

**O'Hara v Kiewit Infrastructure Co.**

2022 NY Slip Op 33336(U)

October 2, 2022

Supreme Court, Kings County

Docket Number: Index No. 518233/2021

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3<sup>rd</sup> day of OCTOBER, 2022

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

-----X  
O'HARA, DANIEL et al,

Petitioner,

Index No.: 518233/2021  
Decision and Order  
Mot. Seq. No. 1

-against-

KIEWIT INFRASTRUCTURE CO. et al,

Respondents,  
-----X

The following papers NYSCEF Doc #'s 2 to 19 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	2-16
Opposing Affidavits (Affirmations) _____	17
Reply Affidavits _____	19

After having come before the Court and the Court having reviewed the aforementioned papers and having heard Oral Argument on May 11, 2022 the court finds as follows:

Petitioner moves by Order to Show Cause for leave to file a late Notice of Claim.

Respondent's KIEWIT INFRASTRUCTURE CO., METROPOLITAN TRANSPORTATION AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, MTA BRIDGES AND TUNNELS, MTA CAPITAL CONSTRUCTION COMPANY, and MTA CONSTRUCTION & DEVELOPMENT oppose the same.

### FACTS

Petitioner is an electrician who was employed by Mass Electric Construction Co. on May 27, 2020. It is alleged on that date; he was working for Mass Electric at the Verrazano-Narrows Bridge project. Petitioner alleges he was involved in an accident at work. Petitioner alleges he was walking on a platform located between the catwalk and a scaffold which had been constructed adjacent to the concrete anchor located on the Brooklyn side of Verrazano Bridge project when he slipped and fell on a wet, rotted, and slippery wooden platform, causing him to fall to the ground and sustain injuries to "his lower back and legs.". The ninety (90) day limit on filing a notice of claim expired on August 25, 2020. Petitioner filed this Order to Show Cause on July 22, 2021.

### ANALYSIS

General Municipal Law §50-e requires that a Claimant bringing a claim against a public corporation file a Notice of Claim within 90 days of the alleged date of loss. The legislative intent behind the requirement of filing a Notice of Claim is to provide a public or municipal entity with an opportunity to investigate the circumstances surrounding an alleged incident and to evaluate the merits of the claim while the information is still readily available. *See, Lozano v. New York City Housing Authority*, 153 AD3d 1173 (1st Dep't 2017); *see also, Carpenter v. New York City Hous. Auth.*, 146 AD3d 674 (1st Dep't 2017); *Martinez v. City of New York*, 104 AD3d 407 (1st Dep't 2013).

In determining whether to grant leave to file a late Notice of Claim, the Court considers the following three questions: (a) whether there is a reasonable excuse for failure to file a timely Notice of Claim; (b) whether the municipal entity acquired actual

knowledge of the essential facts constituting the claim within 90 days after it arose or a reasonable time thereafter; and (c) whether the delay would substantially prejudice the public or municipal entity in maintaining a defense of the matter on the merits. See, *Newcomb v. Middle Country Cent. School Dist.*, 28 NY3d 455 (2016); *Matter of D'Anjou v. New York City Health and Hosp. Corp.*, 196 AD2d 818 (1st Dep't 1993); *Jusino v. New York City Housing Auth.*, 255 AD2d 41 (1st Dep't 1999).

In the present case, petitioner proffers no reasonable excuse for the lateness of filing the Notice of Claim. See *Perez v. New York City Housing Authority*, 156 AD2d 177 (1st Dep't 1989) (holding that ignorance of the 90-day filing deadline is not a reasonable excuse); *Montero v. City of New York*, 176 AD3d 614, 615 (1st Dep't 2019) ("Petitioner's assertion that he was unaware of the requirement that he file a notice of claim within 90 days of his accident is not a reasonable excuse for failing to file a timely notice").

Petitioner has failed to demonstrate the respondents had actual knowledge of essential facts supporting the claim 90 days after the claim arose. Contrary to petitioner's contention that the respondents were made aware of the claim pursuant to a workers compensation claim filed, there is no evidence substantiating this contention. Specifically, the respondents would not have been given the C-2 form filed by the employer, nor are they a party to the workers compensation claims. Moreover, said C-2 workers compensation form does not state any essential facts and knowledge of the claims that would impute notice to the municipal entities had they received it. Additionally, even if the municipal entities received the C-2 form "knowledge of the facts underlying an occurrence does not constitute knowledge of the claim. What satisfies the statute is not knowledge of the wrong. ... [it] is notice of the claim." See *Chattergoon v.*

*New York City Housing Auth.*, 161 A.D.2d 141 (1st Dep't 1990) *aff'd* 78 NY2d 958 (1991); *see also*, *Blaze v. New York City Dept. of Educ.*, 112 AD3d 428 (1st Dep't 2013); *Corwin v. City of New York*, 141 AD3d 484 (1st Dep't 2016).

Finally, the respondents would be prejudiced in granting leave to file the late Notice of Claim because they would not be able to properly investigate the accident two years later, evidence was not preserved, the work site is not preserved or even locatable, witnesses and workers may be unreachable at this late stage and memories of the incident have surely faded. Accordingly, Petitioners Order to Show cause for leave to file a late Notice of Claim is hereby denied.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York  
OCTOBER 2, 2022

ENTER FORTHWITH:

  
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HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

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