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| McNeil v City of Binghamton |
| 2022 NY Slip Op 33904(U) |
| November 22, 2022 |
| Supreme Court, Broome County |
| Docket Number: Index No. EFCA2022001139 |
| Judge: Eugene D. Faughnan |
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 19th day of August 2022, on submission.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

TAYLOR R. MCNEIL,

Claimant/Petitioner,

DECISION AND ORDER

vs.

Index No. EFCA2022001139

CITY OF BINGHAMTON,

Respondent.

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the motion of Claimant/Petitioner Taylor McNeil (“McNeil” or “Claimant”), for permission to file a late Notice of Claim pursuant to General Municipal Law (“GML”) § 50-e (5). The motion is opposed by Respondent City of Binghamton (“City”). After due deliberation, this Decision and Order constitutes the determination of this Court.¹

BACKGROUND FACTS

McNeil claims that on or about February 11, 2022, she slipped and fell on snow and ice covering a concrete slab abutting the sidewalk outside her apartment building in the City of Binghamton. Later that day she sent a text message to her landlord informing him of her fall, and the landlord provided her with contact information for his insurance company, Leatherstocking Co-Op Insurance Company. McNeil notified Leatherstocking of her accident and attempted to obtain payment for medical bills and damages. She subsequently submitted documentation requested by the insurance company regarding her claim. On June 7, 2022, Leatherstocking denied McNeil’s claim. On June 15, 2022, McNeil contacted the law firm of Coughlin & Gerhart, LLP to assist her in pursuing her claim. Believing that the subject location may be owned and maintained by the City of Binghamton, and not the landlord’s responsibility (an allegation disputed by the City), Claimant submitted the instant Petition to permit the filing of a late Notice of Claim.

LEGAL DISCUSSION AND ANALYSIS

GML § 50-e establishes a “protocol for serving a notice of claim as a condition precedent to a suit against a public corporation.” *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 535 (2006). The purpose of requiring Notice of Claim is “[t]o enable authorities to investigate, collect evidence and evaluate the merit of a claim.” *Brown v. City of New York*, 95 NY2d 389, 392 (2000); *New York State Elec. & Gas Corp. v. County of Chemung*, 137 AD3d 1550 (3rd

¹ All the papers filed in connection with the Petition are included in the NYSCEF electronic case file, and have been considered by the Court.

Dept. 2016), app dismissed 28 NY3d 1044 (2016). Pursuant to GML § 50-e (1), notice of claim must be provided to a public corporation within ninety days after the claim arises (*Wally G. v. New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672 [2016]; *Williams v. Nassau County Med. Ctr.*, 6 NY3d at 535), except in wrongful death actions where notice must be provided within ninety days of the appointment of a representative of the decedent's estate. See, *Rosenblatt v. N.Y. City Health & Hosps. Corp.*, 149 AD3d 961 (2nd Dept. 2017); *Roberts v. State of New York*, 20 Misc3d 1141(A) (NY Ct. Cl. 2008); *Matter of Morton v. New York City Health & Hosps. Corp.*, 24 AD3d 229 (1st Dept. 2005); GML § 50-e (1)(a). If timely Notice of Claim is not made, the Petitioner/Plaintiff can still seek a court order authorizing late notice, and GML § 50-e (5) permits a court, in its discretion, to extend the time to serve a Notice of Claim, or deem a late Notice of Claim timely served, *nunc pro tunc*. *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 (2016); see, *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d 1263, 1263 (3rd Dept. 2019); *Matter of Kranick v. Niskayuna Cent. Sch. Dist.*, 151 AD3d 1262, 1262 (3rd Dept. 2017); see also, *Matter of Reddick v. New York City Hous. Auth.*, 188 AD3d 890 (2nd Dept. 2020). However, a court is prohibited from granting leave to serve a late Notice of Claim where the application is not made within the applicable statute of limitations, unless the statute has been tolled. *Pierson v. New York*, 56 NY2d 950 (1982) (court lacks power to authorize late Notice of Claim where the application is not filed prior to the expiration of the statute of limitations); *Bennett v. City of Buffalo Parks & Rec.*, 192 AD3d 1684 (4th Dept. 2021); *Matter of Dougherty v. County of Greene*, 161 AD3d 1253, 1254 (3rd Dept. 2018); see *Heslin v. County of Greene*, 14 NY3d 67 (2010); *Watts v. City of New York*, 186 AD3d 1574 (2nd Dept. 2020). Thus, absent a toll (such as for infancy or incapacity), the motion to file a late Notice of Claim must be made within the Statute of Limitations period of one year and 90 days in a personal injury action. See, *Mindy O. v. Binghamton City School Dist.*, 83 AD3d 1335, 1336 (3rd Dept. 2011); GML § 50-e (5); *Bennett v. City of Buffalo Parks & Rec.*, 192 AD3d 1684; *Adam H. v. County of Orange*, 66 AD3d 739 (2nd Dept. 2009).

Here, the accident occurred on February 11, 2022, and 90 days from that date for the filing of a timely Notice of Claim would have been May 13, 2022. Claimant filed this Petition on June 24, 2022, which was forty three days late, but well within the one year and 90 day statute of limitations time limit contained in GML § 50-e (5). Therefore, the Court is not precluded under GML § 50-e (5) from considering the requested relief.

A. STANDARD FOR FILING LATE NOTICE OF CLAIM

In deciding whether to grant an application to file a late Notice of Claim, the court “is statutorily required to consider a nonexhaustive list of factors, including whether the respondent had actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, whether the petitioner offered a reasonable excuse for the delay in filing and whether the respondent incurred substantial prejudice as a result.” *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d at 1264 [internal brackets omitted], quoting *Daprile v. Town of Copake*, 155 AD3d 1405, 1406 (3rd Dept. 2017); see *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY 3d at 461; *Matter of Cornelius v. Board of Educ. of Delhi Cent. School Dist.*, 77 AD3d 1048, 1049 (3rd Dept. 2010); *Mindy O. v. Binghamton City School Dist.*, 83 AD3d at 1336-1337. “No single factor is dispositive and, absent a clear abuse of discretion, Supreme Court’s determination in this regard will not be disturbed.” *Matter of Waliszewski v. Ulster*, 169 AD3d 1212, 1213 (3rd Dept. 2019) quoting *Matter of Cornelius v. Bd. of Educ. of Delhi Cent. Sch. Dist.*, 77 AD3d at 1049; *Matter of Reinemann v. Village of Altamont*, 112 AD3d 1264, 1265 (3rd Dept. 2013) (citations omitted). Courts have also recognized that actual knowledge is a factor that should be given significant weight. *Matter of Christopher M. v. Boquet Val. Cent. Sch. Dist.*, 200 AD3d 1176 (3rd Dept. 2021); *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d at 1264; *Matter of Lugo v. GNP Brokerage*, 185 AD3d 824, 825 (2nd Dept. 2020); *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147 (2nd Dept. 2008).

1. Actual Knowledge

With respect to the “actual knowledge” category, “the relevant inquiry is whether the [City] had actual knowledge of the facts-as opposed to the legal theory-underlying the claim.” *Williams v. Nassau County Med. Ctr.*, 6 NY3d at 537; *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 AD3d at 148. The statute refers to actual knowledge of the essential events, not a specific claim. See *Mariani v. Wilson Cent. Sch. Dist.*, 192 AD3d 1579 (4th Dept. 2021).

Here, McNeil does not allege that the City acquired knowledge of the incident within 90 days. In fact, she claims that she was unaware herself about a claim against the City until after

the landlord's insurance company denied her claim. The question then is whether the City obtained knowledge within "a reasonable amount of time after" the expiration of the 90 days. The determination of what is a "reasonable amount of time after" does not lend itself to a specific rigid rule that applies in all circumstances. A case by case analysis is required, and a review of relevant cases illuminates what sort of time delays can be countenanced by the court.

In *Daprile*, the plaintiff provided notice approximately one month after the 90 day time limit had expired, and the Third Department concluded that the Town had obtained actual knowledge within a reasonable time after the 90-day statutory period. *Daprile v. Town of Copake*, 155 AD3d at 1407, citing *Matter of Edwards v. Town of Delaware*, 115 AD2d 205 (3rd Dept. 1985). In *Edwards*, the Third Department concluded that "the facts underlying the claim became known to [the Town] approximately four months after the expiration of the 90-day period [and] this was a reasonable time particularly in light of the fact ... [that there was no change in the condition of the property]." *Edwards*, 115 AD2d at 206. Similarly, in *Beatty v. County of Saratoga*, 74 AD2d 662 (3rd Dept. 1980), the Third Department found that when the nature of the claim was made known to the municipality within 4 months after the 90 days expired, it was still within a "reasonable time" and the court characterized it as a "brief delay." *Id.* at 663; see *Barnes v. New York City Hous. Auth.*, 262 AD2d 46 (1st Dept. 1999) (56 days after the 90 days is a reasonable time); *Cannistra v. Town of Putnam Valley*, 124 AD2d 801 (2nd Dept. 1986) (actual knowledge within five months after the 90-day period was a reasonable time). The delay here of 43 days beyond the 90 day limit is within the timeframe that other cases have found to be a reasonable time; particularly if there is no indication of any change at the accident site. See, *Edwards*, 115 AD2d 205; *Lacey v. Village of Lake Placid*, 280 AD2d 863 (3rd Dept. 2001).

Where there is no contention that "there has been any subsequent change in the condition of the [premises] which might hinder the investigation or defense of [the] action" (*Beatty v. County of Saratoga*, 74 AD2d at 663), then a brief delay does not prohibit the granting of an Order. See, *Edwards*, 115 AD2d at 206; see also, *Lacey v. Village of Lake Placid*, 280 AD2d 863. Here, the City has not alleged any change in the physical condition of the premises, and Claimant has provided pictures of the area the day after the fall. There is no contention that the premises have been physically altered by any damage or repairs. McNeil stated that the presence of snow and ice in the pictures appeared similar on the day of her fall. Even if the snow and ice conditions had changed that would not be determinative. "[T]he transitory nature of the icy pavement, standing alone, does not demonstrate substantial prejudice ... especially given that,

even had the notice of claim been filed timely, the accident site would not have remained completely unaltered due to weather changes within the 90 day statutory period.” *Perkins v. Albany Port Dist. Comm’n*, 189 AD3d 1929, 1931 (3rd Dept. 2020). Although prejudice is also distinctly a separate factor to consider, the cases show that there is an interplay between prejudice and what will be considered actual knowledge within a reasonable time. Snow and ice cannot be expected to remain in the same state for extended periods of time. The fact that environmental and weather fluctuations may have altered the exact conditions that existed at the time of the accident does not foreclose the Court from granting permission to file a late Notice of Claim. McNeil took pictures and submitted them with her application, which provides the City with some visual information of the conditions at or around the time of McNeil’s fall. Other important factors for actual knowledge such as the occurrence of the accident, the identity of plaintiff, nature of claim and the alleged cause of the accident were all identified in Claimant’s proposed Notice of Claim.

Based on all the relevant considerations, the Court concludes that although the Claimant did not file a Notice of Claim within 90 days of her accident, that the City did obtain “actual knowledge” within a reasonable time thereafter.

2. Reasonable Excuse

The Court next turns to issue of whether Petitioner has articulated a reasonable excuse for the delay. Although the statute does not expressly list this factor, the statute does require the court to “consider all other relevant facts and circumstances”, and the courts have consistently considered a Petitioner’s “reasonable excuse” when determining whether to permit a late Notice of Claim. *See, e.g. Perkins v. Albany Port Dist. Comm’n*, 189 AD3d at 1930; *Matter of Waliszewski v. Ulster*, 169 AD3d 1212, 1213; *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d 1263, 1264. Furthermore, GML § 50-e(5) does recognize that another factor to consider is “whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted.” In the present case, McNeil alleges that as a result of her initial contact with Leatherstocking, she was under the impression that the insurance company would be considering, and possibly covering her damages, leading her to further believe that the fall was on the landlord’s premises.

Thus, there was no reason for her to believe that the area where she fell might be City property. Indeed, the City still does not concede that it was City property.

“[A]n excusable error concerning the identity of the public corporation against which a claim should be asserted may be accepted, where ... prompt application for relief is made after discovery of the error.” *Cannistra v. Putnam Valley*, 124 AD2d at 801; *Cf. Dell’Italia v. Long Island R.R.*, 31 AD3d 758, 759 (2nd Dept. 2006) (four month delay between Petitioner’s discovery as to the ownership of the property and bringing the application was not reasonable). In this case, Leatherstocking informed Claimant that the insurance company would not be accepting the claim on June 7, 2022. Claimant’s first indication that she may have made an error as to the owner of the subject area was when she received the denial. McNeil contacted an attorney the following week and this application was filed on June 24, 2022, just 17 days after Leatherstocking’s denial.

Claimant’s explanation shows she acted promptly when she initially contacted her landlord, and then his insurance company, following her fall. Further, her belief that the carrier was investigating the matter and apparently processing her claim, was reasonable under the circumstances. In addition, when she learned that she may have been mistaken about who actually owned the area where she fell, she again acted very promptly in obtaining an attorney and filing the instant application. Based on all the relevant considerations, the Court concludes that Petitioner has offered a reasonable excuse for her delay in filing a Notice of Claim.

3. Lack of prejudice

The Court next turns to the question of prejudice. “[T]he 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 at 466; *Matter of Kranick v. Niskayuna Cent. Sch. Dist.*, 151 AD3d at 1263. If Petitioner makes that showing, then the burden is shifted to Respondent to rebut Petitioner’s showing of a lack of prejudice, by providing particularized evidence. *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 467; *Perkins v. Albany Port Dist. Comm’n*, 189 AD3d 1929.

Petitioner met her burden by showing, as discussed above, that the City had actual knowledge within a reasonable time and there has been no change in the physical condition of the premises (other than the snow and ice). *See, Perkins v. Albany Port Dist. Comm'n*, 189 AD3d 1929. “[A] finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record.” *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 465-466. Respondent contends that it is prejudiced not only by the passage of time as related to the transitory nature of the snow and ice (which was discussed above), but also by its inability to locate witnesses of conduct a meaningful investigation. The mere passage of time or delay in serving the Notice of Claim will not suffice to establish the municipality’s claim of prejudice. *Id.* at 467-468. Contrary to Respondent’s argument, the burden is not on the Petitioner to show that the City’s ability to investigate the accident will not be substantially prejudiced, because Petitioner has already met her burden. Thus, it is up to the City to show that its ability to investigate has been hampered and results in substantially prejudice. *See, Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY 3d at 467-468 (“The public corporation, however, is in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice. [W]here the facts are within the defendant’s peculiar knowledge, . . . he [or she] should prove them.” [citations omitted]).

The City has not proffered any proof that it will not be able to adequately investigate this accident. Claimant also stated that she made a claim to the landlord’s insurance company, so the claim has been subject to some investigation, whether or not that is adequate for the City’s purposes. The City has failed to rebut Claimant’s showing that the City will not be prejudiced.

Respondent also argues that even if the Petitioner were granted leave to file a late Notice of Claim, she could not succeed on the merits because she has not alleged that the City had prior written notice of the defect, or that the City created the condition or the City has a “special use” of the area in question. In support, the City submitted an affidavit of the Commissioner of Public Works which stated that the City’s records do not contain any written notice of any defect in, or on, the subject sidewalk. However, at this juncture, the question is not with regard to the ultimate merits of Petitioner’s claim, but rather, permission to file a late Notice of Claim. It is true that the Court can, and should, consider the merits of the underlying claim, but denial is only appropriate if the claim is “patently meritless”. *Daprile v. Town of Copake*, 155 AD3d 1405. Here, the Claimant should be permitted an opportunity for discovery on the question of whether

the City created the dangerous condition or there was any “special use”, prior to the Court deciding whether the action would be patently meritless.

CONCLUSION

The Court concludes that Petitioner has established the City had actual knowledge of the essential facts constituting the facts of the claim within a reasonable time; that Petitioner has set forth a reasonable excuse for her failure to timely file a Notice of Claim; and that the City will not be prejudiced. Accordingly, Petitioner has met the requirements for the Court to grant her relief under GML § 50-e (5).


Based on all the foregoing, it is hereby

ORDERED, that the Petition seeking an Order to permit the filing of a late Notice of Claim is GRANTED.

This Decision and Order is being electronically uploaded to the NYSCEF system, but Petitioner remains responsible for ensuring proper compliance with any service upon Respondent of the Decision and Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: November 22, 2022
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice