

**Iemetti v Mta Capital Constr. Co.**

2012 NY Slip Op 30215(U)

January 27, 2012

Sup Ct, NY County

Docket Number: 113639/11

Judge: Cynthia S. Kern

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SCANNED ON 1/31/2012  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KERN  
Justice

PART 52

JEMETTI, SALVATORE

INDEX NO. 113639/11

- v -

MTA CAPITAL CONSTRUCTION Co.,  
ETAL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, It is ordered that this motion

JAN 30 2012

NEW YORK  
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

RECEIVED

JAN 30 2012

MOTION SUB PORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: \_\_\_\_\_ OK \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
In the Matter of the Application of

SALVATORE IEMETTI,

Petitioner,

Index No. 113639/11

-against-

**DECISION/ORDER**

MTA CAPITAL CONSTRUCTION COMPANY, LONG  
ISLAND RAILROAD, NEW YORK CITY TRANSIT  
AUTHORITY AND THE METROPOLITAN  
TRANSPORTATION AUTHORITY,

**FILED**

Respondents.

**JAN 30 2012**

-----x  
**HON. CYNTHIA S. KERN, J.S.C.**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	2
Exhibits.....	3

Petitioner commenced the instant action to recover damages for personal injuries he allegedly sustained when he was struck by a rubber pipe (also known as a "slick line") in the course of his employment. Petitioner now seeks to serve a late Notice of Claim against MTA Capital Construction Company, Long Island Railroad, New York City Transit Authority and the Metropolitan Transportation Authority (collectively the "respondents"). For the reasons set forth below, his motion is granted.

The relevant facts are as follows. On May 27, 2011, petitioner was excavating caverns

for underground railroad tunnels underneath 49<sup>th</sup> Street and Madison Avenue in New York City. While he was working, a scooper/mucker machine being operated by another employee picked up a 5 inch 100 foot long rubber pipe which was buried underneath the muck. When it came up, it struck petitioner's left ankle and caused him to fall to the ground. Co-workers had to use a crow bar to remove the pipe from pinning petitioner's ankle against the wall. An MTA Supervisor's Accident Investigation Report was completed documenting the accident.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law ("GML") §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the delay prejudiced the municipality's defense and whether the municipality acquired "actual knowledge of the essential facts constituting the claim" within ninety days after the claim arose or within a reasonable time thereafter. *See* GML §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1<sup>st</sup> Dept 1993). It is plaintiff's burden to prove each of these elements, including lack of prejudice to the defendant. *See Delgado v City of New York*, 39 A.D.3d 387 (1<sup>st</sup> Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1<sup>st</sup> Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See Justiniano v New York City Housing Authority Police*, 191 A.D.2d 252 (1<sup>st</sup> Dept 1993). The lack of a reasonable excuse alone is not fatal. *See Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1<sup>st</sup> Dept 2010).

Petitioner fails to satisfy the first factor, the existence of a reasonable excuse. Although petitioner states that it was hard for him to get around after the accident, he has failed to provide evidence demonstrating that his injuries were so severe that he could not consult with an attorney. Moreover, petitioner's excuse that he did not know that he could bring a lawsuit against respondents is also not reasonable because ignorance of the law and, in particular, of the 90-day deadline for filing a Notice of Claim, does not constitute a reasonable excuse. *See Gaudio v City of New York*, 235 A.D.2d 228 (1<sup>st</sup> Dept 1997). Nonetheless, the lack of such an excuse is not fatal. *See Velasquez*, 69 A.D.3d 441.

Respondents, however, have acquired actual knowledge of the claim within the statutory period or shortly thereafter. Within a month of the incident, a Supervisor's Accident Investigation Report was completed by an MTA supervisor regarding this incident which specifically alerted respondents to the facts forming the basis of petitioner's claim – that while petitioner was working in an underground cavern, a mucking machine picked up a buried slick line pipe that was not known to be there and caught petitioner's left ankle, pinning it between a slick line pipe and the cavern wall causing injury. Because the report contained details sufficient to furnish notice of a claim of negligence, respondents acquired actual knowledge of the facts underlying plaintiff's claim. *See Rao v. Triborough Bridge and Tunnel Authority*, 223 A.D.2d 374 (1<sup>st</sup> Dept 1996).

*Felice v Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138 (2d Dept 2008), the case that respondents cite for the proposition that an accident report is insufficient to give actual notice, is distinguishable. In *Felice*, the court found that the accident report which merely stated that the petitioner, a high school cheerleader, was "dismounting in a vertical position from an

