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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE PART 5

BARBARA JAFFE J.S.C.

CRUZ, CLARA

INDEX NO. 104164/11

MOTION DATE

- v -

MOTION SEQ. NO. 01

N.Y.C. HOUSING AUTHORITY

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for late notice of claim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

AUG - 8 2011

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/4/11
AUG 04 2011

BARBARA JAFFE 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 5

----------x

CLARA CRUZ,

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------x

Index No. 104164/11

Motion Date: 5/31/11
Motion Seq. No.: 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Martin C. Julius, Esq.
200 Willis Ave.
Mineola, NY 11501
516-741-8200

For defendant:
Janine Silver, Esq.
Newman Myers *et al.*
14 Wall St., 22nd Fl.
New York, NY 10005-2101
212-619-4350

By order to show cause dated April 8, 2011, plaintiff moves pursuant to General Municipal Law (GML) § 50-e for an order granting her leave to serve defendant with a late notice of claim. Defendant opposes.

I. CONTENTIONS

Plaintiff alleges that on September 29, 2010, while walking in front of 132 Baruch Place in Manhattan (premises), she tripped on a raised and cracked portion of the sidewalk and fell, sustaining physical injuries. (Affirmation of Martin C. Julius, Esq., dated March 30, 2011 [Julius Aff.], Exh. A).

Plaintiff alleges on December 16, 2010 she attempted to serve defendant with a timely notice of claim by sending a letter to the premises seeking information as to the owner's identity. (*Id.*, Exh. B). After receiving no response, on March 14, 2011, plaintiff sent another letter to the same address. (*Id.*).

On March 16, 2011, plaintiff wrote to the New York City Department of Finance pursuant to the Freedom of Information Law requesting information as to the premises' owner, and upon learning that defendant owned the premises, wrote to it at 140 Baruch Place, New York, New York. On March 27, 2011, the letter was returned as undeliverable. (*Id.*, Exh. C). On March 30, 2011, plaintiff served defendant with a notice of claim at its official address, 250 Broadway, New York, New York. (*Id.*, Exh. D).

Plaintiff argues that her efforts to learn the identity of the owner were reasonable and conducted in a timely manner, thus constituting a reasonable excuse for the delay in serving defendant with her notice of claim, and that her letters provided defendant with actual knowledge of the accident and her cause of action against it. Plaintiff also maintains that the 50-H hearing held by the City of New York (City) on March 15, 2011 afforded defendant a sufficient opportunity to investigate her claim, thereby negating any prejudice resulting from her late service. (Julius Aff.).

In opposition, defendant denies that plaintiff exerted a reasonable effort to ascertain the identity of the building's owner, asserting that a standard and customary search of City records would have disclosed the owner within minutes or days, and that counsel's failure to conduct such a search is unexplained. It maintains that plaintiff's March 22, 2011 notice of claim is a nullity as the 90-day deadline to file had passed and that plaintiff sent the notice to the wrong address. Defendant also denies having acquired knowledge of plaintiff's accident prior to its receipt of the notice of claim on or after March 30, 2011 or that notice to City constitutes notice to it, and alleges that it has been prejudiced by the delay as plaintiff's photographs show that on the day of her accident, construction was being performed on the sidewalk on which she fell, thereby raising the possibility that the condition of the sidewalk has since changed. It also

denies receipt of any of plaintiff's letters before receiving the March 30, 2011 letter, which reached its offices on April 4, 2011, and contends that this late notice of claim was improperly served without leave of the court. (Affirmation of Janine Silver, Esq., dated May 5, 2011[Silver Aff.]).

As plaintiff's reply affirmation contains new facts and evidence, and given defendant's objection to it, I do not consider it. (*See Ford v Weishaus*, 2011 NY Slip Op 05858 [1st Dept 2011] [reply affidavit containing new facts properly rejected as attempt to remedy fundamental deficiency in moving papers by submitting evidentiary material in reply]; *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223 [1st Dept 2008] [court erred in considering factual argument, and related materials, first made in reply]).

II. APPLICABLE LAW

Pursuant to GML § 50-a, in order to commence a negligence action against a municipality, a claimant must serve a notice of claim upon the municipality within 90 days of the date on which the claim arose. Pursuant to GML § 50-e, the court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (*Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]; *Powell v City of New York*, 32 AD3d 227 [1st Dept 2006]).

III. ANALYSIS

A. Actual knowledge

A municipality receives actual knowledge of the essential facts constituting a claim when it acquires actual knowledge of the facts underlying the theory on which liability is predicated (*Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]), not merely knowledge of the facts underlying the incident (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *lv denied* 76 NY2d 875).

Here, absent any indication that defendant learned of the accident or received any information relating to it until plaintiff served it with a notice of claim, plaintiff has not established that defendant received actual knowledge of her claim within the 90 days after her accident or a reasonable time thereafter. (*See Jenkins v New York City Hous. Auth.*, 29 AD3d 319 [1st Dept 2006] [petitioner's application to serve late notice of claim deficient absent any showing that respondents had actual knowledge of claim within 90 days of accident or reasonable time thereafter]). Moreover, notice to City may not be imputed to defendant. (*Lyerly v City of New York*, 283 AD2d 647 [2d Dept 2001] [notice of claim served on City not imputed to Housing Authority]; *Seif v City of New York*, 218 AD2d 595 [1st Dept 1995] [same]).

B. Reasonable excuse

Although plaintiff's accident occurred on September 29, 2010, she waited an additional three months, until the 90-deadline had expired, before first attempting to ascertain the identity of the premises owner, and then, despite receiving no response to her first letter, waited an another three months before sending a second letter and contacting City for more information. Thus, as plaintiff did no more than send two letters to the building owner within the first six months after her accident, her efforts to find the owner's identity cannot be deemed reasonable.

(*See Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009] [no reasonable excuse for delay set forth as failure to ascertain property owner due to lack of diligence in investigating matter]; *Bridgeview at Babylon Cove Homeowners Assn., Inc. v Inc. Vil. of Babylon*, 41 AD3d 404 [2d Dept 2007] [no acceptable excuse shown where petitioner failed to research boat's ownership properly]; *Jenkins*, 29 AD3d at 319 [error in ascertaining proper party to sue did not constitute adequate excuse for delay in serving notice of claim]; *Lugo v New York City Hous. Auth.*, 282 AD2d 229 [2d Dept 2001] [as identity of property owner easily ascertainable, delay not excused]; *Seif*, 218 AD2d at 595 [no acceptable excuse shown as petitioner failed to properly research which entity owned property]).

C. Prejudice

Plaintiff did not move for leave to serve a late notice of claim until approximately seven months after the accident, and as the alleged cause of the accident was a sidewalk defect, plaintiff has failed to demonstrate that defendant was not prejudiced by the delay. (*See Arias v New York City Hous. Auth.*, 40 AD3d 298 [1st Dept 2007] [delay of seven months between accident and petition prejudiced defendant's ability to investigate accident]; *Konstantinides v City of New York*, 278 AD2d 235 [2d Dept 2000] [six-month delay between accident and application substantially prejudiced respondent]; *Matter of Gomez v City of New York*, 250 AD2d 443 [1st Dept 1998], *lv denied* 92 NY2d 809 [delay of six months after accident substantially prejudiced respondent's ability to investigate alleged sidewalk defect and other circumstances surrounding accident]; *Seif*, 218 AD2d at 593 [seven-month delay between sidewalk accident and petition]). Nor does plaintiff explain how the 50-H hearing negates prejudice to defendant.

IV. CONCLUSION

Accordingly, it is

ORDERED, that plaintiff s application for leave to serve a late notice of claim is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 4, 2011
New York, New York

AUG 0 4 2011

FILED

AUG - 8 2011

COUNTY CLERK'S OFFICE
NEW YORK