SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN **PART 21**
Justice

Index Number : 150389/2011
LEE, MARIA
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 150389/11
MOTION DATE 1/18/13
MOTION SEQ. NO. 001

The following papers, numbered 14-17, 19-37, 39-42, 44, and memo of law and supplemental memo of law were read on this motion to dismiss and cross motion for leave to serve a late notice of claim

Notice of Motion; Affirmation; Exhibits A; B	No(s).	14- 17
Notice of Cross Motion; Affirmation in Opposition and in Support; Exhibits 1-17—Affirmation of Service	No(s).	19-37
Reply Affirmation; Exhibits A; B; C	No(s).	39-42
Affirmation in further Opposition and in further Support	No(s).	44

Upon the foregoing papers, the motion and cross motion are decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/21/13
New York, New York

_____, J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

MARIA LEE,

Plaintiff,

Index No. 150389/2011

- against -

METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

At issue is whether public authorities are entitled to dismissal of an action against them due to the plaintiff's failure to serve notices of claim upon them required by law, when the public authorities erroneously admitted in their answer that documents purporting to be notices of claim were timely received.

BACKGROUND

Plaintiff Maria Lee alleges that she suffered injuries while boarding a M14D bus on November 20, 2010. According to plaintiff, the bus driver retracted the bus lift for disabled passengers while plaintiff was in the process of boarding the bus, causing her to fall back onto the sidewalk.

By a letter dated December 2, 2010 addressed to defendant New York City Transit Authority (NYCTA), plaintiff's attorney wrote,

"Re: No Fault Application of Maria Louisa Lee
Date of Accident: 11-20-2010

To Whom It May Concern:

Please be advised that I represent Maria Louisa Lee in connection with an accident on a New York City Transit Authority ("NYCTA") bus traveling from 11th Street and Avenue C towards 14th Street and 1st Avenue, New York, New York. Enclosed please find the No Fault Application of Maria Louisa Lee. Ms. Lee was injured on a. [*sic*] Kindly assign a claim number for the enclosed application as Ms. Lee has suffered injuries and requires medical care to be covered by No Fault."

(Redmond Affirm., Ex 4.) A Form NF-2 was apparently enclosed with the letter. (*Id.*)

By a letter dated December 22, 2010 addressed to the NYCTA, plaintiff's attorney again wrote:

"To Whom It May Concern:

My office represents Maria Louisa Lee in connection with an accident that occurred on a New York City Transit Authority bus traveling from 11th Street and Avenue C towards 14th Street and 1st Avenue on November 20, 2010. My office submitted a No Fault Application for the foregoing accident via certified mail on December 2, 2010, but I have yet to receive a response. I kindly request that a claim number be assigned and passed on to my office as soon as possible as Ms. Lee has suffered injuries and requires medical care to be covered by No Fault. Please contact me . . . with the requested claim number."

(Redmond Affirm., Ex 7.)

By a letter dated December 30, 2010 addressed to plaintiff's attorney, the NYCTA's No Fault Unit wrote, "We have received your application for No-Fault

Benefits but are unable to consider payment of your claim at this time for the reason(s) stated below: ○ Claim will be delayed pending further investigation." (Redmond Affirm., Ex 8.) Later, in a letter dated January 14, 2011 addressed to plaintiff, Utopia Claim Concepts, Inc. wrote, "An Independent medical evaluation has been scheduled for you at the request of the New York City Transit Authority in reference to the above-captioned No-Fault claim." (Redmond Affirm., Ex 6.)

On February 15, 2011, plaintiff's attorney allegedly sent, via certified mail, a "Personal Injury Claim Form" to the New York City Comptroller. (Redmond Affirm., Ex 1.) Plaintiff does not allege that a similar "Personal Injury Claim Form" was sent to either the NYCTA or defendant Metropolitan Transportation Authority (MTA).

By a letter dated February 18, 2011 (90 days after the alleged incident), the NYCTA's No-Fault Unit again purportedly informed plaintiff's attorney, "NO-FAULT BENEFITS DELAYED PREVIOUSLY PENDING RECEIPT OF VERIFICATION OF FACTS AND VERIFICATION OF VEHICLE IN HOUSEHOLD RIDER Please Refer to previously delay letter dated 12/30/2010." (Redmond Affirm., Ex 9.)

On October 3, 2011, plaintiff commenced this e-filed action. Paragraphs 4 and 7 of the verified complaint identically allege, "That within ninety (90) days after the claim herein sued upon arose, plaintiff (then claimant) caused a Notice of Claim, in

writing, sworn to by or on behalf of plaintiff, to be served" upon the MTA and NYCTA,

> "which said Notice of Claim set forth the name and post office address of plaintiff, the name of her attorneys, the nature of the claim, the time when, the place where and the manner in which the claim arose and the items of damages or injuries claimed to have been sustained so far as then practicable."

(Blythe Affirm., Ex A; Redmond Affirm., Ex 2.) In paragraph 2 of their undated verified answer, defendants stated,

> "Denies, upon information and belief, each and every allegation contained in paragraph(s) of the verified complaint number 4, 5, 7 and 8, *except admit(s) that a certain paper purporting to be a notice of claim was received by the office of the defendant(s), METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY; within ninety days of the alleged occurrence herein and that more than 30 days elapsed since receipt thereof and said matter remains unadjusted and unpaid.*"

(Blythe Affirm., Ex B; Redmond Affirm., Ex 3 [emphasis added].)

Nearly two years after the alleged subject incident, defendants move to dismiss the action on the ground that no notice of claim was served upon them. Plaintiff opposes their motion and cross-moves for leave to serve late notices of claim upon defendants. Plaintiff's cross motion was apparently made more than two years after the alleged incident.

DISCUSSION

Defendants argue that the action should be dismissed because plaintiff did not serve timely notices of claim upon them, as required under Public Authorities Law §§ 1212 and 1276. In opposition, plaintiff contends that defendants are estopped from asserting that ground because they admitted in their answer that they received timely notices of claim. Alternatively, plaintiff argues that the No-Fault Form NF2 and accompanying correspondence sent to the NYCTA on December 2, 2010, which the NYCTA received on December 8, 2010, comply with notice of claim requirements. (Opp. Mem. at 7.) In reply, defendants request leave to amend their answer to deny that they received notices of claim from plaintiff. (Blythe Reply Mem. ¶ 19.)

Plaintiff also cross-moves for leave to serve late notices of claim upon defendants. Defendants argue that leave should be denied because the statute of limitations has run.

The Court granted the parties leave to submit supplemental memoranda of law providing case law as to whether an answer admitting to service of a notice of claim can be amended to deny such service after the expiration of the limitations period.

I.

If plaintiff's cross motion for leave to serve late notices of claim were granted,

then defendants' motion to dismiss the action due to a lack of a notice of claim would be rendered academic. Therefore, the Court addresses plaintiff's cross motion first. However, plaintiff's cross motion begs the question of whether such leave is necessary. That is, whether the No-Fault form and accompanying correspondence sent from plaintiff's attorney "was substantively and fatally deficient" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 67 [1st Dept 2007]) is a threshold issue this Court must consider.

A.

Public Authorities Law §§ 1212 (2) and 1276 (2), which are applicable to this action, require service of a notice of claim upon The NYCTA and MTA, respectively, within the time limited by, and in compliance with "all of the requirements of section [50-e] of the general municipal law."

> "General Municipal Law § 50–e (2) requires written notice, 'sworn to by or on behalf of the claimant,' which sets forth 'the name and post-office address of each claimant, and of his attorney, if any,' 'the nature of the claim,' 'the time when, the place where and the manner in which the claim arose' and 'the items of damage or injuries claimed to have been sustained so far as then practicable.' As we have explained,
>
> > '[t]he test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate .... Thus, in determining compliance with the requirements of General Municipal Law § 50–e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand

> the nature of the [claim]' (*Brown v. City of New York*, 95 N.Y.2d 389, 393, 718 N.Y.S.2d 4, 740 N.E.2d 1078 [2000] [internal quotation marks and citations omitted]).
>
> Put another way, the 'plain purpose' of statutes requiring pre-litigation notice to municipalities 'is to guard them against imposition by requiring notice of the circumstances ... upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation' [citation omitted]."

(*Rosenbaum v City of New York*, 8 NY3d 1, 10-11 [2006].) "[K]nowledge of the facts underlying an occurrence does not constitute knowledge of the claim. 'What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of 'claim'.'" (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990] [citation omitted].)

The statutory requirement for service of a notice of claim "is a condition precedent to the commencement of the action in the same way as is the service of a summons." (*Barchet v New York City Tr. Auth.*, 20 NY2d 1, 6 [1967]; *see e.g. Bennett v New York City Tr. Auth.*, 4 AD3d 265 [1st Dept 2004].) Defendants are not required to raise the late service or lack of service of a notice of claim as an affirmative defense. (*Singleton v City of New York*, 55 AD3d 447 [1st Dept 2008]; *Reaves v City of New York*, 177 AD2d 437 [1 Dept 1991].) In addition, the failure to serve a timely notice of claim may be raised at any time prior to trial. (*Wade v NYC*

Health & Hosps. Corp., 16 AD3d 677 [2d Dept 2005]; *Frank v City of New York*, 240 AD2d 198 [1st Dept 1997].)

Here, plaintiff argues that the No-Fault Form NF2 and accompanying correspondence that the NYCTA received on December 8, 2010 comply with notice of claim requirements. Alternatively, plaintiff argues that any defects in what defendants received were deemed waived by virtue of General Municipal Law §50-e (3) (c), because defendants demanded an independent medical exam of plaintiff, and because they failed to return what defendants had received within the time specified in General Municipal Law § 50-e (3) (c).

In *Richardson v New York City Transit Authority* (210 AD2d 38, 39 [1st Dept 1994]), the Appellate Division, First Department ruled, "the no fault application alone did not satisfy the notice requirements of the Public Authorities Law § 1212." The Appellate Division, Second Department, has also consistently held that a no-fault claim form served on the NYCTA is insufficient to satisfy the notice of claim requirements. (*See Astree v New York City Tr. Auth.*, 31 AD3d 589 [2d Dept 2006] [collecting cases].) The Appellate Division, Second Department reasoned,

> "Although a notice of claim need not be denominated as such in order to meet the requirements of those provisions, it must advise the public authority of the claimant's intent to commence a tort action against it. In this way, the purpose behind the service requirement, i.e., to afford the public authority or municipality 'an adequate opportunity to investigate

> the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available', may be achieved. In contrast, when one serves a no-fault claim form his or her purpose is to obtain expeditious compensation for injuries sustained through the prompt payment of benefits without regard to fault and without expense to the claimant. Thus, the regulations pertaining to no-fault coverage are written in such a way as to discourage investigation by the insurer. To hold that the serving of a no-fault claim form is sufficient to meet the notice requirements of General Municipal Law § 50–e and Public Authorities Law § 1212(2) would clearly defeat the purpose of those provisions, as well as the purpose behind the no-fault law."

(*Zydyk v New York City Transit Auth.*, 151 AD2d 745, 746 [2d Dept 1989][internal citations and quotation marks omitted].) As defendants indicate, the Appellate Division, First Department has also ruled, "the no fault application alone did not satisfy the notice requirements of the Public Authorities Law § 1212." (*Richardson v New York City Tr. Auth.*, 210 AD2d 38, 39 [1st Dept 1994].)

Yet, in certain cases originating with *Losada v Liberty Lines Transit* (155 AD2d 337 [1st Dept 1994]), the Appellate Division, First Department held that a "no-fault claim form completed by plaintiff and sent to defendant bus company, *together with correspondence from the attorney directed to defendant's claim department*, 'constituted in the aggregate a sufficient notice of claim [to the County] within the meaning of General Municipal Law 50–e.'" (*Miller v Liberty Lines*, 208 AD2d 454, 454 [1st Dept 1994] [emphasis added], citing *Losada*.) In contrast, the Appellate Division, Second Department has squarely rejected the contention that a

"no-fault application and various correspondence served upon the claims administrator for Liberty Lines constituted a sufficient notice of claim within the meaning of General Municipal Law § 50–e." (*Kossifos v Liberty Lines Tr.*, 277 AD2d 205, 205 [2d Dept 2000].)

Here, the correspondence from plaintiff's attorney served, in effect, as a cover letter to the NF2 form; it did not add any significant details about the subject incident that was not already on the NF2 form. Given that the Appellate Division, First Department ruled in *Richardson* that a no-fault application alone does not constitute a notice of claim, applying *Losada* to this case would conflict with *Richardson*. Therefore, the Court must examine *Losada* and its progeny closely to determine whether *Losada* and its progeny are applicable in this case.

In *Losada*, Liberty Lines Transit, Inc. operated a bus owned by the County of Westchester, and the plaintiff's counsel sent two letters dated December 1 and 15, 1986, and a no-fault claim to Liberty Lines Transit Inc., which was handled by its general counsel. Liberty Lines Transit's general counsel was also "regularly engaged in representing the county in actions arising out of accidents occurring on buses operated by Liberty Lines." (*Losada*, 155 AD2d at 337.) *Losada* itself does not set forth what was contained in the correspondence, but the letters were reproduced in the record on appeal to the Appellate Division. The letter dated December 1, 1986,

stated:

> "This office has been retained by the above [Coralia Losada] in connection with a claim for damages as a result of your negligence in the ownership, operation, maintenance and control of your motor vehicle (your bus) on November 14, 1986.
>
> Kindly refer this letter to your automobile liability insurance carrier as of the date of this accident to apprise them of our retention in this matter. We strongly suggest that you do so since your failure to notify your insurance carrier of this accident may result in their disclaimer of coverage and your personal responsibility for all damages sustained by our client.
>
> If we fail to hear from either you or your insurance carrier within ten (10) days from the date hereof, we will be constrained to take further action against you in the best interests of our client."

(Record on Appeal in *Losada v Liberty Lines Tr.,* 155 AD2d 337, at A51.) The letter dated December 15, 1986 stated, in relevant part, "Please find enclosed complete No-Fault Application relative to above. Kindly commence payment of medical bills." (*Id.* at A52.)

A common denominator in *Losada* and its progeny is that "Liberty Lines' general counsel is regularly engaged in representing Westchester County in actions arising out of accidents occurring on buses operated by Liberty Lines." (*Gallagher v Liberty Lines Tr.,* 211 AD2d 440, 441 [1st Dept 1995]; *Miller v Liberty Lines Tr.*, 208 AD2d 454 [1st Dept 1994]; *see Santiago v Liberty Lines Tr.*, 259 AD2d 362 [1st Dept 1999], *affg* 1998 WL 35400908 [Sup Ct, NY County 1998].) Another common

denominator is that, like the letters in *Losada*, the correspondence to Liberty Lines's general counsel stated that the claimant's injuries resulted from negligence, which would have alerted Westchester County to the likelihood of a tort action against it. In *Santiago*, the letter to Liberty Lines's General Counsel, which was reproduced in the record on appeal, stated, in relevant part,

> "Please be advised that I am the attorney for the above-named claimant, who was injured when she occupied Bus #20 Express of the Bee Line Bus Co. on April 16, 1996. The claimant sustained serious injuries as the result of the negligence of the driver."

(Record on Appeal in *Santiago v Liberty Lines Tr.*, 259 AD2d 362, at 55.)

Assuming, for purposes of argument, that *Losada* and its progeny are not limited to the cases against Liberty Lines Transit, Inc., the correspondence of plaintiff's attorney with the NYCTA is unlike the correspondence in *Losada*. The key difference is that the correspondence from plaintiff's attorney did not state that plaintiff's injuries resulted from negligence. The correspondence from plaintiff's attorney served, in effect, as a cover letter to the NF2 form; it did not add any significant details about the subject incident that was not already on the NF2 form. The Appellate Division, First Department ruled in *Richardson* that a no-fault application alone does not constitute a notice of claim. It therefore follows that correspondence that merely tracks or repeats information contained in a no-fault

application, coupled with the no-fault application, will not constitute a notice of claim. *Losada* and its progeny are inapposite, because the correspondence in *Losada* conveyed to the receiving government entity that something more than a no-fault claim was being asserted, that a tort claim was potentially in the offing.

Therefore, the Court rejects plaintiff's argument that the No-Fault NF2 Form and accompanying correspondence dated December 2, 2010, which the NYCTA received on December 8, 2010, complied with notice of claim requirements. In any event, the No-Fault NF2 form was sent only to the NYCTA, not to the MTA.

Plaintiff's reliance upon General Municipal Law § 50-e (3) (c)[1] is misplaced. "[S]ection 50–e (3)(c) was intended to cure improper methods of service, such as service by ordinary mail, not service on the wrong public entity." (*Scantlebury v New York City Health and Hosps. Corp.*, 4 NY3d 606, 611 [2005].) General Municipal Law § 50-e (3) (c) does not apply here because defendants are contending they were never served with notices of claim. They are not claiming that plaintiff failed to

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[1] General Municipal Law § 50-e (3) (c) provides,

> "If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received."

comply with notice of claim requirements due to a defect in the manner in which the notices of claim ought to have been served.

B.

Pursuant to General Municipal Law § 50-e (5), the Court has discretion to grant leave to serve a late notice of claim under certain statutorily permitted circumstances.

> "In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50–e(5), the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.'"

(*Plaza v New York Health & Hospitals Corp. [Jacobi Medical Center]*, 97 AD3d 466, 467 [1st Dept 2012] [internal citations omitted]; *Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005].) "Proof of actual knowledge, or lack thereof, 'is an important factor in determining whether the defendant is substantially prejudiced by such a delay.'" (*Plaza,* 97 AD3d at 471; *see e.g. Padilla v Department of Educ. of City of N.Y.,* 90 AD3d 458 [1st Dept 2011]["The most important factor that a court must consider in deciding such a motion is whether corporation counsel, . . . 'acquired actual knowledge of the essential facts constituting the claim within the time specified'"].)

The Court agrees with plaintiff that the NYCTA acquired knowledge of the essential facts of plaintiff's claim within the ninety-day period, because the no-fault application that the NYCTA received on December 8, 2010 contained such essential facts.[2] (*See Richardson*, 210 AD2d at 39.) The NYCTA's actual knowledge of the essential facts constituting plaintiff's claim may undermine defendants' contention of prejudice. (*Miranda v New York City Tr. Auth.*, 262 AD2d 199, 200 [1st Dept 1999].)

However, as defendants indicate, the statute of limitations has run.[3] Where the statute of limitations has run, the Court is without discretion to permit service of a late notice of claim. "To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50-e which expressly prohibits the court from doing so." (*Pierson v City of*

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[2] As *Richardson* indicates, it is not inconsistent that a no-fault application, in itself, falls short of constituting a notice of claim, and yet would provide the essential facts constituting the claim to warrant granting leave to serve a late notice of claim. A notice of claim is more than just knowledge of the essential facts. "[K]nowledge of the facts underlying an occurrence does not constitute knowledge of the claim. 'What satisfies the statute is not knowledge of the wrong. What the statute exacts is notice of 'claim'.'" (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990] [citation omitted].)

[3] Defendants state that the applicable statute of limitations is one year and ninety days. (Blythe Affirm. ¶ 10; Blythe Reply Affirm. ¶ 18), which plaintiff does not dispute.(Redmond Suppl. Affirm. ¶ 11.) While this is true as to the NYCTA (*see* Public Authorities Law § 1212 [2]), the statute of limitations for tort actions against the MTA (except an action for wrongful death) is one year. (Public Authorities Law § 1276 [2].)

New York, 56 NY2d 950, 954 -955 [1982].)

Therefore, plaintiff's cross motion for leave to serve late notices of claim upon defendants is denied.

II.

Turning to defendants' motion to dismiss, plaintiff maintains that defendants are estopped from seeking dismissal because they admitted in their answer that they received timely notices of claim. Estoppel, in the sense of plaintiff's use here, raises two issues: (1) whether the doctrine of equitable estoppel bars defendants from seeking dismissal on the ground that plaintiff failed to serve timely notices of claim; and (2) whether defendants' admissions bar them from asserting a factual position that is inconsistent with their admissions.

A.

As a general rule,

> "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties. Among other reasons, to permit estoppel against the government 'could easily result in large scale public fraud.' While we have not absolutely precluded the possibility of estoppel against a governmental agency, our decisions have made clear that it is foreclosed 'in all but the rarest cases.'"

(*Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990] [citations omitted].) Plaintiff relies upon an exception that the Court of

Appeals recognized in *Bender v New York City Health & Hospitals Corp.* (38 NY2d 662, 668 [1976]).

In *Bender*, which decided appeals in two separate cases, the plaintiffs served notices of claim upon the City of New York instead of the New York City Health and Hospitals Corporation. The Legislature had passed a statute that required a party sustaining injury allegedly attributable to municipal medical facilities to file a notice of claim with the New York City Health and Hospitals Corporation. In both cases, the Corporation Counsel, who appeared for the City of New York and the Health and Hospitals Corporation, conducted hearings and physical examinations of the plaintiffs without informing the plaintiffs that the notices of claim had been filed with the wrong agency. Both plaintiffs sought leave to file notices of claim on the Health and Hospitals Corporation, *nunc pro tunc*, claiming that they were misled by the manner in which their claims were handled and by the inequity caused by the new statutory scheme as it related to notice.

The Court of Appeals ruled that "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped from asserting a right or defense which it otherwise could have raised." (*Bender,* 38 NY2d at 668.) However, the Court of Appeals ruled that "the

records before us do not present facts sufficient to resolve the issue", and remitted the matters to Special Term. (*Id.* at 668-669.)

Several years later, the Court of Appeals discussed *Bender*:

> "In that case [*Bender*] we held that, subject to the development of additional evidentiary facts, the doctrine of equitable estoppel might be invoked to permit the filing of notices of claim *nunc pro tunc* under section 50-e of the General Municipal Law during a period of particular confusion incident to the transfer of operational control of municipal hospitals from the city to the Health and Hospitals Corporation. That holding, addressed to an unusual factual situation, is of very limited application and should not be read as diminishing the vitality of the general rule that the doctrine of estoppel is not applicable to agencies of the State acting in a governmental capacity."

(*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 94 n 1 [1981]; *Luka v New York City Tr. Auth.*, 100 AD2d 323, 325 [1st Dept 1984] ["It is to be invoked sparingly and only under exceptional circumstances"].)

Here, the Court is not persuaded that defendants' admissions constitute exceptional circumstances that warrant application of the doctrine of estoppel in this case. To be clear, plaintiff is not arguing that defendants' admissions prevented plaintiff from serving timely notices of claim upon defendants. Rather, plaintiff essentially contends that defendants' admissions lulled plaintiff into refraining from seeking leave of court for permission to serve a late notice of claim.

However, plaintiff was free to seek leave to serve late notices of claim upon

defendants even before the action was commenced, and even if defendants themselves had not brought to plaintiff's attention that notices of claim were not served. Plaintiff did not seek leave to serve a late notice of claim before the action was commenced, or after the action was commenced, until defendants brought this motion raising lack of service of a notice of claim. Plaintiff's attorney asserts that "there was no reason to investigate whether the Notice of Claim was received or properly filed." (Redmond Affirm. ¶ 28.) Yet, the "Personal Injury Claim Form" was clearly addressed to and sent to the Comptroller of the City of New York (Redmond Affirm., Ex 2), a local officer who has no legal relationship with either defendant. Thus, the Court is not persuaded that defendants' admissions either induced plaintiff to change her position to her detriment, or prevented plaintiff from asserting a right that she could have otherwise raised. Moreover, defendants did not admit that they received timely notices of claim; rather, they admitted to the fact that they received "a certain paper", and that "a certain paper" was received within 90 days after the alleged occurrence.

This is not a situation where defendants prevented plaintiff from discerning the actual circumstances, thereby preventing plaintiff from serving a notice of claim within 90 days of the alleged occurrence. (*See Reed v City of Syracuse*, 309 AD2d 1195 [4th Dept 2003] [defendants equitably estopped from asserting lack of a timely

notice of claim because the vehicle that allegedly collided with plaintiff's vehicle was registered to a fictitious individual, and the County did not acknowledge ownership until the statute of limitations expired].) Neither is this a situation where defendants lulled plaintiff into refraining from serving a timely notice of claim. (*Conquest Cleaning Corp. v New York City School Constr. Auth.*, 279 AD2d 546, 547 [2d Dept 2001].)

Plaintiff's reliance upon *King v City of New York* (90 AD2d 714 [1st Dept 1982]) is misplaced. In *King*, the plaintiff was struck in the face by a bullet fired by one of several police officers, who were pursuing an alleged criminal. The plaintiff's attorney served a notice of claim 91 days after the incident. The plaintiff attended a comptroller's hearing concerning the subject claim on December 18, 1979, and subsequently commenced an action. On September 3, 1980, the City of New York belatedly served an answer asserting, as a defense, that plaintiff failed to serve a timely notice of claim. The plaintiff rejected the answer and moved for a default judgment; the City of New York cross-moved to dismiss the action based on the late service of the notice of claim. In reply, the plaintiff requested the court to deem the notice to have been timely served. Special Term denied the plaintiff's request and dismissed the complaint.

In *King*, the Appellate Division, First Department ruled that the court erred in

denying plaintiff leave to serve a late notice of claim, notwithstanding the Court of Appeals's then recent decision in *Pierson v City of New York* (56 NY2d 950 [1982]). The Appellate Division, First Department ruled,

> "In *Pierson* (*supra*, p 954), the Court of Appeals determined that an application for an extension of time to file a notice of claim cannot be made 'more than one year and 90 days after the cause of action accrued, unless the statute has been tolled'. Although the plaintiff in the instant matter failed to make such an application, the actions of the city prior to moving to dismiss the complaint amount to a waiver of the right to assert the defense of the untimely service of the notice of claim. On the night of this incident at least two agents of the city knew the details of the accident. In addition, the service of the notice was a mere one day late and the city some nine months after the injury fully participated in a comptroller's hearing. At this hearing they knew, or should have known, that the notice was untimely. To actively participate in these preliminary proceedings, and to wait some 15 months after service to assert this defense, is certainly tantamount to a surrender of this right. Under these circumstances to permit the city to allege late service would perpetrate an injustice. *Pierson* (*supra*) provides the city with a shield, not a sword."

(*King*, 90 AD at 715-716.)

Plaintiff's reliance upon *King* is misplaced because the rationale given in *King* is now contrary to established appellate precedent. In *King*, the Appellate Division faulted the City of New York for belatedly asserting the "affirmative defense" of the plaintiff's timely failure to serve a notice of claim. However, service of a notice of claim "is a condition precedent to the commencement of the action in the same way as is the service of a summons." (*Barchet*, 20 NY2d at 6.) Consequently, a municipal

defendant or public authority is not required to raise the late service as an affirmative defense. (*Singleton*, 55 AD3d at 447; *Reaves*, 177 AD2d at 437.) The Appellate Division in *King* pointed out that the City waited 15 months after service of the notice of claim to assert the ground of late notice. However, the failure to serve a timely notice of claim may be raised at any time prior to trial. (*Wade*, 16 AD3d at 677; *Frank*, 240 AD2d at 198.) The Appellate Division in *King* reasoned that, "To actively participate in these preliminary proceedings, and to wait some 15 months after service to assert this defense, is certainly tantamount to a surrender of this right." However, it is now well established that conducting a General Municipal Law § 50–h hearing and participating in years of litigation will not preclude the City from first raising the untimeliness of the notice of claim, even if the action was well advanced. (*Frank*, 240 AD2d at 198; *see also Rodriguez v City of New York*, 169 AD2d 532, 533 [1st Dept 1991] [defendants' mere failure to apprise plaintiff of the untimeliness of the notice of claim does not constitute wrongful conduct such as to warrant a departure from the general rule that estoppel is not applicable to state agencies acting in a governmental capacity, or justify the finding of an estoppel].)

Finally, it is now well established that, under *Pierson*, "once the statute of limitations has expired, the court is without discretion to entertain an application for leave to file a late notice of claim." (*Matter of Goffredo v City of New York*, 33 AD3d

346, 347 [1st Dept 2006]; *see e.g. Bobko v City of New York*, 100 AD3d 439 [1st Dept 2012]["the court lacked the authority to deem the notice timely served nunc pro tunc, as the one-year and 90–day statute of limitations period had expired"].)

Plaintiff also cites *Bethel v New York City Transit Authority* (215 AD2d 206 [1st Dept 1995]), where the Appellate Division ruled, "The record reveals that NYCTA and the Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA") should be equitably estopped from denying lack of proper notice, where, as here, their conduct was calculated to, or negligently did, mislead or discourage the plaintiff from serving a timely notice of claim." The appellate decision does not recite any facts from the record.

A review of the record on appeal in *Bethel* reveals that *Bethel* is a unique case, the facts of which are inapposite to the instant action. According to the record on appeal in *Bethel*, the plaintiff was a bus passenger who was injured while the bus was near the intersection of West 49th Street and Sixth Avenue in Manhattan. (Record on appeal in *Bethel v New York City Tr. Auth.*, 215 AD2d 206, at 10.) The plaintiff served a notice of claim upon the NYCTA, but the bus actually belonged to the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA). MABSTOA sent a no-fault application and letter to the plaintiff's attorney to schedule an examination under oath. (*See id.* at 60-63.) The plaintiff commenced an

action against "the New York City Transit Authority d/b/a Manhattan and Bronx Surface Transit Operating Authority." (*See id.* at 22 [Complaint].) In its answer, the NYCTA denied plaintiff's allegations that it owned the bus. (*Id.* at 27.) Meanwhile, the plaintiff's attorney executed a stipulation granting MABSTOA additional time to answer the complaint. (*Id.* at 56.) It appears from the record that MABSTOA never submitted its own answer to the complaint.

The NYCTA later moved for summary judgment dismissing the action on the grounds that it was not the owner of the bus, and that service of process was made only upon the NYCTA, not MABSTOA. (*Id.* at 7, 15.) The NYCTA also argued that the plaintiff was therefore precluded from maintaining an action against MABSTOA, and contended that the plaintiff never served a timely notice of claim upon MABSTOA (*Id.* at 19, 162.) The plaintiff's attorney argued that MABSTOA was a defendant because it actively participated in discovery, and that the NYCTA was involved with the maintenance and repair of the bus at issue. (*Id* at 69-70.) Supreme Court (Toker, J.) denied the motion for summary judgment, reasoning that MABSTOA had waived the argument of lack of service of process by failing to raise it in the answer, even though only the NYCTA answered the complaint. (*Id.* at 5-6.)

On appeal, the Appellate Division, First Department upheld the denial of summary judgment, stating, "The record reveals that NYCTA and [MABSTOA]

should be equitably estopped from denying lack of proper notice, where, as here, their conduct was calculated to, or negligently did, mislead or discourage the plaintiff from serving a timely notice of claim." (*Bethel*, 215 AD2d at 206.) The Appellate Division cited *Fryczynski v Niagara Frontier Transp. Auth.* (116 AD2d 979 [4th Dept 1986]), where the Appellate Division, Fourth Department ruled that the defendant "acted wrongfully in failing to take affirmative steps to notify plaintiff that she had sued the wrong entity." (*Fryczynski*, 116 AD2d at 979.)

Bethel is inapposite because this case does not involve the unique situation in *Bethel*, where the plaintiff named two separate public authorities, which both operate buses, as a single defendant, and where service of process was made only on one defendant. MABSTOA, who the NYCTA claimed was a non-party, was estopped from asserting that only the NYCTA was sued and served.

This Court notes that the Appellate Division reached a result different from *Bethel* in *McHale v Anthony* (70 AD3d 463, 466 [1st Dept 2010]), which had somewhat similar facts. In *McHale*, the plaintiff was injured in a motor vehicle collision involving a truck that had been rented from Ryder Truck Rental, Inc. The plaintiff commenced the action against "Ryder Truck Rental, Inc." but served the pleadings upon Ryder TRS, Inc., a company which had purchased the consumer truck rental division of Ryder Truck Rental, Inc. Ryder TRS, Inc. answered complaint, but

did not point out the misnomer until four years later, when it amended the answer to read "Defendant, Ryder TRS f/a/k/a Ryder Truck Rental incorrectly sued as Ryder Truck Rental, Inc." The Appellate Division upheld denial of plaintiff's motion for a default judgment against Ryder Truck Rental, Inc. The Appellate Division reasoned,

> "While service of process in this manner was capable of conferring jurisdiction over the served Ryder truck rental entity, it could not have conferred jurisdiction over the unrelated Ryder Truck corporation that actually owned the offending truck. The absence of any jurisdictional defense in the served answer is irrelevant; there was no basis to interpose an affirmative defense of improper service, since the served Ryder entity was properly served, albeit by a name slightly different from its own, while the Ryder corporation that actually owned the truck had no need to claim improper service, having never been served at all.
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> * * *
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> *Neither the error by defense counsel in failing to note or correct the misnomer, nor the substance of the answer, establishes grounds to estop the served Ryder entity from asserting a defense to the action.* As troubling as this situation is, the confusion grows primarily out of plaintiffs' decision to serve Ryder Truck Rental, Inc. without reference to the readily available information as to its correct location. The problem was merely exacerbated when counsel for the served Ryder entity served its answer without correcting the misnomer. Neither counsel's failure to point out the misnomer, nor the failure to definitively deny ownership of the offending truck in the initial answer, is comparable to a purposeful, strategic silence intended to mislead plaintiffs as to the proper defendant, which would justify using a theory of estoppel to hold it liable for a truck it did not own."

(*McHale*, 70 AD3d at 466 [emphasis added].)

Here, plaintiff served a "Personal Injury Claim Form" on the Comptroller of the City of New York, not defendants. The lack of service of notices of claim upon

defendants was merely exacerbated when counsel for defendants served their answer admitting that they received a paper purporting to be a notice of claim that was non-existent. Nothing in the record indicates that defendants' failure to deny receipt of the notices of claim was purposeful, or strategic, or intended to mislead plaintiffs. In addition, as discussed above, the plaintiff's participation at the statutory hearing and defendants' participation in years of litigation will not preclude the defendants from first raising the untimeliness of the notice of claim, even if the action was well advanced. (*Frank*, 240 AD2d at 198.)

In sum, the doctrine of equitable estoppel does not apply here.

B.

Defendants admitted that they received "a certain paper purporting to be a notice of claim" within 90 days of the alleged occurrence. (Blythe Affirm., Ex B [Verified Answer] ¶ 2.) Plaintiff contends that this was a formal judicial admission that notices of claim were timely received.

"Facts admitted by a party's pleadings constitute formal judicial admissions. Formal judicial admissions are conclusive of the facts admitted in the action in which they are made." (*Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010] [citations omitted].) "In order to constitute a judicial admission, the statement must be one of fact." (*Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012].)

Here, defendants admitted to the fact that they received "a certain paper", and to the fact that "a certain paper" was received within 90 days after the alleged occurrence. Defendants are bound by those facts. (*Moncreiffe Corp. v Heung*, 293 AD2d 324, 324 [1st Dept 2002].) Therefore, they cannot argue that a paper purporting to be a notice of claim was not timely served.

However, defendants did not admit that the paper they received was a notice of claim. They did not admit to the allegations of the complaint as to what the notice of claim had allegedly set forth. Defendants were careful to say that they received "a certain paper purporting to be a notice of claim." The issue of whether "a certain paper" that defendants received complied with notice of claim requirements is not a fact. Defendants should not be barred from raising the legal argument that what they admittedly received was not a legally sufficient notice of claim. The legal argument does not indirectly contradict either the admitted existence of the document, or the admission that such a document was timely received. It would be unfair to defendants if the Court were to find that defendants' judicial admission that they received a document amounted to an admission as to the contents of the document, and by extension, of the legal significance of the document.

In sum, defendants' admissions do not bar them from arguing that plaintiff failed to serve timely notices of claim upon them. That is, defendants' admissions do

not bar them from arguing that the paper they admittedly received did not comply with notice of claim requirements.

C.

Defendants' counsel served an answer on behalf of the NYCTA and MTA. The answer admitted that a "paper purporting to be a notice of claim" was received. The document received by the NYCTA, i.e., the No Fault NF2 Form and correspondence from plaintiff's attorney, did not suffice as a notice of claim to the NYCTA. There is no evidence that any document was received by the MTA. As to the MTA, the admitted document contains no details that would suffice as a notice of claim. The admitted document simply does not exist. It is one thing to say that defendants admitted receiving a document within 90 days of the alleged incident; it would be altogether another matter to rule that what defendants admitted they received contained all the information required under General Municipal Law § 50-e, and thus constituted the functional equivalent of a valid notice of claim.

Defendants' motion to dismiss the action is therefore granted, and the action is dismissed.

III.

In reply, defendants requested leave to amend their answer to deny that they received any notices of claim. Although this request was raised for the first time in

reply, the Court asked the parties to submit supplemental papers on this issue.

Defendants' request for leave to amend is denied as academic. The Court granted defendants' motion to dismiss the action. As discussed above, defendants' admissions did not bar them from raising the legal argument that what they admittedly received from plaintiff did not meet the requirements of a notice of claim.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted, the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross motion for leave to serve a late notice of claim is denied; and it is further

ORDERED that defendants' request for leave to amend their answer is denied.

Dated: May 21, 2013
New York, New York

ENTER:

5/21/13

J.S.C.