

Mendez v New York City Dept. of Transp.

2025 NY Slip Op 32397(U)

July 3, 2025

Supreme Court, New York County

Docket Number: Index No. 160877/2024

Judge: Carol Sharpe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL SHARPE PART 52M

Justice

-----X

ELEANA ACEVEDO MENDEZ,

Plaintiff,

- v -

THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, THE CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 160877/2024

MOTION DATE 11/19/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12
were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, the Order to Show Cause seeking to file a late notice of claim is granted.

Plaintiff moved by Order to Show Cause (“OSC”), filed on November 11, 2024 (NYSCEF Doc. #2), seeking leave to file a late notice of claim or, in the alternative, deem the notice of claim dated July 3, 2024, timely filed *nunc pro tunc*. No written opposition was filed.

Plaintiff alleges that on October 24, 2023, at approximately 8:00pm, while she was walking on the sidewalk in the vicinity of 109-01 111th Street, Jamaica, New York, she tripped and fell, and was removed by ambulance to Jamaica Hospital Medical Center (“Jamaica Hospital”) where she was treated and released on October 24, 2023. Plaintiff alleges that she served a notice of claim on the City of New York and on the New York City Department of Transportation (collectively “The City”) on July 3, 2024, and on July 23, 2024, she received a disallowance letter from The City stating that the Notice of Claim was filed late. She now seeks to have that notice of claim be deemed served on July 3, 2024, or for leave to file a late notice of claim.

In support of the petition, plaintiff submitted her own notarized petition dated July 31, 2024; a notice of claim dated July 3, 2024; a disallowance letter from the Comptroller dated July 23, 2024; photographs of the area of the incident, one of which is a Google photo; photographs of plaintiff's alleged injuries; and discharge papers from Jamaica Hospital dated October 24, 2023.

Counsel for plaintiff states in her affirmation that, "failure to service notice of claim timely is excusable as attorney calendared the date of service of Notice of Claim late. The Notice of Claim was due on January 22, 2024. However, by programming error it was deadlines on January 22, 2025, by mistake. As soon as attorney caught the calendaring error at the time of case audit, the Notice of Claim was filed immediately on July 3, 2024." (NYSCEF Doc. #3, Pg. 3 ¶13). Plaintiff contends that there is no delay as the OSC was made within one year and ninety days; that plaintiff's failure to serve notice of claim timely is reasonably excusable; and that The City had notice of the incident and is not substantially prejudiced because 911 was called, New York City Police Officers ("Police Officers") responded to the incident, and an ambulance transported plaintiff to Jamaica Hospital.

GML § 50-e (1)(a) provides in pertinent parts that a notice of claim shall be served "within ninety days after the claim arises." GML § 50-e (5) provides that "the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section..." Among the factors for the court to consider are whether The City "acquired actual knowledge of the essential facts constituting the claim;" infancy or disability causing the delay of service; a reasonable excuse for the delay; "and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits." GML § 50-e (5); *see also, Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 45 N.Y.S.3d 895, 68 N.E.3d 714 (2016).

While the decision to grant or deny a motion to serve a late notice of claim is discretionary, the decision must be supported by the evidence. *Id.*, at 465. The question of “acquired actual knowledge of the essential facts constituting the claim;” is to be considered “in particular” by the court as great weight is placed on those facts. *Matter of Jaime v. City of New York*, 41 N.Y.3d 531, 540, 237 N.E.3d 796, 213 N.Y.S.3d 730 (2024). In addition to actual knowledge, the courts must consider “all other relevant facts and circumstances” (General Municipal Law § 50-e [5]), and “the presence or absence of any one factor is not determinative” (*Matter of Morris v County of Suffolk*, 88 AD2d 956, 957, 451 N.Y.S.2d 448 [2d Dept 1982], *affd* 58 NY2d 767 [1982]).” *Id.*, at 541.

The fact that Police Officers responded to the incident and plaintiff was transported to the hospital by an ambulance, without more, is insufficient to prove actual knowledge of the facts constituting the claim. *Williams v. Nassau Cnty. Med. Ctr.*, 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154 (2006). “A medical provider’s mere possession or creation of medical records does not ipso facto establish that it had “actual knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process. [internal citation omitted].” *Wally G. v. N.Y.C. Health & Hosps. Corp. (Metro. Hosp.)*, 27 N.Y.3d 672, 677, 37 N.Y.S.3d 30, 57 N.E.3d 1067 (2016). Here, that plaintiff fell on the street and was taken by ambulance to Jamacia Hospital is insufficient to constitute actual knowledge of the facts constituting the claim as the hospital did not cause the injury. *Matter of Newcomb*, 28 N.Y.3d at 465.

In determining whether there is a reasonable excuse for the delay in service, while “law office failure generally is not a reasonable excuse for failing to timely serve a notice of claim, failure to offer a reasonable excuse is not necessarily fatal to a motion for leave to serve a late notice (*see Colarossi v City of New York*, 118 AD3d 612, 612, 989 N.Y.S.2d 24 [1st Dept 2014];

Alladice v City of New York, 111 AD3d 477, 478, 974 N.Y.S.2d 437 [1st Dept 2013]).” *Clarke v. N.Y.C. Transit Auth.*, 222 A.D.3d 552, 553, 202 N.Y.S.3d 89, 90-91 (1st Dept. 2023). Plaintiff counsel’s excuse of law office failure in the form of a calendaring error is not alone dispositive of plaintiff’s OSC to serve a late notice of claim.

The question of substantial prejudice, or the lack thereof, is decided under the burden-shifting framework. *Matter of Jaime v. City of N.Y.*, 41 N.Y.3d 531, 541, 213 N.Y.S.3d 730, 237 N.E.3d 796 (2024). “[T]he burden initially rests on the plaintiff to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the plaintiff must present some evidence or plausible argument that supports a finding of no substantial prejudice.” *Matter of Newcomb*, 28 N.Y.3d at 466. “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... [t]he public corporation, however, is in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice.” *Id.*, at 467. “Providing proof of substantial prejudice on the record is qualitatively and quantitatively different from a mere inference of prejudice. Generic arguments and inferences will not establish ‘substantial prejudice’ in the absence of facts in the record to support such a finding.” *Id.*, at 466; *Matter of Benavides v. N.Y.C. Health & Hosps. Corp.*, 220 A.D.3d 458, 459, 197 N.Y.S.3d 493 (1st Dept. 2023)(“In addition, respondent New York City Health and Hospitals Corporation (HHC) failed to make an adequate showing that it would be substantially prejudiced if plaintiff is granted leave to file his claim.”). Here, The City has not offered any facts to support a finding of substantial prejudice as it has not filed opposition. Accordingly, it is hereby:

ORDERED, that plaintiff’s OSC to file a late notice of claim is granted; and it is further

ORDERED, that plaintiff shall commence an action and purchase a new index number in the event a lawsuit arising from this Notice of Claim is filed.

This constitutes the Decision and Order of the Court.

ENTER:

July 3, 2025

DATE


HON. CAROL SHARPE J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE