate the rights of individuals with legitimate claims" and as noted, the court may excuse a delay in filing a notice of claim, in its discretion, upon consideration of the statutory factors and all other relevant facts and circumstances. (*See Matter of Porcaro v City of New York*, 20 AD3d 357 [1st Dept 2005].) The statute is remedial in nature and as such should be liberally construed. (*Id.*; *see also, Moynihan v New York City Health and Hospitals Corp.*, 120 AD3d 1029 [1st Dept 2014]); *Camacho v City of New York*, 187 AD2d 262 [1st Dept 1992].)

Thus, although Petitioner has failed to support her contention of being essentially incapacitated due to Covid-19 with any medical evidence, 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 (*Harris v City of New York*, 297 AD2d 473, 473-74 [1st Dept 2002]), especially where, as here, Respondents had the opportunity to investigate the Petitioner's claims (*see Abbot v City of New York*, 271 AD2d 364 [1st Dept 2000]), and where, as here, Respondents cannot show that they

were prejudiced by the delay (*Weiss v City of New York*, 237 AD2d 212, 213 [1997]). As noted above, Respondents contend that the delay only amounted to a two-day period (Opposition at ¶ 2) and the conclusory assertions of prejudice based on this short time period are insufficient to deny Petitioner relief. Finally, the “Comprehensive Injury Report” completed by Respondents following Petitioner’s accident supports the inference that Respondents had actual notice of the claim within 90 days of accrual. (*See Matter of Gerzel v City of New York*, 117 AD2d 549, 550-551 [1st Dept 1986].) As such, it is hereby

ORDERED and ADJUDGED that the Petition is granted and the Notice of Claim deemed timely filed, nunc pro tunc; and it is further

ORDERED that Petitioner shall serve her Notice of Claim upon the City Comptroller accompanied by a copy of this decision and order; and it is further

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

6/24/2022

DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE