**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF RICHMOND: PART C-2**

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SUSAN MISKIN,

*Plaintiff,*

- against -

THE CITY OF NEW YORK,

*Defendant.*

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**DECISION and ORDER**

**Index No. 152774/2017**
**Motion No. 1859 - 001**

The following papers numbered 1 to 3 were fully submitted on the 20th day of June 2018.

| | Papers Numbered |
|---|---|
| Notice of Motion by Defendant to Dismiss the Complaint, with Supporting Papers (dated April 24, 2018) | 1 |
| Plaintiff's Affirmation in Opposition (dated May 10, 2018) | 2 |
| Reply Affirmation (dated June 1, 2018) | 3 |

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Upon the foregoing papers, the motion of defendant The City of New York to dismiss the complaint is granted in accordance with the following.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Susan Miskin on October 6, 2016 when she tripped and fell on "paving debris…like hardened pieces of asphalt" in the roadway in front of Susan E. Wagner High School, 1200 Manor Road, Staten Island, New York. A Notice of Claim was not filed within 90 days of the accrual of

plaintiff's cause of action as required by General Municipal Law § 50-i. Instead, plaintiff moved by Order to Show Cause dated December 21, 2017, in a Special Proceeding bearing Index Number 85267/2017, for leave to file a late Notice of Claim. This action was commenced on December 28, 2017; defendant The City of New York (hereinafter, the "CITY") interposed an Answer to the Complaint on or about January 18, 2018. The Order to Show Cause was submitted for decision on February 7, 2018 and decided on March 20, 2018. [1]

By way of background, plaintiff was a speech pathologist in the employ of Susan E. Wagner at the time of her alleged accident (*Susan Miskin v. City of New York*, p.1). Plaintiff had alleged in support of her application that immediately after her accident, she filed a Line of Duty Injury Report with her employer, the Board of Education, wherein she provided the City with the essential facts constituting her claim as required by General Municipal Law § 50-i. She further alleged, *inter alia*, that the City's involvement in the roadway project was unknown to her until well after the 90-day period had expired.

In a Decision and Order dated March 20, 2018, this Court rejected plaintiff's assertions and found, *inter alia*, that the Line of Duty Injury Report did not provide actual notice of the essential facts constituting plaintiff's claim against the City, and further, that she failed to set forth a reasonable excuse for her delay in filing a Notice of Claim, which has substantially prejudiced the City. The Court specifically noted that, "petitioner has not explained or provided a reasonable excuse for the failure to obtain the contract from November 2, 2016 [the date the permit was printed from the internet] through October 13, 2017 [the date of commencement of the action against Restani]" (Id. p.4).

[1] See Plaintiff's Exhibit C, page 1, *Susan Miskin v. City of New York*, 85267/2017 (J. Aliotta, 3/20/18).

In view of the Court's Order denying plaintiff's application, the City moves to dismiss the Complaint for failure to serve a Notice of Claim which is a condition precedent to the commencement of an action against a municipality (*see Angulo v City of New York*, 48 AD3d 603, 604 [2d Dept. 2008]; *Maxwell v. City of New York*, 29 AD3d 540, 541 [2d Dept. 2006]).

In opposition to the motion, plaintiff maintains that on February 1, 2018, shortly after this action was commenced, a Notice for Discovery and Inspection was served upon the City requesting disclosure of certain documents alleged to be material and necessary to the Court's "evaluation" of plaintiff's pending application for leave to file a late notice of claim. It is undisputed that defendant failed to provide said disclosure. Plaintiff contends that dismissal of this action would be inequitable without requiring the City to respond to the discovery demands. She argues, without citing any controlling authority, that disclosure will result in allowing a late Notice of Claim.

Plaintiff's contentions are unavailing.

Notably, her discovery demands seek, *e.g.*, inspection reports, contracts, and other records made by or on behalf of the City or its agencies concerning the roadway pavement project, work records maintained by the "milling" contractor, photographs and videos of the paving work, documents or correspondence concerning the milling contractor's work, the insurance carrier's records, and complaints relative to the location at issue.

Assuming, *arguendo*, that plaintiff's request for disclosure is properly before the Court at this juncture, the discovery sought is irrelevant to the two seminal issues in dispute, i.e., a reasonable excuse for failing to timely serve a notice of claim and whether "the public corporation acquired actual knowledge of the essential facts constituting [the injured plaintiff's]

claim" (*Matter of Khalid v. City of New York*, 91 AD3d 779, 780 [2d Dept 2012]), which is to be distinguished from actual knowledge of the *existence* of a defective roadway condition.

Finally, to permit discovery to proceed in the absence of a timely filed notice of claim would circumvent the Legislative intent of General Municipal Law § 50-i, i.e., timely pre-action investigation by the City of New York to prevent fraudulent claims and preserve evidence, and to encourage due diligence from people who believe they have been harmed by a municipal corporation (*See generally,* Division of the Budget Bill Memorandum at p.2, par.5 and Hugh L. Carey Battery Park City Memorandum to Governor at p.2, L.2009, c. 440). Here, given the transitory nature of the alleged condition at a construction site (*Matter of Khalid v. City of New York*, 91 AD3d 780) and conflicting descriptions of same in the Line of Duty accident report and plaintiff's proposed late notice of claim, i.e., a rock versus paving debris (*Miskin v. City of New York, p.4)*, this is the type of situation the legislature sought to avoid. Plaintiff in her prior application offered no excuse for the failure to obtain information through a Freedom of Information request as early as November 2016. It is noted that except under extraordinary circumstances, parties are not entitled to pre-action discovery to frame a notice of claim. Therefore, if this Court were to hold otherwise, a dangerous precedent would be established allowing claimants to utilize CPLR 3101 as an end run around General Municipal Law § 50-e and § 50-i.

Plaintiff's failure to comply with General Municipal Law § 50-i requires dismissal of her underlying claim (*see Bertolotti v. Town of Islip*, 140 AD3d 907, 908-909 [2d Dept 2016]; *Angulo v. City of New York*, 48 AD3d at 604; *Maxwell v. City of New York*, 29 AD3d at 541).

Accordingly, it is

ORDERED, that the motion by defendant The City of New York to dismiss the Complaint for failure to timely file a notice of claim pursuant to General Municipal Law § 50-i is granted, and it is further

ORDERED, that the Complaint is hereby dismissed; and it is further

ORDERED, that the Clerk mark his records accordingly.

ENTER,

Dated: 7/27/18

HON. THOMAS P. ALIOTTA, J.S.C.