Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Daniel W. Braun and Stephanie Ohanessian,

Petitioners,

- against -

The City of New York, New York City Parks Department and New York City Department of Transportation,

Respondents.

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Index Number: 6216/12

Motion Date: 6/26/12

Motion Cal. Number: 1

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this petition for leave to serve a late notice of claim.

	Papers Numbered
Notice of Petition-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioners for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e, is denied.

Petitioner, Daniel Braun, allegedly sustained injuries when he fell into a hole next to a tree stump that was on the front lawn of his home at 39-09 212th Street in Queens County adjacent to his driveway and the sidewalk on December 27, 2010. The tree had been knocked down by the tornado that struck the City on September 16, 2010. Petitioner avers in his affidavit annexed to the petition that respondents arrived within one week of the tornado and removed the tree by cutting it, leaving a stump, and that several weeks later, they returned to remove the stump, attempting unsuccessfully to do so by using a backhoe and leaving the stump protruding from the ground with holes in the ground surrounding it. He also avers that his wife, co-defendant Ohanessian, made numerous complaints to respondents concerning the condition by telephone, some of which complaints were assigned complaint numbers. Petitioner also avers

that on December 27, 2010, while exiting his truck, which he had backed into the driveway, he stepped into the hole that was adjacent to the driveway and fell forward, breaking his wrist. He avers that he did not see the hole because it was covered by snow that had accumulated from a snowstorm on December 26-27.

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]). Since petitioner's cause of action accrued on December 27, 2010, the deadline for serving a notice of claim was January 26, 2011. The instant petition for leave to serve a late notice of claim was served on March 22, 2012, almost one year and two months past the 90-day deadline.

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]).

Petitioner has failed to offer a reasonable excuse for his delay in seeking leave to serve a late notice of claim.

Petitioner avers that he and his wife contacted an attorney in January 2011 and that the attorney prepared a notice of claim which was signed and returned to the attorney. Petitioner also avers that the attorney did not file the notice of claim and that it was their belief that the notice of claim had been filed. In his reply, petitioners' counsel represents that a former attorney in his firm, who was in the process of changing employment to another firm, sent the notice of claim to petitioners to review, sign and return to his office. He also avers that "[d]ue to unknown circumstances, the Notice of Claim was not timely filed. Our firm is unable to allege

with certainty whether the signed Notice of Claim was lost in the mail or misplaced by the attorney leaving our firm."

Petitioner fails to annex an affirmation of his former attorney setting forth the reason for his failure to file a notice of claim. In any event, law office failure does not constitute a reasonable excuse for the failure to serve a timely notice of claim (see Belenky v. Nassau Community College, 4 AD 3d 422 [2nd Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2nd Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2nd Dept 2000]). Moreover, neither petitioners nor their counsel specifies the date in January 2011 on which they retained counsel and fail to set forth either the date when the notice of claim was sent to petitioners for review and signature or the date when they sent it back to counsel's office, and, therefore, fail to show that they even retained counsel or mailed to counsel the signed notice of claim prior to the expiration of the 90-day period for filing a notice of claim.

Counsel contends that the City acquired actual knowledge of the facts underlying petitioners' claim by virtue of the numerous complaints that petitioners made concerning the condition prior to the date of the accident, and by virtue of the fact that it created the condition when it attempted to remove the stump and therefore had knowledge of the condition from the outset. Counsel's arguments are without merit.

Counsel confuses the concept of actual knowledge with the concept of prior notice. "[T]he fact that prior written notice of a defect was filed with a City agency [does not] operate[] to fulfill the purposes for which a notice of claim is required" (Rios v. City of New York, supra, at 802). Therefore, whether or not the City received complaints of the condition is irrelevant to the issue of whether it had actual knowledge of plaintiff's claim.

Likewise, whether or not the City actually created the condition that subsequently cause injury is irrelevant to the issue of whether the City had timely notice of the facts of petitioner's claim. While the creation by the City, through an affirmative act of negligence, of a condition that subsequently results in an injury to a third party is an exception to the prior written notice requirement (see Amabile v. City of Buffalo, 93 NY 2d 471 [1999]), this exception has nothing to do with the actual knowledge exception to the notice of claim requirement. There is no controlling case law holding that the creation of a street defect or dangerous condition by City workers invests the City with actual knowledge of the facts of a claim related to that condition which arises at some time in the future. "What satisfies the statute is

not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2nd Dept 1996]). Thus, even if, arguendo, it were established that defendants' workers created the hole around the tree stump as a result of their aborted efforts to remove the stump, such fact would have nothing to do with the issue of whether the City acquired timely actual knowledge of the essential facts of petitioner's subsequent claim, which were those events concerning the accident itself.

Counsel's additional argument that the City acquired actual knowledge of the facts underlying petitioner's claim by virtue of his employment with the New York City Fire Department, in that he was required to report to an FDNY doctor on a regular basis to confirm his injury and inability to work and that the medical records are in the possession of the City is also without merit.

The possession of medical records does not impart actual knowledge of the facts underlying a claim where the information contained therein does not suggest a causal connection between the plaintiff's injuries and any negligence by the defendant (see Doyle v. Elwood Union Free School Dist., 39 AD 3d 544 [2nd Dept 2007]; Henriques v. City of New York, 22 AD 3d 847 [2nd Dept 2005]). Here, no medical records generated or possessed by the FDNY physician are annexed to the petition and petitioner does not venture to claim that he has any knowledge of what information those records contain. Moreover, even had petitioner shown proof that the FDNY physician generated a medical report that, in some way, indicated a causal nexus between his injury and negligence on the part of the City, there is no proof that such medical records were submitted to the Law Department or any person or department of the City whose knowledge constitutes notice to the City of a potential claim. Petitioners' counsel does annex a copy of an orthopedic medical report by an undisclosed individual that is unaffirmed and a copy of an operative report. Neither of these documents contains any indication of negligence on the part of the City.

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, petitioner has failed to meet his affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138, [2nd Dept 2008]). However, 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 petition where petitioner has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that the City 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]).

Under the totality of the circumstances, it would be an improvident exercise of this Court's discretion to allow the filing of a notice of claim at this late juncture based upon the record presented on this petition.

Accordingly, the application is denied and the petition is dismissed.

Dated: July 24, 2012

KEVIN J. KERRIGAN, J.S.C.