SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

In the Matter of the Application of
KELLY CUHAJ,

Petitioner,

INDEX NO. 157122/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

For Leave to Serve and File Late Notice of Claim

against

THE CITY OF NEW YORK,

Respondent.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes X No

Petitioner Kelly Cuhaj ("Petitioner") brings this action, pursuant to General Municipal Law § 50-e(5) for an Order granting leave to serve a Late Notice of Claim, *nunc pro tunc*, against Respondent The City of New York ("Respondent"). The Notice of Claim seeks to recover for the injuries sustained in a motor vehicle accident on November 14, 2019 at the intersection of Amsterdam Avenue and West 148th Street, New York, New York (the "Accident"). There is no opposition.

Background/Factual Allegations

Petitioner alleges that on or about November 14, 2019, at approximately 8:55 p.m., at the intersection of Amsterdam Avenue and West 148th Street, New York, New York, Petitioner, a police officer employed by the New York City Police Department ("NYPD"), was the passenger of NYPD police vehicle number 0432-17 which was struck by a civilian vehicle bearing plate number HZT6949. Petitioner alleges that the vehicle's air bags did not deploy upon impact, causing further injuries to Petitioner.

Petitioner alleges that she suffered "[i]njury and trauma to back, herniated discs, entire neck, numbness, tingling and soreness in right hand, continuing pain, suffering and disability, bodily injuries, the nature and extent of which are not presently known." (Notice of Claim, Exhibit A).

Parties' Contentions

According to the Notice of Claim, the date of the incident is November 14, 2019. Therefore, the deadline to file the Notice of Claim was February 12, 2020. Petitioner filed a proposed Notice of Claim on August 14, 2020 and therefore failed to serve a Notice of Claim within the requisite 90-day period[1]. Petitioner brought the pending motion for leave to serve a late Notice of claim on September 3, 2020. That

[1] On March 7, 2020, Governor Cuomo issued Executive Order No. 202, which declared a State of Emergency for the entire State of New York, due to the increasing transmission of COVID-19. Thereafter, on March 20, 2020, the Governor issued Executive Order No. 202.8, entitled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," which temporarily suspended or modified any time limitations set forth in any statute, legislative or administrative act, from March 20, 2020 until April 19, 2020. In particular, "[i]n accordance with the directive of the Chief Judge of the State to limit court operations to essential matters, ... any specific time limit for the commencement, filing, or service of any legal action, notice motion, or other process or proceeding ... is hereby tolled from the date of this executive order until April 19, 2020."

On April 7, 2020, the Governor issued Executive Order No. 202.14, which continued the suspension and modifications of Executive Order No. 202.8 for thirty days until May 7, 2020.

On May 7, 2020, the Governor issued Executive Order 202.28, which continued the suspension and modifications of 202.8 and 201.14 for an additional thirty days until June 6, 2020.

On June 6, 2020, the Governor issued Executive Order No. 202.38, which continued the suspension and modifications of 202.14, 202.27 and 202.28 until July 6, 2020.

On July 6, 2020, the Governor issued Executive Order No. 202.48, which continued the suspension and modifications of 202.14, 202.27, 202.28 and 202.38 until August 5, 2020.

On August 5, 2020, the Governor issued Executive Order No. 202.55, which continued the suspension and modifications of 202.27, 202.28, 202.38 and 202. 48 until September 4, 2020.

On September 4, 2020, the Governor issued Executive Order No. 202.60, which continued the suspension and modifications of 202.27, 202.28, 202.38, 202. 48, and 202.55 until October 4, 2020.

date is within one year and 90 days of the date the claim allegedly accrued and therefore within the applicable statute of limitations. *See* Public Authorities Law § 1276.

Petitioner argues that Respondent acquired actual knowledge of the essential facts of the claim within 90 days of November 14, 2019. Petitioner asserts that the Line of Duty Injury Report prepared by the NYPD on November 14, 2019 sets forth the date, time and place of the accident, the manner in which the Petitioner was injured and the approximate nature of her injuries. Petitioner avers that at the time of the Accident, Petitioner was employed by the NYPD as a Police Officer and was acting within the scope and furtherance of her duties as Police Officer. Petitioner argues that she has been "repeatedly" examined by police surgeons for the alleged injuries within the 90 days, to determine whether Petitioner should be permitted to remain out of work or to return to work in a limited or restricted capacity and to determine the nature and extent of the medical treatment Petitioner should receive.

Moreover, Petitioner asserts that Respondent will not be prejudiced in its ability to investigate and defend this claim. Petitioner argues that Respondent "owns the involved motor vehicle and can easily determine how the accident occurred." Petitioner avers that the witnesses to the Accident are "very much available, including the individual actually involved in the incident [Petitioner], and the witness (P.O. Lenihan)." Petitioner argues that "[t]o overcome Petitioner's *prima facia* showing of lack of prejudice, [Respondent] must produce an affidavit from and (sic) individual with personal knowledge of the facts which specifies exactly how [Respondent] was prevented from investigating the merits of the claim because of the delay in serving the notice of claim; an affirmation from counsel complaining of the delay in serving the notice of claim is simply not sufficient." Petitioner further argues that because Respondent had actual knowledge of the essential facts of the claim and would not be prejudiced if the Court grants the Petition, Petitioner need not advance any excuse for the delay in serving the instant notice of claim.

Legal Standard

General Municipal Law § 50-e(1)(a) states that notice of a claim against a municipality must be served within ninety days after the claim arises. The purpose of these notice of claim requirements are to protect the municipality and governmental entities from "unfounded claims and to ensure that [they have] an adequate opportunity to timely explore the merits of a claim while the facts are still

'fresh.' " *Matter of Nieves v New York Health & Hosps. Corp.*, 34 A.D. 3d 336, 337 [1st Dept 2006].

Section 50-2(5) of the General Municipal Law provides that a court may, in its discretion, grant or deny an application made to file a late notice of claim based on the consideration of a number of factors. The key factors considered are "(1) whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, (2) 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 (3) whether the delay would substantially prejudice the municipality in its defense." N.Y. Gen. Mun. Law § 50 (McKinney). In addition, "the presence or absence of any one factor is not determinative." *See also Velazquez v. City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 69 A.D. 3d 441, 442 [1st Dept 2010]. "The failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Id*. at 442.

"The petitioners ignorance of the requirement that a notice of claim pursuant to General Municipal Law § 50-e must be served within 90 days after accrual of the claim is not a legally acceptable excuse." *Ragin v. City of New York*, 222 A.D.2d 678 [1995].

"The most important factor 'based on its placement in the statute and its relation to other relevant factors is whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter.' " *D'Agostino v. City of New York*, 146 A.D.3d 880, 880, [2d Dept 2017]. The Petitioner must demonstrate that the municipality acquired actual knowledge. *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *aff d*, 140 A.D.3d 449 [1st Dept 2016].

"The direct involvement of the respondent's employee in the accident itself, without more, is also not sufficient to establish that the respondents acquired actual notice of the essential facts constituting the claim." *D'Agostino*, 146 A.D.3d at 881. Where "the municipality's employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that it committed a potentially actionable wrong, the municipality can be found to have notice." *Jaffier v. City of New York*, 148 A.D.3d 1021,1023 [2d Dept 2017]. "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have

specific notice of the theory or theories themselves." *D'Agostino*, 146 A.D.3d at 880-81.

A petitioner must show that the delay would not substantially prejudice the defendant so that failure to serve a timely notice of claim does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *affd*, 140 A.D.3d 449 [1st Dept 2016]. "Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice." *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017]. "The mere passage of time is not alone a sufficient basis to deny leave to file a late notice of claim. (*Trejo v. City of New York*, 156 A.D.2d 164, 548 N.Y.S.2d 208 [notice filed 13 years after injury])." *Holmes by Holloway v. City of New York*, 189 A.D.2d 676, 677-78 [1993].

Discussion

Petitioner does not provide a reasonable excuse for the failure to serve the Notice of Claim within 90-days. However, "[t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez*, 69 A.D. 3d at 442. As noted by Petitioner, the pandemic forced certain filings to be delayed, and the Governor's Executive Order froze the statute of limitations during much of this time.

Moreover, Petitioner has demonstrated that Respondent "acquired actual knowledge of the essential facts constituting petitioner's claim, based on the reports." *Bass v. New York City Transit Auth.*, 45 Misc. 3d 1222(A) [N.Y. Sup. Ct. 2014], *aff'd*, 140 A.D.3d 449 [N.Y. App. Div. 2016]. Petitioner was employed by the NYPD as a Police Officer and was acting within the scope and furtherance of her duties as Police Officer. The Line of Duty Injury Report prepared by the NYPD on November 14, 2019, sets forth the date, time and place of the accident, the manner in which the Petitioner was injured and the approximate nature of her injuries. The Line of Duty Injury Report states: "[a]t TPO while responding to a 10-85 officer requires assistance, in unmarked RMP #0432-17, with lights and sirens activated, officers were traveling S/B on Amsterdam Avenue, and collided with a civilian vehicle which was traveling E/B on West 148th Street. Immediately after the accident, listed MOS complained of sharp pains to her neck. Airbags did not deploy. Point of impact for department vehicle was the front bumper on the passenger side.

BWC worn but not activated because MOS had not arrived on scene at the time of collision." Consequently, Respondent had knowledge of a potentially actionable wrong, constituting actual notice. *See Jaffier*, 148 A.D.3d at 1023.

Furthermore, Petitioner has demonstrated that her "failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Velazquez*, 69 A.D. 3d at 442. "Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice." *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017]. The witnesses to the Accident are available, including Petitioner, and the supervisor who prepared and approved the Line of Duty Injury Report, Officer Lenihan. Respondent has failed to submit any opposition showing how they would be prejudiced for Petitioner's failure to serve a timely Notice of Claim. Respondent will not suffer substantial prejudice from the late Notice of Claim. Therefore, the Petition is granted without opposition.

Wherefore it is hereby

ORDERED that the motion to deem the Notice of Claim served upon Respondent as timely filed *nunc pro tunc* is granted without opposition.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 17, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION