

Hoefling v Metropolitan Tr. Auth.

2023 NY Slip Op 34616(U)

January 30, 2024

Supreme Court, New York County

Docket Number: Index No. 157461/2023

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

-----X INDEX NO. 157461/2023

THOMAS HOEFLING

MOTION SEQ. NO. 001

Petitioner

- v -

**DECISION + ORDER ON
MOTION**

METROPOLITAN TRANSIT AUTHORITY,

Respondent

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 6, 7, 8, 9, 10, 11
were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, the Petition to serve a late notice of claim on Respondent METROPOLITAN TRANSIT AUTHORITY (MTA) is denied.

This 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]; *Pierson v. City of New York*, 56 NY2d 950 [1992]).

In evaluating whether leave to file a late notice of claim should be granted, key factors considered are whether the movant demonstrated a reasonable excuse for the delay, whether the public entity 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 public entity in its defense (*Dubowy v. City of New York*, 305 AD2d 320 [1st Dept 2003] *internal citations omitted*; see *Matter of Morris*, 88 AD2d 956 [2d Dept 1982], *aff'd sub nom. Morris v. Suffolk Cnty.*, 58 N.Y.2d 767, 445 N.E.2d 214 [1982]; *Matter of Porcaro v. City of New York*, 20 AD3d 357 [1st Dept 2005]; *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d 455 [2016]).

While the absence or of any one factor is not fatal, great weight must be given to whether the

public entity acquired actual knowledge of the essential facts constituting the claim within ninety (90) days or within a reasonable time thereafter (*Dubowy*, 305 AD2d 320; General Municipal Law §50-e [5]; see *Bertone Commissioning v City of New York*, 27 AD3d 222 [1st Dept 2006]; *Matter of Orozco v City of New York*, 200 AD3d 559 [1st Dept 2021]).

Here, in support of the Petition, Petitioner submits a proposed notice of claim and the Petitioner's affidavit of merit (NYSCEF Doc. 2, 3). The MTA opposes the application and submits affidavits from Marilyn Lund, a Senior Paralegal in the MTA's Freedom of Information Law Office ("Lund Aff."), Robert Murphy, Chief Security Officer at the Long Island Rail Road Company ("LIRR") ("Murphy Aff."), and Peter Kelly, a Claims Agent at the LIRR ("Kelly Aff.")

As per the Petitioner's affidavit of merit, the Petitioner alleges that he was riding a battery-operated scooter on the sidewalk which abuts a purported MTA "yard", located at 300 12th Avenue in Manhattan, near a gated entrance. Petition further alleges that to avoid a purported MTA work who was carrying a "bin" and who had walked in front of the Petitioner as he was operating his scooter on the sidewalk, the Petitioner was caused to fall to avoid the worker. The affidavit does not indicate the date or time of this occurrence, does not identify this purported MTA worker in anyway and does not indicate that the Petitioner reported this incident to anyone at the time it occurred.

As per the proposed notice of claim, this incident occurred at 8:15 a.m. on March 31, 2023. The proposed notice of claim asserts claims sounding in negligence against the MTA based upon its alleged ownership, operation, control and maintenance of the subject "yard" on 12th Avenue. The notice of claim contains additional details regarding this incident that are not included in the Petitioner's affidavit of merit. As per the proposed notice of claim, an MTA employee, who was pushing a large bin with giant pipes protruding from it, pushed the bin onto the sidewalk abutting the yard without looking to see that the Petitioner was riding his scooter on the sidewalk. This caused the Petitioner to swerve and jump off of the scooter, falling to the ground and sustaining injury.

As the accident occurred on March 31, 2023, pursuant to General Municipal Law §50-e, the Petitioner had 90 days, by June 29, 2023, in which to serve the Respondent with a notice of claim.

Upon review, the Petitioner has not demonstrated a reasonable excuse for the delay in timely filing the notice of claim. The Petition alleges that following the accident, the Petitioner is not litigious, was focused on his medical treatment and did not realize the extent of his injuries. However, it is neither alleged, nor shown with admissible evidence, that the Petitioner was incapacitated following the accident nor are any medical records submitted to reflect that the Petitioner was hospitalized, confined to a rehabilitation facility or was otherwise incapacitated for an extended period of time during the 90 days immediately following the incident. (*Umeh v. New York City Health & Hosps. Corp.*, 205 AD3d 599 [1st Dept 2022]; *Atkinson v. New York City Health & Hosps. Corp.*, 184 AD3d 528 [1st Dept 2020]). Moreover, ignorance of the law is not a reasonable excuse (*see Rodriguez v. New York City Health & Hosps. Corp.*, 78 AD3d 538 [1st Dept 2010]).

Nor has the Petitioner shown that the MTA obtained knowledge of this incident within the 90 day timeframe set by the General Municipal Law, or shortly thereafter. The affidavit does not aver that the Petitioner reported this incident to anyone he believed to be associated with the MTA on the day it occurred, or at any time within the 90 days following the incident. No incident/accident report has been submitted documenting that this incident was reported to any entity/agency whatsoever at the time it occurred. There is no evidence submitted describing the individual that the Petitioner believes to be an MTA employee, whether by physical appearance, uniform or in any other manner. In fact, there is no evidence that the MTA worker who was allegedly pushing the bin on the sidewalk were themselves ever aware of the subject incident, let alone the potential claim, as the affidavit makes no mention of any post-accident discussion between this individual and the Petitioner. In short, there is no admissible evidence whatsoever that would indicate to the MTA that the incident occurred, let alone provide the MTA with “sufficient detail to impute knowledge of [the Petitioner’s] claim” (*Alexander* 200 AD3d

509; *Salazar v. Metro. Transportation Auth.*, 219 AD3d 1237 [1st Dept 2023]). Nor is there evidence that the MTA received notice of the underlying facts by which it could be inferred that there was a potential actionable wrong by the MTA and an injury sustained by the Petitioner (see e.g. *Clarke v. Veolia Transportation Servs., Inc.*, 204 AD3d 666 [2d Dept 2022]; *Alexander v. New York City Transit Auth.*, 200 AD3d 509 [1st Dept 2021]). Specifically, there is no evidence that the MTA received any details of the incident, such as the date, time and location nor a description of the accident with sufficient details to establish a *potential* claim sounding in negligence at any time prior to the within application. (see *Rao v. Triborough Bridge & Tunnel Auth.*, 223 AD2d 374 [1st Dept 1996]; cf. *Green v. New York City Hous. Auth.*, 180 AD2d 586, 580 NYS2d 743 [1st Dept 1992]; *Mittermeier v. State*, 101 AD3d 426[1st Dept 2012]).

In opposition, the MTA has submitted the Lund Aff., in which it is averred that upon receipt of the Petitioner's September 23, 2023 FOIL request, a search was conducted to determine if there was any information concerning the Petitioner's claim; no information regarding the incident was found. The Kelly Aff. was also submitted, in which, it is averred that a search of the Petitioner's name, and a search of the date of accident only reflected materials associated with the subject application, and that there are no police reports or Accident Reports Non-Employee concerning this incident.

Finally, it is the burden of the petitioner to demonstrate that the late notice of the claim will not be substantially prejudicial (see *Newcomb*). Petitioner essentially argues that the Respondents will not be prejudiced because the MTA worker caused and witnessed the accident and that they would be able to remember the incident. Such an argument is based upon speculation as there is in fact no admissible evidence that the individual who was pushing the bin was in fact an MTA employee and there is no evidence whatsoever that the MTA ever received notice of the underlying facts prior to the within application or conducted an investigation into this incident. As the Petitioner has not shown a lack of prejudice, (*Newcomb, supra.*), the burden does not shift to the MTA to make a showing that it is

prejudiced (*Orozco, supra.*). However, in opposition, the MTA asserts that it will in fact be prejudiced as notice of the subject incident was received too late for the MTA to properly investigate, including identifying any witnesses or securing evidence such as any video footage that might have depicted the occurrence. The MTA submits the Murphy Aff., in which it is averred that at the time the July 26, 2023 request to retain video footage was received, it was 117 days after the subject incident and outside of the video retention period for the subject location.

Thus, the Petitioner has not shown that the MTA would "... not be substantially prejudiced by the delay in serving a notice of claim, as the failure to give notice deprived them of the opportunity to conduct a prompt investigation of the allegations." (*Salazar* 219 AD3d at 1238 *supra.*)

In evaluating an application to serve a late notice of claim, this Court must balance the intent of the General Municipal Law §50-e to protect public entities from unfounded claims and ensure that public entities have an adequate opportunity "to explore the merits of the claim while information is still readily available, alongside the rights of individuals to bring forth legitimate claims (*Porcaro* 20 AD3d at 357).

Upon review, the Petitioner has not demonstrated that the filing of a late notice of claim is warranted. Accordingly, it is hereby

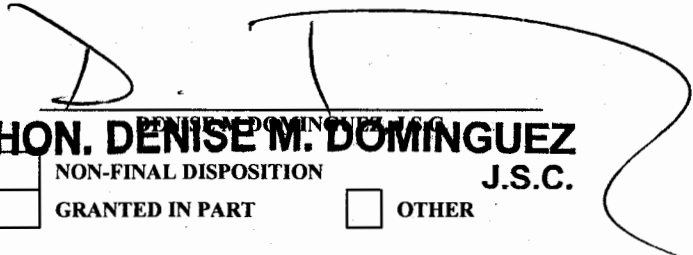
ORDERED that this Petition seeking to serve a late notice of claim upon the Respondents is denied and this matter is disposed; and it is further

ORDERED that within 20 days from the entry of this order, the Petitioner shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court in accordance with e-filing rules.

1/30/2023
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART


HON. DENISE M. DOMINGUEZ
DENISE M. DOMINGUEZ, J.C.
J.S.C.