Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Jeanine Morice and Michael Morice,

Plaintiffs,

- against -

The City of New York, New York City Health and Hospital Corporation, Elmhurst Hospital Center, Parking Services Plus, Inc. And Central parking Systems, Inc.,

Defendants.

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Index Number: 25255/11

Motion Date: 1/24/12

Motion Cal. Number: 18

Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion by plaintiffs for leave to serve a late notice of claim; and cross-motion by The City of New York (the City) and New York City Health and Hospital Corporation (HHC), sued herein as New York City Health and Hospital Corporation and Elmhurst Hospital Center, to dismiss.

	Papers Numbered
Order to Show Cause--Affirmation-Affidavit-Exhibits..	1-5
Notice of Cross-Motion-Affirmation-Exhibits.....	6-9
Affirmation in Opposition-Exhibits.....	10-12

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by plaintiffs for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e, is denied. Cross-motion by the City and HHC to dismiss the complaint and all cross-claims against them, pursuant to CPLR 3211(a)(7) is granted.

Plaintiff, Jeanine Morice, allegedly sustained injuries as a result of slipping and falling upon a step on a staircase at a parking garage at Elmhurst Hospital Center located at 79-01 Broadway in Queens County, where she was employed as a nurse, on May 4, 2011.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Plaintiff did not

serve a prerequisite notice of claim, but commenced an action by filing a summons with notice on November 7, 2011. Thereafter, she, through her attorney, served the instant motion for leave to serve a late notice of claim, together with a complaint, on November 16, 2011, over three months past the 90-day deadline for filing a notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Plaintiffs have failed to articulate any cognizable excuse for their failure to serve the City and HHC within the statutory period. In her affidavit in support of the motion, Jeanine Morice avers that she had not intended to commence an action until she discovered the extent of her injuries on September 6, 2011 and that she was unaware of the notice of claim requirement until her attorney informed her thereof in late October 2011. Her husband, co-plaintiff Michael Morice, avers in his affidavit that he was unaware of the notice of claim requirement.

A lack of awareness of the possibility of a lawsuit or ignorance of the law regarding the necessity of filing a timely notice of claim do not constitute reasonable excuses (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]). A lack of awareness by plaintiff of the extent of her injuries does not constitute a reasonable excuse (see Greene v City of Middletown, 5 AD 3d 384 [2nd Dept 2004]).

In addition, plaintiff fails to proffer any explanation for the delay in seeking leave to file a late notice of claim after she retained counsel who informed her of the notice of claim requirement. Although plaintiff avers that she was informed of the

notice of claim requirement by her attorney in "late October", she fails to state when she retained her counsel. In this regard, the Court notes that her attorney prepared a summons with notice dated "October 25, 2010". The Court assumes this was a typographical error and that the summons with notice was prepared on October 25, 2011, since, according to the Court record, the summons with notice was filed on November 7, 2011. Assuming further that October 25, 2011 was the date counsel was retained and not an earlier date, no explanation is proffered for the delay of 15 days in submitting an order to Show Cause for leave to file a late notice of claim on November 9, 2011. Moreover, counsel fails to explain why he served a summons with notice instead of properly commencing a special proceeding for leave to serve a late notice of claim. Also, as an aside, and not a ground for denial of the instant motion, the Court notes that although the complaint is dated November 1, 2011, counsel's verification of the complaint, annexed to the complaint on a separate un-numbered page, attesting to the fact that he read the foregoing complaint and that the contents thereof are true, is dated October 28, 2011. The Court will not assume that counsel submitted a false verification and will not make an inquiry into such possibility at this time. Suffice to say that counsel is hereby cautioned concerning his ethical obligations pursuant to the Code of Professional Responsibility.

In addition, plaintiff failed to demonstrate that the City and HHC acquired actual knowledge of the facts underlying her claim within the 90-day period or a reasonable time thereafter. Plaintiff's counsel contends that the City and HHC acquired timely actual knowledge of the essential facts underlying the claim by virtue of an accident report prepared by an employee of HHC on the date of the accident, a Workers' Compensation claim filed against Elmhurst Hospital on May 9, 2011 and by virtue of fact that on June 29, 2011, "she gave testimony to the attorneys representing the NYC Corp Counsel and was cross examined by said City attorney."

The accident report merely relates that plaintiff was "coming down steps in parking garage and slipped on metal & fell downs stairs injury to R hand pinky finger & back." This statement is insufficient to indicate that the steps were in a dangerous condition and, therefore, to apprise HHC of a nexus between her injuries and any negligence on its part. Moreover, this report, having been prepared by and filed with HHC, would not serve to impart any notice to the City, which is a separate and distinct entity from HHC.

As to plaintiff's Workers' Compensation claim, it is well-established that the filing of a Workers' Compensation claim does not constitute actual notice of the facts underlying the claim, as

a matter of law (see Mark v Board of Educ. of City of New York, 255 AD 2d 586 [2nd Dept 1998]; McLaughlin v North Colonie Central School Dist., 269 AD 2d 658 [3rd Dept 2000]). Even if it could constitute actual knowledge, the claim merely states, "Slipped on metal strip on stairs, fell injured back & R hand." There is no indication in this claim of any negligence on the part of HHC.

With respect to counsel's representation that plaintiff testified before the Corporation Counsel on June 29, 2011 and the City thereby obtained "the complete details of Plaintiff's accident within 90 days of the accident", the Court assumes that counsel is referring to a statutory 50-h hearing. Plaintiff fails to annex a copy of her 50-h transcript to the moving papers and, therefore, has failed to demonstrate that the City or HHC acquired actual notice of the essential facts of her claim thereby.

The only other argument raised by counsel is that the City would suffer no prejudice by a late notice of claim. In the first instance, since counsel's contention that the City and HHC would suffer no prejudice is predicated upon his unmeritorious argument that the City and HHC acquired timely actual knowledge of the essential facts underlying plaintiff's claim, plaintiffs have failed to meet their affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138, [2nd Dept 2008]). In any event, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant motion where plaintiff has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that the City and HHC acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see National Grange Mutual Ins. Co. v. Town of Eastchester,48 AD 3d 467, supra; Hebbard v. Carpenter, 37 AD 3d 538 [2nd dept 2007]; Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

Since the service of a timely notice of claim is a prerequisite to commencement of an action against the City and HHC, and since plaintiffs' motion for leave to serve a late notice of claim is denied, the City's and HHC's cross-motion to dismiss the complaint and all cross-claims as against them must be granted.

Accordingly, the motion is denied, the cross-motion is granted and the complaint and all cross-claims are dismissed as against the City and HHC.

Dated: January 26, 2012

KEVIN J. KERRIGAN, J.S.C.