

**Matter of Smith v City of New York**

2023 NY Slip Op 33703(U)

September 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 536960/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 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 11<sup>th</sup> day of September, 2023.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
In the Matter of the Application of MARGARET SMITH,

Petitioner,  
-against-

Index No.: 536960/2022

THE CITY OF NEW YORK and THE NEW YORK  
CITY ECONOMIC DEVELOPMENT CORPORATION,

**DECISION AND ORDER**

Respondents.  
-----X

The following papers read herein:

Doc. Nos.:

Order to Show Cause/Petition/Exhibits.....	1-5, 7
Memorandum of Law in Opposition/Affidavits.....	9-11

Petitioner Margaret Smith (“Petitioner”) moves by order to show cause for an order (a) pursuant to General Municipal Law (“GML”) § 50-e(5), granting Petitioner leave to serve and file a late Notice of Claim upon Respondents the City of New York and the New York City Economic Development Corporation (collectively, “Respondents”) and deeming said Notice of Claim as timely filed *nunc pro tunc*; (2) deeming that any examination of the Petitioner sought by Respondents under GML § 50-h is to be completed within 30 days of service of an order granting the above relief with notice of entry; and (3) deeming that pursuant to the *nunc pro tunc* relief sought above, Petitioner satisfied the 30-day statutory period set forth in GML § 50-i(1)(b). In opposition, Respondents argue that they did not own, operate, man, or do anything else regarding the vessel on which Petitioner claims she sustained personal injuries.

Petitioner avers that she purchased a ticket for the “Majestic Princess” boat (the “vessel”) through the National Lighthouse Museum (the “Museum”) and that the ticket included admission to the Museum. Petitioner alleges that on August 7, 2022, while she was aboard the vessel, she fell off a

chair that was unsecured to the floor. With the assistance of a Museum representative, Petitioner filled out an incident report in which she claimed pain to her buttocks and lower back but refused an ambulance. Petitioner alleges that she was “trying to deal with the pain . . . , but it got worse.” Petitioner alleges that she only learned of a diagnosis after she received MRI results on or about November 14, 2022. Approximately three days later, Petitioner retained a law firm, whose investigation allegedly revealed that Respondents “owned, controlled, maintained, and/or leased the museum that operated the boat tour.” Petitioner now seeks to serve a late Notice of Claim under GML § 50-e(5), arguing that (a) Respondents would not be prejudiced by the late filing and (b) Petitioner has a reasonable excuse for the delay in filing because she had not realized the severity of her injuries.

In their opposition, Respondents assert that there is no verified evidence that Respondents had anything to do with the vessel. Respondents produced affidavits of Victor Becker, the owner of the vessel’s operator Vista Yacht Cruises, Inc. (“Vista”) and Richard Thomas, the Assistant Vice President for Legal Affairs for the New York City Economic Development Corporation (“NYCEDC”). In these affidavits, Messrs. Becker and Thomas state that Respondents never owner, operated, repaired, renovated, provisioned, constructed, maintained or managed the vessel. Moreover, they state that Respondents never employed the crew aboard the vessel and Vista was not an agent authorized to act on Respondents’ behalf. Mr. Becker’s affidavit also includes a copy of a private charter agreement between the Museum and Majestic Harbor Cruises, Inc. for the August 7, 2022 boat tour. The agreement provides, in part, that the “vessel will remain under the ownership and control of the vessel owner thereof and/or its agents. [The Museum] shall have no operational control over the vessel.” In addition, Mr. Thomas avers that the Museum is a separate entity with no authority to act on behalf of Respondents. Mr. Thomas also claims that Respondents have nothing to do with the operation of boat tours offered by the Museum. The only link between the Museum and Respondents, according to Mr. Thomas, is that NYCEDC serves as the lease administrator for the City of New York (the “City”) in a

lease between the City and the Museum. Mr. Thomas states that Respondents first received knowledge of Petitioner's claim on January 9, 2023, the date he was made aware of the order to show cause.

A notice of claim must be served upon a public corporation within 90 days after the claim arises (GML § 50-e). The decision to grant or deny an extension of time to serve a notice of claim falls within the Court's discretion (*see* GML § 50-e [5]); *Cohen v Pearl River Union Free Sch. Dist.*, 51 NY2d 256, 265–66 [1980]). The General Municipal Law lists certain factors that the Court must consider, including whether: (1) the petitioner has established a reasonable excuse for failing to timely serve; (2) the public corporation or its attorney acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter; and (3) the delay substantially prejudiced the public corporation in maintaining its defense on the merits (*see* GML § 50-e [5]; *City of New York v Cnty. of Nassau*, 146 AD3d 948, 949–50 [2017]). “The presence or absence of any one of these factors is not necessarily determinative” (*Dell'Italia v Long Island Rail Rd. Corp.*, 31 AD3d 758, 759 [2d Dept 2006] [internal citations omitted]).

Though a court will not typically examine the merits of a claim, leave to serve a late notice of claim will be “denied where the underlying claim is ‘patently meritless’” (*Ramirez v City of New York*, 148 AD3d 908, 909 [2d Dept 2017], *quoting Matter of Catherine G. v Cnty. of Essex*, 3 NY3d 175, 179 [2004]). Courts have denied leave where an entity did not operate, control, or maintain the area in which the accident occurred (*see Pezza v The Battery Park City Authority*, Sup Ct, NY County, May 18, 2018, Chan, J., index No. 160782/2017 [no evidence proffered that entity owned or had a duty to maintain subject premises]; *Matter of Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222[A] [Sup Ct., NY County 2014], *affd* 140 AD3d 449 [1st Dept 2016] [claim is meritless as to MTA because its functions did not include operation, maintenance or control of any facility]; *Tri-State Consumer Ins. Co. v Long Island Power Authority*, Sup Ct, Nassau County, Nov. 29, 2010, Marber, J., index No. 008222/10 [petitioner failed to establish reasonableness of claim after respondent produced evidence that it did not own, maintain or operate the subject items that allegedly caused property damage].


According to Petitioner, Respondents “owned, controlled, maintained, and/or leased the museum that operated the boat tour.” Respondents concede that the City does lease land to the Museum. Nonetheless, Petitioner failed to demonstrate how the lease to the Museum had anything to do with the accident. Even if the City owned the Museum, the accident did not occur inside the building or even in the vicinity. Instead, it occurred on a moving boat. The Museum’s connection with the accident is limited to being the location of the ticket sale and a party to the private charter agreement. The agreement, a two-page document, constituted the entirety of the parties’ contractual obligations. Nothing in the agreement provided the Museum, let alone Respondents, with any authority for the vessel’s control, maintenance, operation, or ownership. Thus, the Court finds that Petitioner’s claims as to Respondents are patently meritless.

Accordingly, it is hereby

ORDERED, that Petitioner’s order to show cause is DENIED.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

  
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Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**