Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

----------X

Jose Hernandez an infant under the age of 8 years by his parent and natural guardian, Madeline Maldonado, and Madeline Maldonado, individually,

Plaintiff,

- against -

The City of New York, New York City Fire Department, New York City Department of Transportation, New York City Department of Public Works, New York City Department of Environmental Protection and New York City Police Department,

Defendants.

----------X

Index Number: 7735/13

Motion Date: 9/13/13

Motion Cal. Number: 72

Motion Seq. No.: 4

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

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

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

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

Infant petitioner allegedly sustained injuries as a result of being struck by a motor vehicle on Britton Avenue near the intersection of Forley Street in Queens County on June 28, 2012. Infant plaintiff was playing near an open fire hydrant that was spraying water. The police officer's note on the police accident report Form MV-104AN states that the driver told him that her view was obstructed by water from the open fire hydrant spaying into the middle of the street.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity 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 June 28, 2012, the deadline for serving a notice of claim was September 26, 2012.

Plaintiffs' counsel initially filed an order to show cause for leave to serve a late notice of claim on April 22, 2013, almost seven months past the 90-day deadline. This Court declined to sign that order to show cause because, as petitioners' counsel informs, it did not contain an ordering paragraph directing the manner of service upon defendants. A second order to show cause was filed on May 13, 2013, which was signed by this Court, setting a return date of May 28, 2013. On said return date, the matter was marked off-calendar in the Centralized Motion Part for failure of petitioner to appear. Counsel explains that he mis-calendared the return date for May 29, 2013 and, therefore, failed to appear for the calling of the calendar on May 28, 2013. Counsel thereupon filed the instant, third, order to show cause on May 29, 2013, which was signed by this Court, setting a return date of July 11, 2013. At the calling of the calendar on said return date in the Centralized Motion Part, the matter was adjourned to August 15, 2013 for the City to submit opposition, and on said date, was adjourned to September 13, 2013 for petitioners to submit a reply. The petition was marked fully submitted on September 13, 2013.

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, including, inter alia, 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 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]).

The statute also directs the Court to consider all other relevant factors, including, inter alia, whether the claimant was

an infant, which, although listed separately, is related to the inquiry as to whether claimant had a reasonable excuse (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]).

Petitioner Madeline Maldonado has failed to offer a cognizable excuse for her failure to serve the City on behalf of her child, infant petitioner Jose Hernandez, and on her own behalf on her individual claim within the statutory period, failed to demonstrate that infant petitioner's infancy was in any way related to the failure to serve a notice of claim, 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.

Petitioners' counsel's only excuse for failing to serve a timely notice of claim and then waiting almost seven months past the 90-day deadline to seek leave to serve a late notice of claim is that a notice of claim was timely mailed to the City on July 16, 2012, as well as FOIL requests, but that it was "recently" discovered that it was not mailed by certified mail, return receipt requested "as required by the CPLR".

In the first instance, there is no requirement in the CPLR for mailing notices of claim, by certified mail, return receipt requested or otherwise. Such requirement is contained in General Municipal Law §50-e(3)(a) and (b).

Moreover, counsel fails to submit any proof that a notice of claim was mailed to or received by the Office of the Comptroller of the City of New York and fails to state the date when he purportedly "discovered" that the notice of claim was not mailed properly. The City, in its opposition, submits the results of a search of the data input system of the Comptroller's Office dated May 21, 2013, wherein it informs that research conducted by the Comptroller and the NYC Law Department regarding a notice of claim allegedly served on July 16, 2012 reveals that no notice of claim was found.

Annexed to the petition is an affidavit of one Melissa Leuthner, who avers that she is administrative assistant of petitioners' counsel's office, that she sent a notice of claim and FOIL requests to the New York City Law Department on July 16, 2012 inadvertently by regular mail instead of certified mail, return receipt. Also annexed to the petition is a copy of the notice of claim signed by petitioner's counsel, James Mattone, and dated July 16, 2012.

The Court makes the following observations concerning this purported notice of claim: First, there is no date stamp on it from the Comptroller's Office indicating receipt thereof. Second, contrary to Melissa Leuthner's averment in her affidavit that she mailed this notice of claim to the New York City Law Department, the notice of claim is addressed to the Comptroller of the City of New York. The Court notes in this regard that Leuthner does not set forth the address to which she purportedly mailed the notice of claim. Third, the notice of claim is dated July 16, 2012, yet petitioner Madeline Maldonado signed it on July 2, 2012, and Mr. Mattone notarized her signature, averring that she read and signed the notice of claim on the 2nd day of July, 2012, two weeks before it was purportedly prepared and signed by Mr. Mattone. Fourth, the last paragraph, paragraph 4, of the notice of claim ends halfway down the second page, and the bottom half of the page is blank, but the dates and signatures are on a separate piece of paper, and none of the pages is numbered and no continuation is noted on the bottom of any page.

Therefore, this purported notice of claim, on its face, appears to be false.

Even if, arguendo, petitioners' counsel had mailed a notice of claim by regular mail instead of by certified mail, return receipt requested, and even if he did only "recently" discover such error, and, therefore, his excuse were one of law office failure, law office failure does not constitute a reasonable excuse for a failure to serve a timely notice of claim (see Belenky v. Nassau Community College, 4 AD 3d 422 [2nd Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2nd Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2nd Dept 2000]).

Counsel also contends that plaintiff's infancy "weighs in his favor" and that the delay of six months is reasonable. Counsel's arguments in this regard are without merit. "[P]etitioner's infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse" (Vicari III v. Grand Avenue Middle School, 52 AD 3d 838, 839 [2nd Dept 2008]). Here, there was no relationship between petitioner's infancy and the failure to file a timely notice of claim, which, counsel contends was the result purely of law office failure. Moreover, this Court does not consider the delay of almost seven months (not six as counsel represents) as reasonable.

Petitioner has also failed to demonstrate that the City acquired actual knowledge of the essential facts constituting the claim within the statutory period or a reasonable time thereafter by virtue of the police accident report prepared by the officer who

responded to the scene of the accident. A police accident report, in and of itself, does not constitute actual notice to the municipality of the essential facts constituting the claim (see State Farm Mut. Auto. Ins. Co. v New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]; Dominguez v Continental Ins. Co. v City of Rye, 257 AD 2d 573 [2nd Dept 1999])). The filing of a police accident report may be considered as comprising part of the information constituting actual notice to the municipality where the report connects the accident to negligence on the part of the municipal agency and where there was further investigation conducted by the City (see Hardayal v City of New York, 281 AD 2d 593 [2nd Dept 2001]; Caselli v. City of New York, supra). The accident report herein does not indicate any negligence on the part of the City. Moreover, even if it did, there is no indication that there was any investigation conducted by the City. Moreover, even if, arguendo, the accident report were sufficient to connect the accident to negligence on the part of the City, the accident report would still not be sufficient to impart actual notice to the City where there was no evidence that it was "ever filed with or otherwise brought to the attention of the officer of the City designated by law to accept service of a notice of claim" (Caselli v. City of New York, 105 AD 2d 251, 255 [2nd Dept 1984]).

A notice of claim involving a City agency must be served upon the Corporation Counsel of the City of New York or the New York City Comptroller (see Knox v. NYC Bureau of Franchises, 48 AD 3d 756 [2nd Dept 2008]). Service upon a City agency is ineffective to satisfy the notice of claim requirement (see id.). The accident report that was prepared by the police officer who responded to the accident was a Department of Motor Vehicles MV-104AN Police Accident Report (NYC) form. Pursuant to §603 of the Vehicle and Traffic Law, the police must file the accident report with the Commissioner of Motor Vehicles. Pursuant to the Police Accident Report Manual published by the New York State Department of Motor Vehicles, the New York City Police Department is to send accident reports to the DMV's Accident Records Bureau in Albany. No evidence has been proffered to show that the report was filed or brought to the attention of the Corporation Counsel or the Comptroller (see Caselli v. City of New York, supra).

Therefore, the filing of an accident report with the DMV did not impart knowledge of the claim to the City so as to enable the City to conduct a proper investigation, unless additional investigations were conducted and/or reports filed that could be viewed as having put the City on reasonable notice of the facts underlying the claim. The notice of claim requirement would be rendered academic if the mere filing of a routine police accident report with the DMV were alone sufficient to excuse the claimant

from serving a timely notice of claim in all motor vehicle accident cases involving City property. Petitioner has failed to proffer any evidence that the City conducted any other investigation of the accident or that any other reports were filed so as to apprise it of the facts underlying the claim.

Although petitioner also alleges that the City would not be prejudiced by late service of a notice of claim, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant motion where petitioner has failed to demonstrate either that there was a reasonable excuse for its failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the statutory 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]).

In any event, petitioner has failed to show that the City would not suffer prejudice by the delay. It is the burden of the claimant seeking leave to serve a late notice of claim to show lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008). Petitioner's only basis for her contention that the City would not suffer prejudice is the unmeritorious argument that the police accident report imparted actual knowledge of the facts underlying the claim.

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for leave to serve a late notice of claim without an adequate excuse by counsel for the delay, and absent the receipt by the City of timely actual knowledge of the facts constituting petitioner's claim (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

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

Dated: October 18, 2013

KEVIN J. KERRIGAN, J.S.C.