STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOSEPHINE REINEMANN AND
ADAM REINEMANN,

Petitioners,

For an Order pursuant to General Municipal Law Section 50-e(5) granting leave of Court to serve a late Notice of Claim,

DECISION and ORDER
INDEX NO. 2202-12
RJI NO. 01-12-106692

-against-

VILLAGE OF ALTAMONT AND
THE VILLAGE OF ALTAMONT
FIRE DEPARTMENT,

Respondents.

Supreme Court Albany County All Purpose Term, May 25, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Petitioners commenced this proceeding pursuant to General Municipal Law §50-e[5], seeking leave to serve a late notice of claim. Respondents oppose the petition. Because Petitioners failed to demonstrate their entitlement to an extension, the petition is denied.

General Municipal Law §50-e[5] provides this Court with the discretionary authority to extend Petitioners' time to serve a notice of claim upon weighing the "actual knowledge of the respondents, reasonable excuse of the petitioners, and prejudice to the respondents caused by the delay." (Matter of Franco v Town of Cairo, 87 AD3d 799, 800 [3d Dept 2011]). "No single factor is dispositive." (Schwindt v County of Essex, 60 AD3d 1248, 1249 [3d Dept 2009]).

First, Petitioners failed to show that Respondents acquired "actual knowledge" within the statutory time period or a reasonable time thereafter. Actual knowledge requires notice of the injury not just the underlying facts (Lemma v Off Track Betting, 272 AD2d 669 [3d Dept 2000]), and may only be imputed if a municipality's employees ascertain "more than a merely generalized awareness of an accident and injuries from their presence at an accident site." (Matter of Franco v Town of Cairo, *supra*, at 800; *see also* Kirtley v Albany County Airport Auth., 67 AD3d 1317 [3d Dept 2009]; Matter of Curiel v Town of Thurman, 289 AD2d 737 [3d Dept 2001]). Moreover, the known facts must "provide reasonable notice that an actionable wrong had been committed by the [Respondent]." (Matter of Padovano v Massepequa Union Free School Dist., 31 AD3d 563, 564 [3d Dept 2006]).

Petitioners' claim arises from a Village of Altamont Fire Department (hereinafter "AFD") fireman allegedly restarting the flow of heating oil to the Petitioners' defective furnace, which allowed 200 gallons of heating oil to leak into their basement. The leak was not immediately apparent to either party, however, and was not discovered for another five days. At the time, the AFD made no report at all. Nor, upon discovering the leak, did Petitioners inform the AFD. Thus, Respondents gained no actual or imputed knowledge of Petitioners' injury at the time of their alleged involvement.

Thereafter, the AFD was not notified of the spill for nearly three months, when the New York State Department of Environmental Conservation (hereinafter "DEC") informed them by telephone. Such notification, however, was still deficient because it merely informed the AFD that a spill occurred, not that they were the alleged cause of the spill. Because Petitioners offered no proof that Respondents received notice of their alleged responsibility for the spill until five months after it occurred, upon service of this petition, they "failed to show that [Respondents] had actual knowledge of the essential facts constituting the claim." (Kirtley v Albany County Airport Auth., *supra*, 1318-19[internal quotation marks omitted]; *see also* Matter of Peterson v Susquehanna Val. Cent. School Dist., 57 AD3d 1332 [3d Dept 2008]; Matter of Roberts v County of Rensselaer, 16 AD3d 829 [3d Dept 2005][affirming the denial of a request to serve a notice of claim eight days late]).

Turning next to the prejudice element, Petitioners demonstrated that Respondents suffered only minimal prejudice. Here, Respondents received notice of Petitioners' claim only two months late and "the transitory nature of [this] accident scene, standing alone, does not prevent physical inspection or demonstrate substantial prejudice." (Matter of Schwindt v County of Essex, 60 AD3d 1248, 1250 [3d Dept 2009]). However, "where a petitioner fails to show that the respondent acquired knowledge of the claim within a reasonable time, it is an improvident exercise of discretion to grant the application.... and this is so even in the absence of substantial prejudice." (Heffelfinger v Albany Intern. Airport 43 AD3d 537, 538 [3d Dept 2007][internal citations omitted]; *see also* Matter of Roberts v County of Rensselaer, *supra*; Matter of Cuda v Rotterdam-Mohonasen Cent. School Dist., 285 AD2d 806 [3d Dept 2001]).

Lastly, Petitioners failed to proffer a reasonable excuse for their delay. While it is

uncontested that Petitioners were sickened by the leak, "nothing contained in [their] affidavit or attached medical documentation reveals a physical incapacitation so great so as to have precluded [them] from contacting an attorney sooner." (Smith v Ostelic Valley Central School Dist., 302 AD2d 665, 666 n [3d Dist 2003]). In fact, Petitioners admittedly attempted to contact numerous attorneys within the ninety day period after the spill. Moreover, contrary to Petitioners' claim that the contractors' failures excuse their delay, the nature and extent of the injury allegedly caused by Respondents was immediately apparent.

Because Petitioners established neither Respondents' "actual knowledge" nor their own "reasonable excuse," notwithstanding Respondent's minimal prejudice Petitioners failed to demonstrate their entitlement to an extension of time to serve their notice of claim. (Matter of Conger v Ogdensburg City School Dist., 87 AD3d 1253 [3d Dept 2011]; Matter of Roberts v County of Rensselaer, *supra*.)

Accordingly, the petition is dismissed.

This Decision and Order is being returned to the attorneys for Respondents Village of Altamont and Village of Altamont Fire Department. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 25, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, undated, Petition, dated April 18, 2012, Affidavit of Josephine Reinemann, dated April 16, 2012, Affidavit of Adam Reinemann, dated April 16, 2012, Notice of Claim, dated April 16, 2012
2. Affidavit of Robert D. White, dated May 15, 2012, Affidavit of James M. Gaughan, dated May 14, 2012.
3. Affidavit of Josephine Reinemann, dated May 23, 2012, with attached Exhibits A-D.