

<b>Ruiz v City of New York</b>
2018 NY Slip Op 32035(U)
August 16, 2018
Supreme Court, New York County
Docket Number: 153339/17
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 56**

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**ESTHER RUIZ,**

**Index No. 153339/17**

Petitioner,

*-against-*

Decision and Order

**CITY OF NEW YORK and NEW YORK CITY HOUSING  
AUTHORITY,**

Respondents.

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**HON. JOHN J. KELLEY**

The petitioner has brought this order to show cause seeking leave to file a late amended notice of claim. The petitioner claims that she fell on a broken, uneven, and/or defective sidewalk located near the entrance of a building owned and operated by the respondent, New York City Housing Authority (“NYCHA”).

As a pre-requisite for maintaining a lawsuit against a municipality or municipal agency, General Municipal Law (“GML”) § 50-e requires that a notice of claim be served on the municipality or municipal agency within 90 days of the date from which the claim arose. Initially, the petitioner claimed that her accident occurred on September 20, 2016, but she did not serve her initial notice of claim until April 19, 2017. On May 22, 2017, the petitioner’s counsel filed an order to show cause seeking leave to file a late notice of claim. The petitioner’s counsel claimed that it had not been retained until after the expiration of the 90-day deadline because the petitioner was in a great deal of pain and was medically incapacitated from the injuries that she sustained in the accident.

Before the initial order to show cause could be heard, the petitioner’s counsel withdrew the application because he discovered that the notice of claim had the wrong accident date. The accident actually occurred on August 18, 2016, over a month earlier than the date listed in the notice of claim. This application, which seeks leave to file a late amended notice of claim pursuant to GML § 50-e(5), was filed on November 21, 2017.

Public Housing Law §157(2) and GML §50-e require that a notice of claim be filed within 90 days of the date of the occurrence and accurately portray “the time when, the place where, and the manner in which the claims arose.” The

statutory requirement of a prompt and accurate notice of claim exists to allow a municipality or municipal agency an opportunity to timely investigate a claim and preserve whatever evidence is needed while it is still readily available (*see Ruiz v City of New York*, 237 AD2d 422, 423 [2d Dept 1997]). GML §50-e(5) gives the court discretion to grant an application that extends the time to serve a notice of claim past the 90-day deadline. The key factors that the court must consider in determining whether to grant an application for leave to serve a late notice of claim include: (1) whether the movant demonstrated a reasonable excuse for the delay; (2) whether the municipality acquired actual knowledge of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter; (3) whether the delay would substantially prejudice the municipality in its defense; and (4) whether the petitioner's claims are patently meritless (*see* GML §50-e(5); *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]). Moreover, the presence or absence of any one factor is not determinative (*see id.*). The failure to set forth a reasonable excuse is not, by itself, fatal to the application (*see Velazquez v City of New York Health and Hospitals Corp. (Jacobi Medical Center)*, 69 AD3d 441, 442 [1st Dept 2010]).

The respondents argue that the petitioner has failed to satisfy any of the above criteria for obtaining leave from the court to serve a late amended notice of claim. The Court agrees. The petitioner has not established a reasonable excuse for her failure to file a notice of claim within the statutory 90-day period. Her initial motion for leave to file a late notice of claim was not filed until April 4, 2017: 196 days after the alleged accident. The petitioner claims that she was severely disabled from her injuries and could not effectively communicate with or retain an attorney within the 90-day period; however, her application lacks the required medical proof that demonstrate that she was incapable of filing a notice of claim within the statutory period (*see Matter of Perry v City of New York*, 133 AD2d 692, 693 [2d Dept 1987]). In fact, the only medical proof submitted demonstrates that the petitioner sustained a nondisplaced fracture to her left wrist, an injury that while serious is hardly disabling, and is not the type of condition that would effectively prevent someone from consulting with an attorney.

In any event, the first application had to be withdrawn because the proposed notice of claim had the wrong accident date. The petitioner's counsel claims that the correct date of the accident only was discovered after a review of all the petitioner's medical records. The petitioner's counsel does not explain why all the relevant records could not have been reviewed in a timely fashion and/or before the

initial application was filed. It should be noted that to the extent any delay in investigating the petitioner's claims can be attributed to law office failure, such delay does not constitute a reasonable excuse for failing to timely serve a late notice of claim (*see Colarossi v City of New York*, 118 AD2d 612, 612 [1st Dept 2014]).

As a result, the petitioner's proposed amended late notice of claim is 139 days late instead of 106 days. That is a substantial delay that may well have prejudiced the respondent's ability to defend against the petitioner's claims. In such a case, while the unreasonableness of the delay may not be completely dispositive, in order to be granted leave to file a late notice of claim, the petitioner must demonstrate either that the respondents acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, or that the delay did not substantially prejudice the respondent's ability to investigate the claim and prepare a defense (*see Rodriguez v City of New York*, 144 AD3d 574, 574-575 [1st Dept 2016]). The petitioner has failed to meet her burden.

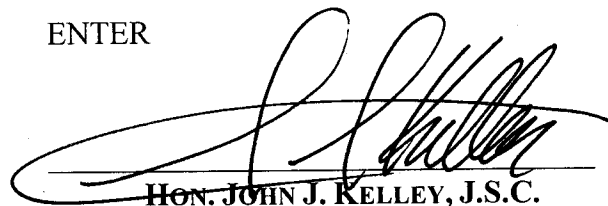
It is undisputed that the respondents received no notice of any kind until the initial notice of claim was filed and served on April 4, 2017. The initial notice of claim failed to provide the correct accident date and failed to provide sufficient notice of the location of the sidewalk defect that allegedly caused the petitioner's fall. The petitioner's proposed amended notice of claim was not served until October 31, 2017, more than 14 months after the alleged incident, and almost 12 months after the expiration of the statutory 90-day period. The amended notice of claim also fails to provide sufficient information regarding the location of the alleged defect. Although the photographs attached to the notice of claim depict construction scaffolding, they are undated and do not provide sufficient information to determine what construction work was being performed on respondents' property at the time that the photographs were taken. Accordingly, the petitioner has failed to demonstrate that the respondents had actual notice of the alleged accident, including the injuries that the petitioner sustained and/or the specific defective conditions that allegedly caused the accident within 90 days of the accident or a reasonable amount of time thereafter. The petitioner has also

failed to demonstrate that the delay does not substantially prejudice the respondents' ability to investigate the claim and prepare a defense.<sup>1</sup>

The petition is dismissed. The clerk shall enter judgment accordingly.

Dated: August 16, 2018

ENTER



HON. JOHN J. KELLEY, J.S.C.

**HON. JOHN J. KELLEY**

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<sup>1</sup> The petitioner claims that respondents are not prejudiced by the late filing of her amended notice of claim because she testified at a 50-h hearing on September 22, 2017 and provided the correct date of the accident. The 50-h hearing was conducted 13 months after the accident and 10 months after the expiration of the statutory period. It does not constitute an adequate substitute for the timely filing of a notice of claim.