SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JENNA VOLZ, as Proposed Administrator of the Estate of JASON VOLZ, Deceased,

Petitioner,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

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INDEX NO. 150212/2025

MOTION DATE 03/10/2025

MOTION SEQ. NO. 001

DECISION + JUDGMENT ON PETITION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 1-22 were read on this petition for LEAVE TO SERVE 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 respondent New York City Transit Authority is **GRANTED**, and the proposed notice of claim annexed to the petition as Exhibit 1 (NYSCEF Doc. No. 2) is deemed timely served, *nunc pro tunc*, upon respondent New York City Transit Authority upon service of a copy of this decision, order, and judgment with notice of entry; and it is further

ORDERED that petitioner must purchase a new index number to commence an action in the event a lawsuit is filed arising from this amended notice of claim; petitioner may not re-use this index number for such action.

Petitioner Jenna Volz, the proposed administrator of the Estate of Jason Volz,[1] seeks leave to serve an amended notice of claim upon respondent, to include claims regarding the negligent operation of a northbound #4 train that struck and killed the decedent on March 25, 2024, at approximately 6:55 p.m. (*see* exhibit 1 in support of petition [NYSCEF Doc. No. 2]). Respondent opposes the petition.

It is undisputed that the original notice of claim was served on or about June 18, 2024 (*see* exhibit 4 in support of petition [NYSCEF Doc. No. 5]). The original notice of claim alleged that decedent was pushed onto the tracks by a person with a mental health condition, a 24-year-old named Carlton McPherson (*see* exhibit 5 in support of petition [NYSCEF Doc. No. 6]). The original notice of claim alleged that respondent and others were negligent in failing, among other things, to provide security for persons

[1] Although not raised by respondent, the court notes that a proposed administrator of a decedent's estate may bring a special proceeding seeking leave to serve a late notice of claim (*Almanzar v New York City Health and Hosps. Corp.*, 86 Misc 3d 708, 713 [Sup Ct, NY Bronx County 2025]).

entering the subway, and in failing to secure and assist persons with mental health conditions with a history of violence.

Petitioner now seeks to add, in essence, allegations that the train operator negligently operated the train (*see* exhibit 1 in support of petition, "PROPOSED AMENDMENT TO NTOICE [sic] OF CLAIM"). Petitioner argues that the amendment should be granted because it has great merit (petition ¶ 11), and that there is no prejudice to respondent because it thoroughly investigated the occurrence (*id.* ¶ 20).

Contrary to the argument of respondent's counsel, General Municipal Law § 50-e (6) is not applicable here. General Municipal Law § 50-e (6) allows amendments to a notice of claim at any time "only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, but not to substantively change the nature of the claim or the theory of liability" (*Mitchell v Jimenez*, 233 AD3d 773, 774 [2d Dept 2024] [internal quotation marks, citations and emendation omitted]). "As such, amendments that create new theories of liability do not fall within the purview of General Municipal Law § 50–e (6)" (*Matter of Corwin v City of New York*, 141 AD3d 484, 488 [1st Dept 2016]).

Although the original notice of claim is being amended, petitioner's counsel therefore correctly recognized that, "[u]nder [General Municipal Law] § 50–e(5), a notice of claim may be amended within one year and ninety days of an accident to include new theories of liability" (*Thomas v New York City Hous. Auth.*, 132 AD3d 432, 433 [1st Dept 2015]).

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*, 41 NY3d 531 [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.

Reasonable excuse

Petitioner did not demonstrate a reasonable excuse for not serving a timely notice of claim as to the additional allegations regarding the train operator's negligence. Petitioner's argument that they refrained from alleging the train operator's negligence until their Freedom of Information Law (FOIL) requests were completed is unpersuasive. The incident occurred on March 25, 2024, and petitioner's current counsel was retained on October 29, 2024 (*see* petition ¶ 5), well after the 90-day period after the incident had passed.

Actual knowledge of the essential facts

"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]).

Petitioner contends that respondent had actual knowledge of the essential facts of the claim regarding the the train operator's alleged negligence because they had investigated the incident. The court agrees (*see Matter of Rijos v New York City Tr. Auth.*, 227 AD3d 452, 453 [1st Dept 2024]*, lv denied*, 43 NY3d 903 [2025] ["petitioner demonstrated that NYCTA had the opportunity to investigate the essential facts in a timely manner"]).

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).

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).

In this case, petitioner met the initial burden of demonstrating lack of substantial prejudice. "Petitioner's evidence showing that respondent[ ] had actual notice of the facts constituting the claim within 90 days of the accident or a reasonable time thereafter provides a 'plausible argument' that respondent[ ] will not be substantially prejudiced in investigating and defending the claim" (*Matter of Dubuche v New York City Tr. Auth.*, 230 AD3d 1026, 1027 [1st Dept 2024]).

Respondent argues that "new claims fundamentally inhibit NYCTA's ability to defend the claim(s) and is thus prejudicial by its very nature" (affirmation of respondent's counsel in opposition ¶ 44 [NYSCEF Doc. No. 20]). However, respondent has not come forward with any evidentiary showing that it will be substantially prejudiced if late notice were allowed. Given that respondent had the opportunity to investigate the essential facts in a timely manner, petitioner's delay did not cause substantial prejudice to respondent (*Matter of Rijos*, 227 AD3d at 453).

Finally, "as a general proposition, a court entertaining an application to serve a late notice of claim will not examine the merits" (*Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp.*, 272 AD2d 112, 113-14 [1st Dept 2000]). Petitioner "'is not required to establish conclusively the merits of the claim at this stage in the litigation but only that there are sufficient facts to establish the reasonableness of said claims'" (*Ali v Bunny Realty Corp.*, 253 AD2d 356, 358 [1st Dept 1998], quoting *Matter of Logan v City of Albany*, 154 AD2d 861 [3d Dept 1989]). However, "[l]eave is not appropriate for a patently meritless claim" (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179 [2004]; *Swinton v City of New York*, 61 AD3d 557, 558 [1st Dept 2009]). Here, respondent has not established that the additional allegations are patently meritless.

Because petitioner has demonstrated that respondent had timely actual knowledge of the essential facts constituting the claims set forth in the amended notice of claim, and respondent did not demonstrate that it would suffer substantial prejudice if leave were granted, the application for leave to serve an amended notice of claim, *nunc pro tunc*, is granted.

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8/25/2025
DATE

RICHARD TSAI, J.S.C.

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