Elpenord v Metropolitan Transp. Auth.
2025 NY Slip Op 32820(U)
July 25, 2025
Supreme Court, New York County
Docket Number: Index No. 159624/2024
Judge: Richard Tsai

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD TSAI** **PART** **21**

Justice

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HANSOU ELPENORD

Petitioner,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY,

Respondent.

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INDEX NO. 159624/2024

MOTION DATE 11/29/2024

MOTION SEQ. NO. 001

DECISION + JUDGMENT ON PETITION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 1-15 were read on this petitioner for LEAVE TO SERVE A LATE NOTICE OF CLAIM.

Upon the foregoing documents, it is **ADJUDGED** that the petition to serve a late notice of claim upon respondent Metropolitan Transportation Authority is **DENIED**, and the proceeding is dismissed.

Petitioner seeks leave to serve a late notice of claim upon respondent Metropolitan Transportation Authority (MTA), alleging that, on July 2, 2024, between 1:00 pm to 2:00 pm, petitioner fell while walking down a staircase during his employment as a construction worker on the 34th floor of the Waldorf Astoria in Manhattan, due to debris on the steps (*see* affirmation of petitioner's counsel ¶ 5 [NYSCEF Doc. No. 3]). The MTA allegedly owned the property at the time of the incident (*id.*). Petitioner's counsel allegedly served a notice of claim on or about October 8, 2024 (*see* affirmation of petitioner's counsel ¶ 7; *see* petitioner's Exhibit A, notice of claim [NYSCEF Doc. No. 4]).

The MTA opposes the petition.

As a threshold matter, the MTA argues that the order to show cause was not validly served, because the order to show cause was not served by personal service, as indicated in the order to show cause (affirmation of respondents' counsel ¶ 10 [NYSCEF Doc. No. 11]). Additionally, the MTA asserts that the order to show cause was sent to the wrong address, to the NYCTA's address at 130 Living Street in Brooklyn, not to the MTA's address at 2 Broadway in Manhattan (*id.* ¶ 11). According to an affidavit of service, the order to show cause was purportedly served upon respondent "via United Parcel Service" at "130 Livingston Street Brooklyn, New York 11201" (*see* NYSCEF Doc. No. 10).

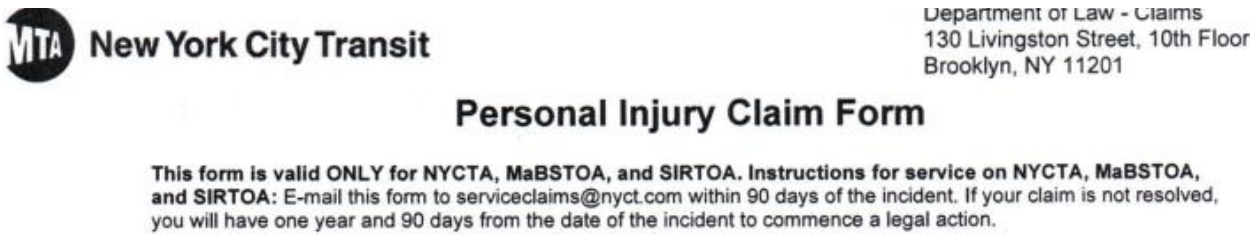
Although this court indicated that the order to show cause and supporting papers must be made by personal service because "these are initiatory papers which

commence a special proceeding," the court inadvertently failed to strike that portion of the order to show cause which permitted service by overnight mail, which was apparently made here. Therefore, the court rejects the argument that the order to show cause was not properly served via United Parcel Service.

However, the order to show cause was clearly not served at respondent's address. Thus, the order to show cause must be denied (*see Gonzalez v Haniff*, 144 AD3d 1087, 1088 [2d Dept 2016] ["The mode of service provided for in an order to show cause is jurisdictional in nature and must be literally followed"] [internal quotation marks and emendation omitted]).

Even assuming that the order to show had been properly served, the petition would be denied on the merits.

Petitioner failed to show that respondent timely acquired essential knowledge of facts constituting petitioner's claim. As the MTA points out, the header of the notice of claim that petitioner's counsel used clearly indicated that the notice of claim form was valid only for the New York City Transit Authority, MaBSTOA and SIRTOA:


MTA New York City Transit

Department of Law - Claims
130 Livingston Street, 10th Floor
Brooklyn, NY 11201

Personal Injury Claim Form

This form is valid ONLY for NYCTA, MaBSTOA, and SIRTOA. Instructions for service on NYCTA, MaBSTOA, and SIRTOA: E-mail this form to serviceclaims@nyct.com within 90 days of the incident. If your claim is not resolved, you will have one year and 90 days from the date of the incident to commence a legal action.

(*see* petitioner's Exhibit A [NYSCEF Doc. No. 4]). The notice of claim that was served upon the NYCTA cannot be imputed to the MTA, for the MTA and NYCTA are separate entities (*Konner v New York City Tr. Auth.*, 143 AD3d 774, 776 [2d Dept 2016]).

Petitioner failed to demonstrate that the MTA received the notice of claim served upon the NYCTA. The email acknowledgement of the notice of claim was sent by "ServiceClaims@nyct.com" (*see* petitioner's Exhibit B [NYSCEF Doc. No. 5), and petitioner fails to demonstrate that this was sent from the MTA. The email itself does not bear any indicia that it was sent from the MTA.

Even assuming, for the sake of argument, that the MTA had received the notice of claim emailed to the NYCTA, this notice of claim was emailed eight days after the 90-day period after the incident had passed.

Previously, there appeared to be a split between the Appellate Division, First Department and the Appellate Division, Second Department regarding whether a public corporation can acquire actual knowledge from a late notice of claim served without leave of court.

In *Feduniak v New York City Health & Hosps. Corp. (Queens Hosp. Ctr.)*, the Appellate Division, Second Department stated, "this Court has ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court" (170 AD3d 663, 665 [2d Dept 2019]).[1]

By contrast, in *Bertone Commissioning v City of New York* (27 AD3d 222, 224 [1st Dept 2006]), the Appellate Division, First Department held that a late notice of claim, served without leave of court, and served on the Transit Authority less than two months (i.e., 59 days) after the 90–day deadline set by General Municipal Law § 50–e (1) (a) gave the authority "actual knowledge within a reasonable time frame." As petitioner's counsel points out, in *Weiss v City of New York* (237 AD2d 212 [1st Dept 1997]), the Appellate Division, First Department ruled that a letter faxed to the City of New York—no greater than 16 days after the accident—with the proposed notice of claim containing all the pertinent and necessary information about the accident "provided the City with actual knowledge of the essential facts underlying petitioners' claims within a reasonable time after expiration of the statutory period" (237 AD2d at 213).

However, the Appellate Division, First Department recently held in *Cassidy v New York City Transit Authority* that "an untimely notice of claim on defendants *five days after* the 90–day statutory time period expired did not establish that defendants had actual knowledge of his claims because '[t]his late service, without leave of court, was a nullity'" (238 AD3d 484 [1st Dept 2025] [emphasis added]).[2] Thus, the Appellate Division, First Department now appears to agree with the Appellate Division, Second Department.

Thus, under *Cassidy*, assuming for the sake of argument that the MTA and not the NYCTA received the notice of claim, the MTA did not have timely actual knowledge of petitioner's claims based on a late notice of claim that was served without leave of court.

Finally, petitioner points out that there is an accompanying Workers' Compensation claim (*see* petitioner's Exhibit D [NYSCEF Doc. No. 7]). However, the Workers' Compensation claim did not give notice of the MTA's negligence (*see Matter of Rodriguez v City of NY*, 172 AD3d 556 [1st Dept 2019] ["Supreme Court correctly found that petitioner failed to establish that respondent had actual knowledge of the

[1] Petitioner's reliance upon the pre-*Feduniak* cases from the Appellate Division, Second Department, which allowed notices of claim served without leave of court to constitute actual knowledge of the essential facts, is misplaced.

[2] The Appellate Division quoted *Bobko v City of New York* (100 AD3d 439 [1st Dept 2012]). There, the plaintiff had moved to amend the date of the incident from March 18, 2009 to March 9, 2009, which had the effect of rending the service of the original notice of claim untimely by three days. The Appellate Division further ruled that the court lacked the authority to deem the notice of claim timely served because the statute of limitations had run (*id.* at 440).

essential facts constituting the claim based on the documentation that petitioner submitted to the Workers' Compensation Board"]).

In light of the court's determination, the court does not reach the MTA's remaining arguments in opposition, especially the MTA's alternative argument that the petition is patently meritless because the MTA was not the owner of the Waldorf Astoria where plaintiff was allegedly injured, but rather has title over certain subsurface property and easements.

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7/25/2025
DATE

RICHARD TSAI, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**