

**Clarke v New York City Tr. Auth.**

2023 NY Slip Op 30665(U)

March 1, 2023

Supreme Court, New York County

Docket Number: Index No. 157920/2022

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DENISE M DOMINGUEZ PART 21

*Justice*

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TYRONE CLARKE,  <div style="text-align: center;">Claimant,</div>	INDEX NO. <u>157920/2022</u>  MOTION DATE <u>09/15/2022</u>  MOTION SEQ. NO. <u>001</u>
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- v -

THE NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY, MTA  
BUS COMPANY, BUS OPERATOR SIEGREID SEVERIN

**DECISION + ORDER ON  
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15 were read on this motion to/for LEAVE TO FILE.

Upon reading the above listed documents, Petitioner TYRONE CLARKE's motion by Order to Show Cause for leave to serve a late notice of claim upon Respondents, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, BUS OPERATOR SIEGREID SEVERIN is denied.

A court, pursuant to General Municipal Law §50-e, has discretion to grant or deny a timely application for an extension of time to serve a late notice of claim upon a public entity (General Municipal Law §50-e [5]; CPLR 217-a; *Pierson v. City of New York*, 56 NY2d 950 [1992]). "The key factors which the court must consider in determining if leave should be granted are whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense.... the presence or absence of any one factor is not determinative...." (*Dubowy v. City of New York*, 305 A.D.2d 320, 321, 759 N.Y.S.2d 325 [1<sup>st</sup> Dept 2003] citations omitted; see *Matter of Morris*, 88 A.D.2d 956, 957, 451 N.Y.S.2d 448 [2d Dept 1982], aff'd sub nom. Morris v. Suffolk Cnty., 58 N.Y.2d 767, 445 N.E.2d 214 [1982]; See *Porcaro v. City of New York*, 20 A.D.3d 357, 358, 799 N.Y.S.2d 450 [1<sup>st</sup> Dept 2005]).

Upon review, the Claimant has not met his burden in establishing the key factors warranting leave to file a late notice of claim.

As set forth in his "Proposed" Notice of Claim (NYSCEF Doc. #4), the Claimant intends to assert claims sounding in negligence against the Respondents. The Claimant alleges in his Affidavit in Support (NYSCEF Doc. #3), that on January 9, 2022, near the intersection of East 96<sup>th</sup> Street and 3<sup>rd</sup> Avenue in Manhattan, the Respondent's bus, #4669, struck the Claimant's vehicle as he was attempting to enter it. The Claimant further avers that the Respondents were aware of the incident at the time it occurred as a Supervisor came to the scene of the accident, investigated the accident and then prepared and provided the Claimant with a document, a "Bus Information" form. Claimant also provides a copy of the "Bus Information" form (NYSCEF Doc. #7), which appears to be a photo of a piece of paper with the heading "Bus Information". The form contains information regarding bus #4669 and its operator, Respondent SIEGREID SEVERIN. However, the "Bus Information" document does not identify that an accident, or any other incident, occurred on January 9, 2022. The "Bus Information" document does not indicate that the Claimant reported any damages or personal injuries at the time of the incident, nor does it indicate that the Claimant requested or was provided with any medical attention. In fact, the "Bus Information" document contains no information attributed to the Claimant whatsoever; neither his name, telephone number, address, nor even his vehicle information are noted on the document. Thus, even if the "Bus Information" document notified the Respondents of an accident, there is nothing in the document to which advises of the basis of a possible claim sounding in negligence against the Respondents.

The Claimant's Affidavit in Support likewise does not demonstrate that the Respondents were made aware of a possible claim sounding in negligence on January 9, 2022. The Claimant's Affidavit states that his vehicle was struck by bus #4669 as he was attempting to enter it. However, the Claimant does not allege in the affidavit that he reported any damages or injuries to the bus operator or Supervisor at the scene on January 9, 2022. The Claimant does not aver that he requested or was provided with any medical attention at the scene. In fact, the Affidavit in Support does not even aver that the Claimant actually sustained any damages or injuries as a result of the alleged incident.

Mere "... knowledge of the facts underlying an occurrence does not constitute knowledge of the claim. 'What satisfies the statute is not knowledge of the wrong. What the statute exacts is

notice of ‘claim’.” (*Chattergoon v. New York City Hous. Auth.*, 161 A.D.2d 141, 142, 554 N.Y.S.2d 859, 860 [1990], affd., 78 N.Y.2d 958, 580 N.E.2d 406 [1991], quoting *Thomann v. City of Rochester*, 256 N.Y. 165, 172, 176 [1931]; see also *Kim v. City of New York*, 256 A.D.2d 83, 84, 681 N.Y.S.2d 247 [1998]).

Accordingly, the Claimant has not established that the Respondents acquired actual notice of the essential facts of a claim sounding in negligence against them within the 90 days of the alleged accident, or within a reasonable time thereafter.

Given the January 9, 2022 accident date, pursuant to General Municipal Law §50-e, the Claimant would have had until April 9, 2022 to file his notice of claim. According to the Petition (NYSCEF Doc. #1), the Claimant retained counsel on or about February 3, 2022. A Notice of Claim was prepared by counsel and sent to the Claimant. The Claimant apparently executed the Notice of Claim on February 28, 2022 (NYSCEF Doc. #3), and returned it to his counsel as of March 2, 2022. Counsel then claims that because the signed Notice of Claim contained an incorrect date of loss, January 5, 2022, and not January 9, 2022, it was not served on the Respondents and while counsel directed his staff to prepare a new Notice of Claim, one was not prepared and was not sent to the Claimant for execution. This was only uncovered by counsel on August 15, 2022, 128 days after the Notice of Claim should have been filed. The within Petition was purportedly first filed in the Supreme Court, Bronx County, but, as it was not the proper venue, that Petition was discontinued and a new Petition was filed in Supreme Court, New York County on September 15, 2022. The motion, with the “Proposed” Notice of Claim (NYSCEF Doc. #4, which contains no date of loss as it simply states “January, 2022”), submitted in support of the motion, was served on the Respondents on October 13, 2022 at the time the within motion was served. Essentially, the Claimant’s explanation for why the Notice of Claim was not timely served amounts to “law office failure”. However, mere law office failure is not an adequate excuse for the delay in filing the Notice of Claim. (*see Seif v. City of New York*, 218 A.D.2d 595, 593, 630 N.Y.S.2d 742, 743 [1<sup>st</sup> Dept 1995], *Ordillas v. MTA New York City Transit*, 50 A.D.3d 391, 391, 854 N.Y.S.2d 311 [1<sup>st</sup> Dept 2008]).

Accordingly, the Claimant has not established a reasonable excuse for the delay in filing the Notice of Claim.

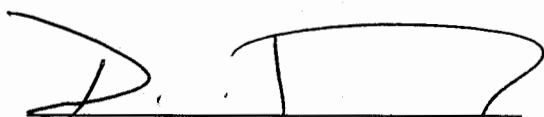
Finally, it is the burden of the petitioner to demonstrate that the late notice of the claim will not be substantially prejudicial. (*Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455,

466, 68 N.E.3d 714 [2016]). Here the Claimant argues that the Respondents will not be prejudiced because an investigation occurred at the scene. However, the speculation that an investigation into this claim has already occurred is unavailing as the "Bus Information" form does not support that the Respondents were ever aware of a potential claim, sounding in negligence. The form does not indicate that an accident occurred, it does not reflect the Claimant's involvement in any incident and it does not reflect that anyone, let alone the Claimant sustained any injuries or damages. The Claimant has not shown how the over 10 month delay in notifying the Respondents of his claim (through the within motion) would not substantially prejudice the Respondents. (*Bornschein v. City of New York*, 203 A.D.3d 570, 162 N.Y.S.3d 708 [1<sup>st</sup> Dept 2022]).

Accordingly, the Claimant has failed to demonstrate that the Respondents would not be prejudiced if a late Notice of Claim were to be filed.

Accordingly, it is hereby ORDERED that this Petition seeking to serve a late notice of claim upon the Respondents is denied.

3/1/2023  
DATE

  
DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION