Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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In the Matter of the Application of
Juana Rivera,

Petitioner,

- against -

The City of New York,

Respondents.

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Index Number: 20919/12

Motion Date: 12/5/12

Motion Cal. Number: 98

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this petition for leave to file a late notice of claim.

	Papers Numbered
Order to Show Cause-Petition-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply-Exhibits.....	7-9

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

Application by petitioner for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), is denied.

Petitioner allegedly sustained injuries as a result of being struck by a motor vehicle at the intersection of 35th Avenue and 82nd Street in Queens County at 7:40 a.m. on Wednesday, October 19, 2011. Petitioner avers in her affidavit in support of the petition that she was walking to St. Joan of Arc Church and St. Joan of Arc Elementary School on 35th Avenue between 82nd and 83rd Streets and that as she was crossing 82nd street, she was struck by a motor vehicle that turned onto 82nd Street from 35th Avenue. She avers that at the time of the accident, the intersection was controlled by a crossing guard because school was starting for the day. She also avers that the crossing guard motioned for her to cross and that in reliance thereon, she began to cross, and that the crossing guard failed to act to prevent the vehicle from turning and striking her.

In her proposed notice of claim, petitioner refers to and annexes a copy of the police accident report, wherein she stated to the responding officer that she began crossing within the crosswalk with the walk signal and that when she saw the vehicle turn she attempted to run to avoid it but was struck. The report also notes

the name, address and telephone number of the school crossing guard.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim 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 October 19, 2011, she had until January 17, 2012 to file a notice of claim. No notice of claim was filed. The instant petition for leave to file a late notice of claim was served on December 4, 2012, over 10½ months after the expiration of 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, foremost of which are 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 Scolo v. Central Islip Union Free School Dist., 40 AD 3d 1104 [2nd Dept 2007]; 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 cognizable excuse for her failure to serve the City within the statutory period, failed to demonstrate that the City acquired actual knowledge of the facts underlying the claim within 90 days of the incident or a reasonable time thereafter and failed to show that a late notice of claim would not substantially prejudice the City.

The only excuse proffered by petitioner for her failure to serve a notice of claim on her behalf, namely, that she assumed that the crossing guard was privately employed by the schools and did not learn that the guard was an employee of the City until she retained her attorney in September 2012, is not a reasonable excuse. A lack of awareness of the possibility of a lawsuit or ignorance of the law regarding the necessity of filing a timely notice of claim do not constitute reasonable excuses (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept

2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]).

Although the lack of a reasonable excuse for the delay is not, in and of itself, fatal to an application for leave to file a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]), no such additional factors are present in this case.

Petitioner has also failed to demonstrate that the City acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. The Appellate Division, Second Department has emphasized that in determining whether to grant leave to file a late notice of claim, the acquisition by the municipality of actual knowledge of the facts constituting the claim is a factor that must be given particular consideration (see Hebbard v. Carpenter, 37 AD 3d 538 [2nd Dept 2007]).

Counsel for petitioners contends that respondents acquired actual knowledge of the essential facts by virtue of the police accident report, by virtue of the fact that the crossing guard witnessed the accident and by virtue of the fact that she was transported by ambulance to a City hospital.

"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]; Vicari III v. Grand Avenue Middle School, 2008 NY Slip Op 05938, supra). There is nothing in the accident report that apprises the City of any negligence on the part of the crossing guard in the happening of the accident. Likewise, that an accident victim was transported to a City hospital serves as no indication that the accident resulted from the City's negligence.

Moreover, that the crossing guard witnessed the accident does not impart any knowledge to the City that the crossing guard was in any way negligent so as to alert the City to the possibility of a claim against it.

The municipality does not acquire actual knowledge of the facts underlying the claim merely because its employees were at the scene of the accident and may have had general knowledge that a wrong had been committed (see Morrison v. NYC Health and Hospitals Corp., 244 AD 2d 487 [2nd Dept 1997]).

The Court notes that actual knowledge may be imputed to the City where the Police Department participated in the acts giving rise to the petitioner's claim, but only if other factors are present, such as the timely filing of reports, the conduction of investigations and where there was a reasonable excuse for the delay and lack of prejudice (see McKenna v, City of New York, 154 AD 2d 655 [2nd Dept 1989]; Black v City of New York, 2008 NY Slip Op 52118[U][Supreme Ct, Kings County]). If actual knowledge of the facts underlying the claim could be imputed to the municipality in every case where negligence is claimed against a City employee, the notice of claim requirement would be entirely eviscerated. Indeed, in the cases cited by petitioner's counsel, other reports were filed or investigations conducted within the 90-day period so as to impart the City with actual knowledge.

Here, no investigations conducted within the statutory period or a reasonable time thereafter indicating any negligent or wrongful acts by the crossing guard are proffered to establish any actual knowledge on the part of the City (see e.g. 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]). And as heretofore mentioned, the police accident report upon which petitioner relies does not indicate any negligence on the part of the crossing guard. Indeed, the report indicates that the accident was caused by the driver of the vehicle that struck petitioner, and that petitioner was crossing the street within the crosswalk with the walk signal in her favor. The report mentions the crossing guard only to the extent that she is reported as indicating that she saw the white walk sign.

Therefore, petitioner has failed to establish that the City acquired actual knowledge of the essential facts constituting the claim, which are those facts supporting petitioner's theory of liability.

In view of the foregoing, the Court does not reach the statutory factor of prejudice where petitioner has failed to demonstrate either that there was a reasonable excuse for her 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 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]). Even were the Court to consider this factor, the claimant seeking leave to file a late notice of claim has the burden of establishing that the municipality would not suffer prejudice if a late notice of claim were allowed (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138, supra). Since

petitioner's contention that the City would not suffer any prejudice is based upon her unmeritorious argument that the City acquired timely actual knowledge of the facts underlying the claim, she has failed to meet her burden in this regard.

Finally, since petitioner's claim is patently without merit, there would be no purpose in granting leave to serve a late notice of claim.

Although the courts should not ordinarily delve into the merits in determining an application for leave to serve a late notice of claim, the Court may deny leave to serve a late notice of claim where the claim is patently meritless and it would make no sense to grant leave to serve a notice of claim under such circumstances (see Besedina v New York City Transit Authority, 47 AD 3d 924 [2nd Dept 2008]; Katz v. Town of Bedford, 192 AD 2d 707 [2nd Dept 1993]). Therefore, even had petitioner demonstrated a reasonable excuse for the delay in filing a late notice of claim, and even if the City acquired timely actual notice of the underlying facts of the claim, and even if petitioner demonstrated that there would be no prejudice, it would still be an improvident exercise of the Court's discretion to allow the filing of a late notice of claim against the City, since such claim is without merit as a matter of law.

In order to impose liability on the City acting in its governmental capacity, it is necessary to demonstrate that a special relationship existed between plaintiff and the City (Cuffy v City of New York, 69 NY2d 255 [1987]). However, discretionary acts of a governmental entity may never form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). The complained of actions of the crossing guard in waving petitioner to cross and her alleged failure to prevent the vehicle from turning the corner and striking petitioner clearly constituted discretionary acts for which the City cannot be held liable, and therefore, the concept of special duty does not apply (see id.; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.).

The Court notes that prior to McLean, courts were guided by such cases as Pelaez v Seide (2 NY 23 186 [2004]) and Kovit v Estate of Hallums (4 NY 3d 499 [2005]) which, it was generally thought, articulated the rule that a special relationship between the plaintiff and the municipality or municipal entity was an exception to governmental immunity from liability for the negligent performance of a discretionary act. However, the Court of Appeals, in McLean, for the first time held explicitly that the special duty exception to a municipal entity's immunity for negligence in the performance of a governmental function applies only to ministerial

acts, as opposed to discretionary acts. "[D]iscretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is involved" (12 NY 3d at 202). The Court of Appeals further stated that "any contrary inference that may be drawn from the quoted language in Pelaez and Kovit is wrong" (id. at 203).

In any event, even if, arguendo, the acts of the crossing guard were ministerial in nature, which they are not, plaintiff would have had to demonstrate the existence of all of the following four elements: [1] an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party injured; [2] knowledge on the part of the municipality's agents that inaction could lead to harm; [3] direct contact between the municipality's agents and the injured party; and [4] the injured party's justifiable reliance on the municipality's affirmative undertaking (Cuffy v City of New York, supra). Petitioner has failed to demonstrate or allege that all of these four requirements have been satisfied in this matter.

Petitioner has failed to show that there was any justifiable reliance by her upon the crossing guard's gesture for her to cross since she concedes that she commenced crossing the street, within a crosswalk, with the pedestrian crossing signal in her favor. Petitioner has failed to proffer any facts or allegations to indicate any possibility that she would have been in any different a position had the crossing guard not gestured for her to cross or that she would not have crossed but for the crossing guard's gesture. Since this is not a scenario where the crossing guard instructed her to cross against the light, thereby placing her in danger, but where petitioner began crossing when the light was in her favor, no justifiable reliance is established merely because of the crossing guard's entirely superfluous and gratuitous gesture for her to cross. Moreover, there has been no showing or allegation of any knowledge on the part of the crossing guard that inaction could lead to harm, since it is undisputed that the accident occurred when a vehicle, while petitioner was already crossing with the walk signal in her favor, turned the corner and struck her. In addition, under the facts presented, there has been no showing that the City assumed an affirmative duty to act on petitioner's behalf.

Accordingly, the application is denied and the petition is dismissed. The City may enter judgment accordingly.

Dated: December 14, 2012

KEVIN J. KERRIGAN, J.S.C.