Matter of Etienne v City of New York
2019 NY Slip Op 30654(U)
February 13, 2019
Supreme Court, Kings County
Docket Number: 525286/2018
Judge: Reginald A. Boddie
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At I.A.S. Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 13th day of February 2019.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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In the Matter of the Application of
JEAN MARIE ETIENNE and YOLANDA ANDRE-POTEAU.

Petitioners,

Index No. 525286/2018
Cal. No. 15

-against-

DECISION AND ORDER

THE CITY OF NEW YORK,

Respondent.

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Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause & Annexed Affirmation/Affidavits	1-2
Affirmation in Opposition	3
Reply	4

Upon the foregoing cited papers, and after oral argument, the decision and order on petitioners' order to show cause, pursuant to General Municipal Law § 50-e (5), is as follows:

Petitioners were involved in a motor vehicle accident with a vehicle owned and operated by the City of New York on November 27, 2017. Petitioners filed the instant petition seeking leave to file a late notice of claim on December 21, 2018, 300 days after the expiration of the 90-day period. The City opposes.

Whether petitioners will be granted leave to file a late notice of claim is left to the discretion of the court in consideration of all relevant factors including whether there is a

reasonable excuse for the delay, whether the City acquired actual knowledge of the essential facts constituting petitioners' claims within 90 days after the claim arose or a reasonable time thereafter, and whether the City's defense would be substantially prejudiced by the delay (General Municipal Law § 50-e [5]). Of the factors courts consider, the "most important, based on its placement in the statute and its relation to other relevant factors" (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147 [2d Dept 2008]), is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of the accrual of the claim or a reasonable time thereafter (*see* General Municipal Law § 50-e[5]).

"The phrase 'facts constituting the claim' is understood to mean the facts which would demonstrate a connection between the happening of the accident and any negligence on the part of the municipal corporation" (*Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009], citing *see Saafir v Metro-North Commuter R.R. Co.*, 260 AD2d 462 [2d Dept 1999]). "The municipal corporation must have notice or knowledge of the specific claim and not merely some general knowledge that a wrong has been committed" (*Matter of Wright* at 1038, citing *see Arias v New York City Health & Hosps. Corp.* [Kings County Hosp. Ctr.], 50 AD3d 830, 832 [2d Dept 2008]; *Pappalardo v City of New York*, 2 AD3d 699 [2d Dept 2003]).

Here, petitioners failed to establish the City had actual notice of their claims within 90 days. Petitioners argued the police report generated at the scene of the accident and the fact that an FDNY vehicle was involved gave the City actual notice of their claims. However, the fact that petitioners were injured as a result of the accident is absent from the police report and petitioner failed to attach any FDNY investigative reports containing such information, although petitioners

alleged they exist (*cf. Cruz v City of New York*, 149 AD3d 380, 381 [2d Dept 2017] [concluding the City acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident, since its employees were directly involved in the accident, and the police accident report gave reasonable notice from which it could be inferred that a potentially actionable wrong had been committed by the City and that the petitioner was injured as a result thereof]).

Petitioners further argued that the extent of their injuries was not apparent within 90 days, although they also averred their injuries were apparent at the scene of accident and required emergency medical attention. Excuses for failing to timely serve a notice of claim based on the injuries, medical condition, or incapacity of plaintiff require more than conclusory allegations by petitioner or petitioner's counsel (*See Matter of Papayannakos v Levittown Mem. Special Educ. Ctr.*, 38 AD3d 902 [2d Dept 2007], citing *see Matter of Aliberti v City of Yonkers*, 302 AD2d 456 [2003]; *Robertson v New York City Hous. Auth.*, 237 AD2d 501 [1997]; *Matter of Caruso v County of Westchester*, 220 AD2d 746 [1995]). Here, no medical documentation was attached to establish a nexus between petitioners' alleged medical condition and the delay.

Further, petitioners unconvincingly argued a 10-day delay in the filing of the police report contributed to the delay in filing. Although the lack of a reasonable excuse is not necessarily fatal to the granting of leave to serve a late notice of claim, where, as here, there is also a lack of actual notice, it is an improvident exercise of the Court's discretion to grant the petition (62A NY Jur 2d, Government Tort Liability § 440, citing *Hunt v City of New Rochelle*, 223 AD2d 643 [2d Dept 1996]; *Matter of Martin*, 100 AD2d 879 [2d Dept 1984]).

Finally, "a finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial

prejudice must be based on evidence in the record" (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 465-466 [2016]). Here, petitioners have failed to meet their initial burden of showing, by some evidence or plausible argument, the City will not be substantially prejudiced by the delay (*see Matter of Newcomb*, 28 NY3d at 466). Petitioners averred that the City investigated the accident at the scene and used the time between the date of the accident and the filing of the police report to coordinate a defense.

Petitioners' arguments here are unsupported by evidence in the record. "Indeed, there may be scenarios where, despite a finding that the public corporation lacked actual knowledge during the statutory period or a reasonable time thereafter, the public corporation nonetheless is not substantially prejudiced by the late notice" (*Newcomb*, 28 NY3d at 467, citing *see e.g. Matter of Hubbard v County of Madison*, 71 AD3d 1313, 1315-1316 [3d Dept 2010]). However, petitioners have failed to demonstrate that this is such a case.

Accordingly, the order to show cause is denied.

E N T E R:

Hon. Reginald A. Boddie
Justice, Supreme Court

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HON. REGINALD A. BODDIE
J.S.C.