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

PRESENT: JAFFE PART 5

BARBARA JAFFE, Justice
J.S.C.

Cecilia Vitus

- v -

City of New York

INDEX NO. 100310/12

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/22/12
MAR 22 2012

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

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CECILIA TITUS,

Petitioner,

- against -

THE CITY OF NEW YORK,

Respondent.

----------x

Index No. 100310/12

Motion Date: 1/31/12
Motion Seq. No.: 001

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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For respondent:
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By order to show cause dated January 13, 2012, petitioner moves for an order permitting her to serve respondent City with a late notice of claim. On August 12, 2011, petitioner was injured when she allegedly tripped over uneven sidewalk grates in front of 60 Ann Street in Manhattan (the premises). (Affirmation of Stephen G. Bock, Esq., dated Jan. 10, 2012 [Bock Aff.], Exh. A).

Petitioner claims that City acquired actual knowledge of her claim when emergency medical service (EMS) employees responded to the scene and transported her to the hospital and because the grates were covered and blocked off less than two weeks after her accident. She alleges that her delay resulted from pursuing a claim against the premises owner, and that she was informed on November 14, 2011 by the owner's insurance carrier that City may own the grates. (*Id.*, Exhs. B, E).

City denies that petitioner has a reasonable excuse for her delay, or that it had actual

knowledge of petitioner's claim absent proof that the EMS employees were employed by City or that City blocked off the grates, and it denies that the EMS report afforded it notice of its alleged negligence. City also claims that it is prejudiced by the delay absent an opportunity to conduct a prompt investigation. (Affirmation of Yael Barbibay, ACC, dated Jan. 28, 2012).

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]).

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 proof that the EMS employees were employed by City or that City learned of the accident or received any information relating to it until petitioner served the instant application, petitioner has not established that City received actual knowledge of her claim within the 90 days after her accident or a reasonable time thereafter. (*See Schoen v City of*

New York, 86 AD3d 575 [2d Dept 2011] [fact that EMS personnel were at accident scene insufficient to impute knowledge of petitioner's claim to City]; *Taylor v County of Suffolk*, 90 AD3d 769 [2d Dept 2011] [police accident report did not give defendant actual notice of negligence claim or allegation that defendant's negligence caused accident]; *Pineda v City of New York*, 305 AD2d 294 [1st Dept 2003] [police report did not indicate any causal connection between plaintiff's injuries and any negligent acts by defendant]). Petitioner also offers no basis upon which it may be inferred that City undertook repairs to the grates after her accident.

Although petitioner's accident occurred on August 12, 2011, she waited until receipt of the insurer's letter in November 2011 before determining that City may be responsible for the sidewalk grates, and she does not explain why she could not have ascertained it earlier on her own. Thus, petitioner's effort to investigate the identity of the entity that may own the grates cannot be deemed reasonable. (*See Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009] [petitioner did not set forth reasonable excuse for delay as failure to ascertain owner of property was 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 properly research boat's ownership]; *Jenkins v New York City Hous. Auth.*, 29 AD3d 319 [1st Dept 2006] [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 was easily ascertainable, delay not excused]; *Seif v City of New York*, 218 AD2d 595 [1st Dept 1995] [no acceptable excuse shown as petitioner failed to properly research which entity owned property]).

Moreover, despite learning in November 2011 that City may be liable, petitioner did not move for leave to serve a late notice of claim for another two months, approximately five months

after the accident, and as the alleged cause of the accident was a sidewalk defect, she has failed to demonstrate that City was not prejudiced by the delay, especially as she asserts that repairs were made to the grates shortly after her accident. (*See Khalid v City of New York*, 91 AD3d 779 [2d Dept 2012] [petitioner failed to establish City not prejudiced by delay given transitory nature of curb defect and changed condition of accident site]; *Gitis v City of New York*, 68 AD3d 489 [1st Dept 2009], *lv denied* 14 NY3d 712 [2010] [court should not have granted application made three months after expiration of 90-day deadline, and photographs revealed that repairs had since been made to sidewalk and thus City did not have opportunity to inspect sidewalk in original condition]).

Accordingly, it is

ADJUDGED and ORDERED, that petitioner's application for leave to serve a late notice of claim is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 22, 2012
New York, New York

MAR 22 2012