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 H.M. an infant under the age of 18 years by her mother and natural guardian CARA MANGOIANU and individually,

Petitioners,

For an Order Granting Leave to File a Late Notice of Claim Pursuant to General Municipal Law Section 50-e(5),

- against -

NATIONAL RAILROAD PASSENGER CORPORATION, NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK, and LONG ISLAND RAILROAD,

Respondents.

INDEX NO. 156657/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

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

Petitioners H.M. an infant under the age of 18 years by her mother and natural guardian Cara Mangoianu and individually (collectively, "Petitioner") bring 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 Respondents National Railroad Passenger Corporation, National Railroad Passenger Corporation d/b/a Amtrak, and Long Island Railroad (collectively, "Respondents").

The Notice of Claim alleges serious injuries sustained by Petitioner on April 27, 2019 at approximately 6:00pm at Pennsylvania Station located at 234 West 31st Street, New York, New York, when Petitioner was descending down the staircase to the Long Island Railroad tracks 20-21 (the "stairway") when she was caused to trip and fall on an unlevel portion of a step and was seriously injured (the "accident"). Petitioner alleges that as a result of the accident, she sustained a left distal fibula

fracture and left arthroscopy surgery was performed. Petitioner asserts that she still experiences difficulties relating to her ankle.

Petitioner asserts that:

> Petitioners reported this accident to LONG ISLAND RAILROAD COMPANY personnel on the date of the accident to the train conductor who advised Petitioners to submit an accident report. On the date of the accident I submitted an accident report to LONG ISLAND RAILROAD COMPANY which was marked received by LONG ISLAND RAILROAD COMPANY on May 2, 2019. Petitioner also followed up with a letter advising LONG ISLAND RAILROAD COMPANY of the accident and H.M.'s injuries which was marked received on May 6, 2019.
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> Specifically, Petitioner reported this accident and H.M.'s injuries to the train conductor, who advised her to write an accident report. On September 3, 2019, Petitioners provided in person statement to Alvin Nesbot, Sr. Claim Agent Law/Claims Department located at LIRR Jamaica Station 93-02 Sutphin Blvd., 4th Floor Jamaica, NY 11435. Petitioner submitted all requested medical authorizations to LONG ISLAND RAILROAD.

Parties' Contentions

According to the Notice of Claim, the date of the incident is April 27, 2019. Therefore, the deadline to file the Notice of Claim was July 26, 2019. Petitioner filed a proposed Notice of Claim on July 24, 2020 and therefore failed to serve a Notice of Claim within the requisite 90-day period. Petitioner brought the pending motion for leave to serve a late Notice of Claim on July 24, 2020. That 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 Respondents acquired actual knowledge of the essential facts constituting the claim within 90 days. Petitioner asserts that Respondents' employees created the dangerous condition, which is readily available to Respondents through photographs and took statements from Petitioner. Petitioner

further contends that Respondents were notified on three separate occasions within two weeks of the accident the following information: the cause of the accident, the employees who caused the dangerous condition as well as the injuries. Petitioner further contends that she provided medical authorizations from the hospital regarding the injury.

Petitioner asserts that she has a reasonable excuse for the delay in filing the Notice of Claim. Petitioner argues that she did not seek counsel until after she learned that the statute of limitations was about to expire and Petitioner and Long Island Railroad were in active settlement negotiations until late June 2020. Additionally, Petitioner contends that she is an infant. Petitioner argues that Respondents have not suffered any prejudice. Petitioner asserts that Respondents can interview its workers who created the conditions; can review its own work orders with regard to the scope, nature and extent of the condition; can speak with its own employees regarding the accident and injuries; and can further review the medical records provided by Petitioner.

In oppositions Respondents argue that Petitioner does not meet her burden to justify leave to serve a late notice of claim pursuant to General Municipal Law § 50-e(5). Respondents assert that Petitioner does not provide evidence that Respondents had actual notice of the claim. Respondents argue that while Petitioner states that she reported the incident to Long Island Railroad personnel and notes the existence of incident reports, she does not attach the reports or indicate what details were provided. Respondents assert that Exhibit "1", the "ARNE form" documents the incident and is marked "RECEIVED" by the Long Island Railroad Corporate Safety Department on May 2, 2019 and stamped by the Long Island Railroad Claims Bureau on May 16, 2019. Respondents contend that the report indicates that Petitioner "slipped" on "slippery steps" that were "very crowded." Respondents argue that the report does not state anything about a mis-leveling, nor does it suggest any negligence, and the existence of a slippery condition alone does not imply or suggest negligence. Furthermore, Respondents assert that the referenced letter dated May 6, 2019, does indicate that Petitioner "tripped on the uneven stairs" and "fell down about three or four steps to the bottom of the platform." Respondents argue that the in person statement on September 3, 2019, was a substantial period of time after the 90 day deadline expired and also did not allege facts that would constitute negligence.

Moreover, Respondents argue that Petitioner has failed to show the lack of prejudice to Respondents. Respondents assert that Petitioner has not described what information was provided to Respondents within or close to the 90 day deadline for

the notice of claim and the evidence shows that multiple versions of the event were provided to Respondents. Respondents argue that Petitioner's excuse for failing to file the notice of claim within the 90 days is not sufficient. Additionally, Respondents argue that the Petition should be denied as to Cara Mangoianu. Respondents assert that the proposed notice of claim does not appear to allege any specific claim as to Ms. Mangoianu, however, and Ms. Mangoianu does not satisfy any of the above factors. Respondents argue that there is no information that has been provided to Respondents about any potential claim that she could make, or would like to make, even in the proposed 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 plaintiff 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.

Moreover, Petitioner has not 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 does not provide evidence that Respondents had actual notice of the claim. The "ARNE form" attached as Exhibit "1" documents the incident that was received by Long Island Railroad and Petitioner describes the issues with the platform, station or equipment that may have contributed to the accident as "slippery steps" and "very crowded." The "ARNE form" further states that accident/incident occurred when Petitioner was "Heading down the stairs to train." Additionally, the in-person statement by Petitioner dated September 3, 2019 as Exhibit "2" does not state anything about a mis-leveling, nor does it suggest any negligence, and the existence of a slippery condition alone does not imply or suggest negligence. Petitioner asserts that Respondents' employees created the dangerous condition, and that evidence is readily available to Respondents through photographs statements it took from Petitioner. However, that report and photographs were not provided here; the argument that evidence was readily available is therefore conclusory. Respondents may not have had knowledge of a potentially actionable wrong, constituting actual notice. *See Jaffier v. City of New York*, 148 A.D.3d 1021, 1023 [2d Dept 2017].

Furthermore, Petitioner has not demonstrated that his "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]. Petitioner has not described what information was provided to Respondents within or close to the 90 day deadline for the notice of claim and the evidence shows that multiple versions of the event were provided to Respondents. Thus, Petitioner cannot show that Respondent will not suffer substantial prejudice from the late Notice of Claim. Therefore, the Petition should be denied.

Wherefore it is hereby

ORDERED that the motion to deem the Notice of Claim served upon Respondent as timely filed *nunc pro tunc* is denied.

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

Dated: January 4, 2021

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION