

<b>Harding v Yonkers Cent. Sch. Dist.</b>
2017 NY Slip Op 33122(U)
July 6, 2017
Supreme Court, Westchester County
Docket Number: 51071/2017
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

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**JOSEPH J. HARDING,**

**Claimant-Petitioner,**

-against-

**YONKERS CENTRAL SCHOOL DISTRICT,**

**Respondent.**

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**DECISION & ORDER  
Index No. 51071/2017  
Sequence No. 2**

**WOOD, J.**

The following documents were read in connection with petitioner’s motion by order to show cause:

- Petitioner’s Order to Show Cause, Petition, Exhibits.
- Respondent’s Counsel’s Affirmation in Opposition, Exhibits.
- Petitioner’s Counsel’s Reply Affirmation.

Petitioner brings this proceeding pursuant to General Municipal Law §50–e(5) for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc as against respondent.

Based upon the foregoing, the motion is decided as follows:

In the event that a person seeks to sue a public corporation or entity, one must serve a notice of claim on that public corporation within 90 days after the claim arises (*see General Municipal Law § 50–e[1][a]; (Fethallah v N.Y. City Police Dep’t, 150 AD3d 998 [2d Dept 2017])*). “In determining whether to grant an application for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc, the court must consider all relevant facts and circumstances,

including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits” (Destine v City of N.Y., 111 AD3d 629 [2d Dept 2013]; see also Cruz v City of N.Y., 149 AD3d 835 [2d Dept 2017]).

This is a claim to recover for injuries sustained by petitioner arising out of a motor vehicle accident on August 10, 2016, on Yonkers Avenue at the intersection of Midland Avenue in Yonkers. His vehicle was allegedly struck in the rear by Amaury Trinidad, who was operating a Yonkers Public Schools vehicle. A police accident report was written on that date. On October 25, 2016, petitioner’s counsel states that his office served a notice of claim upon the driver Amaury Trinidad, by certified mail, return receipt requested, setting forth petitioner’s intent to pursue this matter for personal injuries sustained as a result of the accident. Interestingly, the cover letter was dated October 25, 2016, and addressed to Mr. Trinidad’s home address (24 Sunrise Terrace, Yonkers, NY), but the Certified Mail Receipt does not contain his address, nor does it contain a postmark or the fees paid and collected by the United States Post Office. The green receipt card is also glaringly missing from the petitioner’s submissions, which appears to be because it was returned to counsel on November 28, 2016 as undeliverable, as reflected by the USPS website. Respondent’s insurance company Philadelphia Indemnity Insurance Company, issued a check to petitioner on November 7, 2016, for partial reimbursement of petitioner’s rental car.

In petitioner’s reply papers, counsel details that the notice of claim was filed late due to serving the wrong arm of the municipality. He claims that it was not brought to his attention until



December 2016, that the wrong party was named in the notice of claim (The City of Yonkers, and Yonkers Department of Public Works ["DPW"]), when petitioner produced a copy of a check from Philadelphia Insurance naming their insured as Yonkers Public Schools. However, plaintiff selectively omits the fact that 13 days after the accident, claims examiner Bill Reynolds of Philadelphia Insurance Company sent Harding a letter with the correct identity of the insured (Yonkers Public Schools), date of loss, and policy number. Approximately 60 days later, on October 25, 2016, petitioner filed his incorrect notice of claim upon the City of Yonkers. That notice of claim, in addition to giving notice to the wrong party, also alleged that the driver Trinidad was employed by Yonkers DPW.

Next, on or about November 7, 2016, petitioner Harding received a check from Philadelphia Insurance Company, which also stated that Yonkers Public Schools was the insured. Instead of acknowledging that this was a second notice to petitioner within the statutory 90-day period that the correct party was the Yonkers Public Schools, the petitioner tortures logic to claim that this check constituted notice to the Yonkers Public Schools, "of the incident" rather than being a second notice to him of the correct insured.

Then, "[i]t was not brought to (petitioner's counsel's) attention until December, 2016, that the wrong party was named in the Notice of Claim" (Reply affirmation, paragraph 4). The court notes that the month of December has 31 days, all of which are after the expiration of the statutory 90-day period for petitioner to file his notice of claim in connection with the accident of August 10, 2016. The lack of specific date leaves the court unable to effectively determine whether the entire month of December, or just a smaller part of it, should be considered against the defendant in determining whether he promptly remedied his mistake, but at best, petitioner himself waited at least

three weeks to bring it to his attorney's attention. In any event, it was not until January 18, 2017, that petitioner filed an Order to Show Cause without a petition, then filed a petition a week later. Even had this filing been successful, it was over 70 days after the statutory 90-day filing period had expired.

Also, the court is not convinced by the petitioner's conclusory claims that the Yonkers Public Schools will not be prejudiced by the delay. Knowledge of the occurrence does not equate with knowledge of the essential facts and circumstances, which petitioner seems to be attempting to do with hyperbolic statements ("It is extremely evident..."; "The School could not be more on notice..."; "There could not have been any further notice..."). Unlike a case where multiple passengers in an accident filed notices of claim, and the municipality received a late notice of claim regarding the same accident, here the Yonkers Public Schools received no other notice of claim (see Jordan v. City of New York, 41 AD3d 658 [2d Dept 2007]), and the notice of claim was sent to the driver at his home, not through the Yonkers Public Schools, which might arguably have also given the district notice.

Under these circumstances, petitioner has not sufficiently explained the additional lapse of time between his receipt of the check from Philadelphia Insurance Company in November, the expiration of the 90 day filing period shortly thereafter, and the commencement of the instant proceeding, inter alia, to deem the late notice of claim timely served nunc pro tunc—whether in late January, 2017, or in early April, 2017 (Destine v City of N.Y., 111 AD3d 629, 629–30 [2d Dept 2013]). Moreover, from the submissions, petitioner failed to establish that respondent acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident. Petitioner offered only multiple conclusory statements about the school district receiving notice from

the driver, without any support in the record. The mere fact that its employee was involved in the accident, or that its insurance company provided a disbursement for rental car, does not constitute a reasonable opportunity for the Yonkers Public Schools to investigate and learn the essential facts and circumstances necessary to defend the action.

In conclusion, petitioner has not met his burden for leave to file a notice of claim. To grant relief to the petitioner in this case, the court would be completely undermining and rendering inapplicable the requirements set forth in GML §50-e.

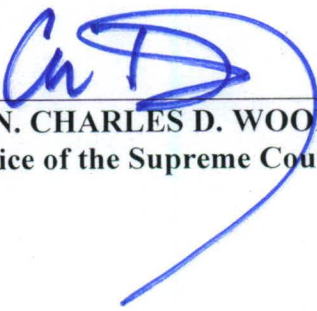
All matters not specifically addressed are herewith denied. This constitutes the decision and order of the court.

NOW, based upon the stated facts, it is hereby.

ORDERED, that the Petition to file a late notice of claim is **denied**; and it is further

ORDERED, that Yonkers Public Schools shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service within five (5) days of service, in accordance with the NYSCEF protocols.

**Dated: July 6, 2017**  
**White Plains, New York**



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**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

**To: All Parties by NYSCEF**