

Gomez v Metropolitan Transp. Auth.

2024 NY Slip Op 32861(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 150060/2024

Judge: Richard Tsai

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

PRESENT: HON. RICHARD TSAI PART 21

Justice

-----X

LUIS J GOMEZ,

Petitioner,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW
YORK CITY TRANSIT AUTHORITY, RICHARD J
RUSZKOWSKI,

Respondents.

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INDEX NO. 150060/2024

MOTION DATE 01/04/2024

MOTION SEQ. NO. 001

**DECISION, ORDER +
JUDGMENT ON PETITION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9-14
were read on this petition for LEAVE TO FILE A LATE NOTICE OF CLAIM.

Upon the foregoing documents, it is **ADJUDGED** that the petition for leave to serve a late notice of claim upon respondents is **GRANTED IN PART TO THE EXTENT THAT** leave is granted to serve a late notice of claim upon respondents New York City Transit Authority and Richard J Ruskowski in the form of the proposed notice of claim annexed to the petition as Exhibit A [NYSCEF Doc. No. 10]), *but only for a claim of property damage*; and it is further

ADJUDGED that such a notice of claim for property damage only will be deemed timely served, nunc pro tunc, upon respondents New York City Transit Authority and Richard J Ruskowski, if it is served within 45 days from entry of this decision, order, and judgment; and it is further

ADJUDGED that the remainder of the petition (including leave to serve a late notice of claim of personal injuries and other related claims such as pain and suffering, medical bills, and economic loss) is denied; and it is further

ORDERED that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

In this proceeding, petitioner seeks leave to serve a late notice of claim upon respondents to allege that, on March 28, 2023 he was the driver of a vehicle which made contact with a bus allegedly owned by the New York City Transit Authority (NYCTA) and Metropolitan Transportation Authority (MTA) and allegedly operated by respondent Ruskowski, which resulted in personal injuries and property damage. Respondents oppose the petition.

Where an action against the MTA and the NYCTA is founded on a tort (except for wrongful death), Public Authorities Law §§ 1212 (2) and 1276 (2) require service of notices of claim upon the NYCTA and MTA, respectively, prior to the commencement of the action, “within the time limited by and in compliance with all of the requirements of section [50-e] of the general municipal law.” A notice of claim is also required where an action against the NYCTA is based on the negligence of an employee “in the operation of a vehicle or other facility of transportation under the jurisdiction and control of the authority” (Public Authorities Law § 1212 [3], [4]). General Municipal Law § 50-e (1) (a) provides that the notice of claim must be served “within ninety days after the claim arises.”

Under General Municipal Law § 50-e (5), courts have discretion to grant an extension of time for service of a notice of claim.

“In determining whether to grant or deny leave to serve a late notice of claim, the court must consider ‘in particular’ whether the municipality ‘acquired actual knowledge of the essential facts constituting the claim within [90 days of the claim’s accrual] or within a reasonable time thereafter.’ Courts are to place ‘great weight’ on this factor, which the party seeking leave has the burden of establishing through the submission of nonspeculative evidence”

(*Matter of Jaime v City of New York*, —NY3d—, 2024 NY Slip Op 01581 [2024] [internal citations omitted]).

“Additionally, the statute requires the court to consider ‘all other relevant facts and circumstances’ and provides a ‘nonexhaustive list of factors that the court should weigh. One factor the court must consider is ‘whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.’”

(*Matter of Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 460-461 [2016] [internal citation omitted]).

The Appellate Divisions have held that courts must also consider whether petitioner has a reasonable excuse for the delay, but the “failure to offer a reasonable excuse is not necessarily fatal” (*Clarke v New York City Tr. Auth.*, 222 AD3d 552, 553 [1st Dept 2023]; *Guerre v New York City Tr. Auth.*, 226 AD3d 897, 898 [2d Dept 2024]). “[W]here there is actual notice and absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim” (*Guerre*, 226 AD3d at 898 [quotation marks and citation omitted]). Thus, petitioner essentially needs to prove only the first two factors to be entitled to leave to serve a late notice of claim.

Actual Knowledge of the Essential Facts

Petitioner contends that respondents had notice of the accident giving rise to the claim within 90 days of the accident because: (1) the accident involved an employee of respondents; (2) the bus operator's supervisor, Tracy Charles, appeared at the scene of the accident and took pictures; and (3) petitioner texted Charles with an MV-104 accident report on or before March 29, 2023, the day after the alleged accident (petitioner's Exhibit E, petitioner's affidavit ¶¶ 4-6 [NYSCEF Doc. No. 7]; see also petitioner's Exhibit F, text messages [NYSCEF Doc. No. 8]).

In opposition, respondents argue that they do not have actual knowledge of the essential facts of petitioner's claim, in that the MV-104 did not detail that petitioner had suffered any personal injuries but claimed only property damage (affirmation of respondents' counsel ¶ 12 [NYSCEF Doc. No. 13]). They further contend that Charles's investigation of the accident did not give respondents actual knowledge of petitioner's personal injuries, in that petitioner did not allege that he had complained of personal injuries to Charles or had requested or received medical attention at the scene of the accident (*id.* ¶ 13).

"The actual knowledge requirement contemplates actual knowledge of the essential facts constituting the claim, not knowledge of a specific legal theory" (*Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401, 403 [1st Dept 2018]; *Matter of Grande v City of New York*, 48 AD3d 565 [2nd Dept 2008]). However, "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 [the] 'claim'" (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990]; see also *Bullard v City of New York*, 118 AD2d 447 [1st Dept 1986]). "The statute contemplates not only knowledge of the facts, but also how they relate to the legal claim to be asserted" (*Carpenter v City of New York*, 30 AD3d 594, 595 [2d Dept 2006]).

Contrary to petitioner's argument, the bus operator's knowledge of the motor vehicle collision does not constitute actual knowledge imputed to the MTA or the NYCTA. The Court of Appeals recently rejected this argument, reasoning

"Allowing imputation in every case would undermine the purpose of the notice of claim requirement because not every employee's knowledge will necessarily afford the municipality an opportunity to commence a prompt investigation. Generally, knowledge of essential facts as to time and place by an actor *in a position to investigate* will suffice"

(*Matter of Jaime v City of New York*, —NY3d—, 2024 NY Slip Op 01581 *4 [emphasis added]). Because the bus operator is not in a position to investigate, the bus operator's knowledge of the collision is not sufficient.

The MV-104 accident report which petitioner texted to Charles did establish that the MTA and the NYCTA had acquired actual knowledge of the essential facts of a property damage claim, but not a claim for personal injuries.

“[I]n order for a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the municipal corporation” (*Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; see *Matter of Bornschein v City of New York*, 203 AD3d 570 [1st Dept 2022] [petitioner submitted no reports generated by employees of respondents whose conduct forms the basis of this action and connects the decedent's death with any negligence on the part of respondents]; *Matter of Brennan v Metropolitan Transp. Auth.*, 110 AD3d 437 [1st Dept 2013]; *Matter of Casale v City of New York*, 95 AD3d 744 [1st Dept 2012]; see also *Walker v NYC Transit Auth.*, 266 AD2d 54 [1st Dept 1999] [police “aided” report did not connect the occurrence with any negligence by respondents]).

Here, the MV-104 accident report states, “Going straight on Canal St. I stopped due to traffic and vehicle #2 made a wide right turn which caused his rear bumper to collide with my vehicle” (petitioner’s Exhibit B [NYSCEF Doc. No. 4]). It can be inferred from the report that the wide turn of the bus was performed negligently, in that there might have been inadequate space to make the turn “with reasonable safety” (Vehicle and Traffic Law § 1163). The claim of property damage can be reasonably inferred from the statement that the bus made contact with the rear bumper of petitioner’s vehicle.

However, as respondents point out, the MV-104 accident report does not state that petitioner suffered any personal injuries. Thus, possession of the MV-104 accident report “does not ipso facto establish that [respondent] had actual knowledge of a potential injury” (*Matter of Atkinson v New York City Health & Hosps. Corp.*, 184 AD3d 528, 528-529 [1st Dept 2020] [internal quotation marks omitted]; *Wally G. v New York City Health and Hosps. Corp.*, 27 NY3d 672, 677 [2016]; see also *Matter of Molme v New York City Tr. Auth.*, 177 AD3d 601, 602 [2d Dept 2019]).

Lastly, because Charles investigated the collision, the court agrees with petitioner that any information that Charles obtained from the investigation would be sufficient to constitute actual knowledge to her employer under *Matter of Jaime v City of New York* (2024 NY Slip Op 01581).

However, petitioner did not meet his burden of establishing respondents’ actual knowledge of petitioner’s personal injuries based on nonspeculative evidence (*Matter of Jaime*, 2024 NY Slip Op 01581, *3). As respondents point out, petitioner does not allege that he told Charles that he had suffered any personal injuries. Neither does the record contain any evidence that petitioner told Charles facts about the collision from which it could be inferred that the collision would result in personal injuries. Thus, it would be speculative to conclude that the Charles learned of petitioner’s injuries based only on the fact that Charles investigated the collision.

“To adopt plaintiff’s position that such circumstances gave [respondents] timely actual notice of the facts constituting his claim would . . . mandate that [respondents] investigate every possible cause of action that might be suggested in an accident report, disregard the prejudice caused by the lost opportunity to conduct a prompt investigation, and ‘effectively vitiate the protections afforded public corporations by [General Municipal Law § 50-e]”

(*Olivera v City of New York*, 270 AD2d 5, 6 [1st Dept 2000] [timely notice of claim alleging property damage could not be amended to include a claim for personal injuries]).

Additionally, although not raised not by respondents, the MTA is not Charles’s employer. “It is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility” (*Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007]).

In conclusion, petitioner has established only that the NYCTA and Ruszkowski acquired actual knowledge of the essential facts of a claim for property damage within 90 days or a reasonable time after the motor vehicle collision on March 28, 2023.

Substantial 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*, 28 NY3d at 466).

For example, if a transitory condition allegedly caused the petitioner’s injuries, a petitioner demonstrates lack of prejudice if the condition would no longer have existed even if timely service had been made (*see Camins v New York City Hous. Auth.*, 151 AD3d 589, 590 [1st Dept 2017]; *Matter of Rivera v City of New York*, 127 AD3d 445, 446 [1st Dept 2015]). Or, if a premises condition had not changed since the date of the alleged accident, such that an investigation would still be possible despite the late notice (*Fredrickson v New York City Hous. Auth.*, 87 AD3d 425, 425 [1st Dept 2011]).

“Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed” (*Matter of Newcomb*, 28 NY3d at 467). “Substantial prejudice may not be inferred solely from the delay in serving a notice of claim” (*id.* at 468 n 7).

Here, as to his claim for personal injuries, petitioner argues that there is no prejudice because respondent had notice of the accident within 90 days of the

occurrence; petitioner's medical records document his injuries; respondents are in possession of photographs of the collision; and petitioner is available for a statutory hearing (affirmation petitioner's counsel in support, at 5 [NYSCEF Doc. No. 2]).

In opposition, respondents argue that, because the MV-104 accident report did not reflect that petitioner was injured, the MTA and NYCTA are prejudiced, in that petitioner deprived them of the opportunity to promptly investigate this matter as a potential bodily injury claim, citing *Matter of Chowdury v New York City Tr. Auth.* (2022 NY Misc LEXIS 17663 [Sup Ct, Queens County 2022]).

"[B]oth the length of delay in service and lack of actual knowledge of the facts underlying the claim certainly can affect whether the late notice substantially prejudices the public corporation in defending the claim. Nonetheless, whether the public corporation is substantially prejudiced remains a separate inquiry under the statute. Indeed, there may be scenarios where, despite a finding that the public corporation lacked actual knowledge during the statutory period or a reasonable time thereafter, the public corporation nonetheless is not substantially prejudiced by the late notice"

(*Matter of Newcomb*, 28 NY3d at 467 [internal citation omitted]).

However, as discussed above, petitioner did not establish that respondents had timely acquired actual knowledge of the essential facts constituting petitioner's claim for personal injuries within 90 days of the motor vehicle collision or within a reasonable time thereafter.

Petitioner did not meet his initial burden of demonstrating that respondents would not suffer substantial prejudice from the late notice of his claim for personal injuries. There were no photographs of petitioner's alleged injuries (see petitioner's Exhibit C [NYSCEF Doc. No. 5]). The arguments that respondents can conduct a statutory hearing, and that petitioner has documentary evidence of medical treatment, are true in every tort action brought against respondents, or against municipal corporations. Accepting those arguments as sufficient to meet petitioner's initial burden would effectively eliminate petitioner's initial burden altogether. Finally, petitioner did not submit any medical records as part of his petition.

Nevertheless, given the fact that Charles investigated the motor vehicle collision, petitioner met his initial burden of demonstrating that late notice of petitioner's property damage claim will not substantially prejudice respondents. Respondents failed to respond with a particularized evidentiary showing that they will be substantially prejudiced if the late notice of the property damage claim were allowed.

Matter of Chowdury is distinguishable. Unlike this case, the court in *Matter of Chowdury* ruled that petitioner failed to meet his initial burden of presenting evidence or

some plausible argument that respondents would not be substantially prejudiced (*Matter of Chowdury*, 2022 NY Misc LEXIS 17663 at *7).

Thus, petitioner did not meet his initial burden of establishing that respondents would not be substantially prejudiced if leave to serve a late notice of a claim for personal injuries were granted. However, petitioner did not meet his burden of lack of substantial prejudice for a claim for property damage, which respondents failed to rebut.

Reasonable Excuse

Petitioner claims, "at first I believed that the pain I was experiencing would go away within a relatively short time. I was determined to try and overcome the pain and injury I felt, but as the condition progressed, I was later advised that I had sustained sever injuries requiring treatment" (petitioner's aff ¶ 9). Additionally, petitioner admits that the notice of claim was not timely served "due to Petitioner's lack of familiarity and knowledge as to what needed to be done, and against whom it needed to be done" (petitioner's aff ¶ 10).

That petitioner did not realize the seriousness of his injury until after the 90-day period had expired cannot be accepted as a reasonable excuse in the absence of any supporting medical documentation (*Moran v New York City Hous. Auth.*, 224 AD2d 257, 257-258 [1st Dept 1996]; *Matter of Ryan v New York City Tr. Auth.*, 110 AD3d 902, 903 [2d Dept 2013]). As respondents correctly point out, "[p]etitioner'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" (*Matter of Montero v City of New York*, 176 AD3d 614, 615 [1st Dept 2019]; *Gaudio v City of New York*, 235 AD2d 228, 228 [1st Dept 1997]).

In conclusion, leave is granted to serve a late notice of claim only with respect to a claim for property damage.

Leave to serve a late notice of claim for a claim of personal injuries is denied, because petitioner failed to demonstrate that respondents had timely acquired actual knowledge of the essential facts constituting a claim for personal injuries, lack of substantial prejudice, and a reasonable excuse for the delay in serving a notice of claim for personal injuries (*Matter of Smiley v Metropolitan Transportation Auth.*, 168 AD3d 631 [1st Dept 2019]).

The court cannot deem the service of the proposed notice of claim annexed to the petition as Exhibit A (NYSCEF Doc No. 10) as timely service, because the notice of claim was not served upon respondents in accordance with General Municipal Law § 50-e.

According to the affidavit of service, the petition and the supporting papers were apparently served by regular mail on January 5, 2024 and via electronic filing on NYSCEF (see NYSCEF Doc. No. 12). However, General Municipal Law § 50-e (3) (a)

states that service shall be by personal delivery, registered, or certified mail. Although the statute permits service upon an attorney "regularly engaged in representing such public corporation" in the City of New York by electronic means, the means must be "in a form and manner prescribed by [the City of New York]" (General Municipal Law § 50-e [3] [b]). Nothing in the record indicates that either the City of New York or respondents permitted service of a notice of claim via NYSCEF.

Additionally, given that leave to serve a notice of claim was granted only for the claim of property damage, the better practice would be for petitioner to serve a notice of claim upon respondents which contains only the claim of property damage, not the other allegations for which leave was denied.

The court reminds petitioner to serve the notice promptly, as the statute of limitations is only tolled "from the time the [petitioner] commenced the proceeding to obtain leave of the court to file a late notice of claim until . . . the date upon which [the order] was to take effect" (*Barchet v New York City Tr. Auth.*, 20 NY2d 1, 6 [1967]). "[A]n order becomes operative from the time of its filing" (*Wilcox v National Shoe & Leather Bank*, 67 App Div 466, 469 [1st Dept 1902]).



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6/21/2024
DATE

RICHARD TSAI, J.S.C.

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE