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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5
Justice

HARRIS, NOVENIA

-v-

N.Y.C. HOUSING AUTHORITY

INDEX NO. 108571/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3 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
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/11
DEC 23 2011

BARBARA JAFFE J.S.C.
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

In the Matter of the Claim of:
NOVENIA HARRIS,

Petitioner,

For Leave to Serve a Late Notice of Claim, *Nunc Pro Tunc*,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

----------x

Index No. 108571/11

Argued: 9/27/11

DECISION & ORDER

BARBARA JAFFE, JSC:

For petitioner:
Harlan A. Platz, Esq.
Fink & Platz
1325 Franklin Ave., Suite 260
Garden City, NY 11530
516-280-5516

For respondent:
N. Jeffrey Brown, Esq.
Krez & Flores, LLP
255 Broadway, Suite 705
New York, NY 10007
212-266-0400

By order to show cause dated July 27, 2011, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order deeming the notice of claim served on respondent timely served, *nunc pro tunc*. Respondent opposes.

I. BACKGROUND

On June 12, 2010, petitioner fell in the bathroom of apartment 6D of 14 Jackson Street in Manhattan, a respondent-owned building. (Affirmation of Harlan A. Platz, Esq., dated July 25, 2011 [Platz Aff.], Exh. A). Sometime thereafter, petitioner retained counsel, and on October 18, 2010, she served respondent with a notice of claim. (*Id.*).

On February 23, 2011, petitioner retained new counsel, and before her file was

transferred, they discovered that a GML § 50-h hearing had been scheduled for March 29, 2011. New counsel thus assumed that petitioner had timely served respondent with a notice of claim. (*Id.*).

On June 8, 2011, the 50-h hearing was held, during which petitioner testified that she fell after a bracket at the end of a rod on which she was installing a shower curtain detached from the wall, that there were no witnesses to the accident, that in the middle of July 2010 a maintenance worker replaced the rod, explaining that he had to do so because of "dry rot," and that she did not report the accident to respondent. (Affirmation of N. Jeffrey Brown, Esq., in Opposition, dated Aug. 25, 2011 [Brown Opp. Aff.], Exh. 2).

Sometime thereafter, petitioner's counsel discovered the date on which she had filed her notice of claim. (Platz Aff.).

II. CONTENTIONS

Petitioner asserts that respondent obtained actual knowledge of the facts underlying her claim through maintenance's repair and the GML § 50-h hearing, and thus, that it will not be prejudiced by her delayed filing. (*Id.*). She also contends that her delay should be excused by her counsel's belief that she had timely filed a notice of claim before retaining them, and in any event, that failure to demonstrate a reasonable excuse is not fatal to her application. (*Id.*).

In opposition, respondent observes that law office failure does not constitute a reasonable excuse, that petitioner fails to explain her delay in filing the instant motion, that its knowledge of the facts underlying petitioner's claim cannot be inferred from maintenance's repair of the curtain rod, as there is no evidence that petitioner told NYCHA about her accident, and that it will be prejudiced by her late filing even though the rod was repaired less than 90 days after the accident,

as witnesses' memories have faded. (Brown Opp. Aff.). Moreover, respondent argues that petitioner does not have a meritorious cause of action, as she has failed to offer evidence demonstrating that the accident occurred as a result of a defective condition, and not her own negligence. (*Id.*).

In reply, petitioner claims that prior counsel miscalculated the 90-day period within which she was required to file a notice of claim, that respondent obtained actual knowledge when it received her notice of claim on October 18, 2010, and that its ability to investigate her accident is not prejudiced, as it has already conducted a GML § 50-h hearing. (Affirmation of Harlan A. Platz, Esq., in Reply, dated Sept. 23, 2011).

III. ANALYSIS

A. Merits of claim

As the curtain rod was replaced due to dry rot and absent any evidence demonstrating that respondent did not cause the condition or that the accident did not result from some other negligence on respondent's part, petitioner's claim is not patently meritless such that her application must be denied. (*Cf. Matter of Hess v W. Seneca Cent. School Dist.*, 15 NY3d 813 [2010] [where proposed negligence claim patently meritless, as agency established that it did not cause or create injury-causing dangerous condition, motion for leave to serve late notice of claim denied]).

B. Factors considered

Pursuant to GML §§ 50-e(l)(a) and 50-I, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. 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 or agency 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 or agency in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). "Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay." (*Williams ex rel Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account all other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

1. Actual knowledge

A claimant bears the burden of demonstrating the public entity's actual knowledge of the essential facts underlying her claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). When a municipal agency has knowledge of the facts underlying the theory on which liability is predicated, it has actual knowledge. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the agency. (*Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1027 [2d Dept 2010]). The agency must have notice or knowledge of the specific claim and not merely general knowledge that a wrong has been committed. (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009];

Matter of Wright v City of New York, 66 AD3d 1037, 1038 [2d Dept 2009]; *Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York,* 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.,* 161 AD2d 141, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]). A reasonable time after the deadline may be upwards of two months. (*Bertone Commissioning v City of New York,* 27 AD3d 222 [1st Dept 2006]).

As petitioner served respondent with her notice of claim only 36 days after expiration of the 90-day period, respondent obtained actual knowledge of the facts underlying her claim within a reasonable time after the deadline. (*See Matter of Gershanow v Town of Clarkson*, 2011 NY Slip Op 7424, 931 NYS2d 131 [2d Dept Oct. 18, 2011] [notice of claim served without leave one month after deadline provided agency with actual knowledge]; *Commissioning*, 27 AD3d 222 [notice of claim served without leave less than two months after expiration of 90-day period provided agency with actual knowledge] *Matter of Harrison v New York City Hous. Auth.*, 188 AD2d 367 [1st Dept 1992] [agency obtained actual knowledge from notice of claim received one month after expiration of 90-day period]).

2. Prejudice

As petitioner has demonstrated that respondent obtained actual knowledge of the facts underlying her claim within a reasonable time after expiration of the 90-day period, and given that respondent has begun its investigation by conducting the GML § 50-h hearing and that there were no witnesses to the accident, respondent's ability to investigate the accident will not be prejudiced by petitioner's delayed filing. (*See Schwindt v County of Essex,* 60 AD3d 1248, 1250 [3d Dept 2009] [where petitioner demonstrated actual knowledge and lack of prejudice on this

basis, municipality's conclusory assertion of prejudice based upon "mere passage of time" is "unpersuasive"]; *Abbott v City of New York*, 271 AD2d 364 [1st Dept 2000] [no prejudice to City where it had already investigated petitioner's claim]). Moreover, as respondent repaired the rod before the 90-day period expired, it would not have been better able to investigate the accident had it been timely served with a notice of claim. (*See Matter of Ruffino v City of New York*, 57 AD3d 550 [2d Dept 2008] [City not prejudiced by delayed filing, as it repaired defect less than month after accident]).

3. Reasonable excuse

As law office failure, including clerical errors and "mere inadvertence," does not constitute a reasonable excuse for failing to file a notice of claim timely (*Lyerly v City of New York*, 283 AD2d 647 [2d Dept 2001]; *Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [1st Dept 2000]), petitioner has failed to offer a reasonable excuse for her delay. However, as "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Matter of Ansong v City of New York*, 308 AD2d 333 [1st Dept 2003]), this failure is not fatal to her application.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for an order deeming the notice of claim served on respondent on October 18, 2010 timely served, *nunc pro tunc*, is granted.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 23, 2011
New York, New York

DEC 23 2011