

**Fratto v City of New York**

2023 NY Slip Op 31852(U)

May 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156228/2019

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 156228/2019
MOTION SEQ. NO. 001

MICHAEL C. FRATTO, DANIELLE C. FRATTO,

Plaintiff,

- v -

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION
AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for LEAVE TO FILE

Upon reading the above listed documents, Petitioners' leave to serve a late notice of claim upon the Respondents is granted in part and denied in part.

A court, pursuant to General Municipal Law §50-e, has discretion to grant or deny a timely application for an extension of time to serve a late notice of claim upon a public entity (General Municipal Law §50-e [5]; CPLR 217-a; Pierson v. City of New York, 56 NY2d 950 [1992]). "The key factors which the court must consider in determining if leave should be granted are whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, 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 whether the delay would substantially prejudice the municipality in its defense.... the presence or absence of any one factor is not determinative... and the absence of a reasonable excuse is not fatal." (Dubowy v. City of New York, 305 A.D.2d 320, 321, 759 N.Y.S.2d 325 [1st Dept 2003] citations omitted; see Matter of Morris, 88 A.D.2d 956, 957, 451 N.Y.S.2d 448 [2d Dept 1982], aff'd sub nom. Morris v. Suffolk Cnty., 58 N.Y.2d 767, 445 N.E.2d 214 [1982]; See also Porcaro v. City of New York, 20 A.D.3d 357, 358, 799 N.Y.S.2d 450 [1st Dept 2005]). "Once there has been an initial showing regarding the lack of substantial prejudice toward the public corporation or municipality, the public

corporation or municipality is required to make a ‘particularized or persuasive showing that the delay caused them substantial prejudice.’” (*Orozco v. City of New York*, 200 A.D.3d 559, 563, 161 N.Y.S.3d 1 (2021), *leave to appeal granted*, 39 N.Y.3d 903, 199 N.E.3d 481 [2022], *quoting Lawton v Town of Orchard Park*, 138 AD3d 1428, 1428 [4th Dept 2016]).

Further, in making this decision, courts must balance the intent of the General Municipal Law §50-e [5] to protect public entities from “unfounded claims and to ensure that [they] have an adequate opportunity ‘to explore the merits of the claim while information is still readily available’” alongside the rights of individuals to bring forth legitimate claims (*Porcaro* 20 AD3d at 357 *supra.*, *quoting Teresta v. City of New York*, 304 N.Y. 440, 443, 108 N.E.2d 397 [1952]).

Here, Petitioner MICHAEL FRATTO, alleges that on January 24, 2019 at 6:45 a.m., he was caused to slip and fall on a wet floor in the pedestrian tunnel in the subway station beneath West 42<sup>nd</sup> Street and Port Authority Terminal in Manhattan. Petitioner MICHAEL FRATTO avers that as a result of the accident he sustained various injuries and that following his accident, he was assisted by personnel from Respondent NEW YORK CITY TRANSIT AUTHORITY, the Port Authority, police and EMS. Petitioners also claim that an incident report concerning the accident was prepared, but was not provided to Petitioner MICHAEL FRATTO at the time of the incident. On March 21, 2019, Petitioners’ counsel submitted a FOIL request to the Port Authority Law Department to obtain a copy of the report, along with any other relevant documents and information concerning the subject incident (NYSCEF Doc. #5). Counsel received a response to the FOIL request from New York City Transit dated April 1, 2019 which advised that it could take several months to complete the search and provide results, if available. The notice of claim was to have been filed within 90 days of the subject accident, or by April 24, 2019. (NYSCEF Doc. #6). On June 19, 2019, 56 days after the notice of claim was to have been filed, Petitioners, through their attorney, filed the instant petition to seek leave to file a late notice of claim.

In the proposed notice of claim, (NYSCEF Doc. #3) the Petitioners assert that Respondent THE CITY OF NEW YORK was negligent in its ownership, operation, control and maintenance of the subway station and tunnel.<sup>1</sup> As to Respondents METROPOLITAN TRANSPORTATION

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<sup>1</sup> The proposed notice of claim names additional entities, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, the NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and the NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION BUREAU OF WATER AND SEWER OPERATIONS. However, these entities have not been individually named in the within petition.

AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY, the Petitioners also assert that the Respondents were negligent in their ownership, operation, control and maintenance of the subway station tunnel.

Respondent THE CITY OF NEW YORK has opposed the petition and motion by order to show cause, asserting that an extension of time to serve the notice of claim should not be granted as to THE CITY OF NEW YORK, because the Petitioners do not have a meritorious claim against THE CITY OF NEW YORK as it was an out of possession landlord that had no control over the subject subway station and tunnel.

Respondents METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY have not opposed the motion nor have Respondents submitted any affirmation opposing or contradicting Respondent THE CITY OF NEW YORK's position that it did not have control over and did not maintain the subject subway station.

Upon review, based on the facts and circumstances surrounding this case and the totality of the evidence submitted by Petitioner, and having received no opposition by Respondents METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY, the Court finds that Respondents METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY had actual knowledge of the facts constituting this claim (*Orozco*, 200 AD3d 559, *supra*). The Court further finds that Respondent in maintaining and operating the subway system, had access to the time and date of the alleged accident, any potential video recordings and all paperwork related to any investigation involving the accident and thus will not be prejudiced in preparing a defense (*id.*) Further, Petitioner has shown that any delay in the filing of the notice of claim will not have substantially prejudiced Respondents METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY's investigation due to the admittedly transient nature of the alleged dangerous condition, a wet condition on the tunnel floor, and the Respondents have not submitted any showing that the delay has prejudiced them. (*see Camins v. New York City Hous. Auth.*, 151 A.D.3d 589, 590, 55 N.Y.S.3d 247 [1<sup>st</sup> Dept 2017], *see also Orozco* 200 A.D.3d at 563, *supra*). Although the Petitioner has not demonstrated a reasonable excuse of the delay in filing the notice of claim, “[t]he absence of a reasonable excuse is not, standing alone, fatal to the application,” where the municipal respondent had actual notice of the essential facts constituting the claim and was not prejudiced by the delay”. (*Mercedes v. City of New York*, 169 A.D.3d 606,

607, 94 N.Y.S.3d 69, 70 [1<sup>st</sup> Dept 2019] quoting *Matter of Dominguez v. City Univ. of N.Y.*, 166 A.D.3d 540, 541, 88 N.Y.S.3d 19 [1<sup>st</sup> Dept. 2018]). Accordingly, the Petitioner's motion by order to show cause seeking leave to file a late notice of claim as to Respondents METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY is granted.

However, as the Petitioners' claims against Respondent THE CITY OF NEW YORK are not meritorious, that portion of the within petition and motion by order to show cause which seeks to file a late notice of claim against Respondent THE CITY OF NEW YORK is denied.

Respondent THE CITY OF NEW YORK has shown that it is an out of possession landlord that had no control over and no responsibility to maintain the subject subway station and tunnel as per the 1953 lease agreement between THE CITY OF NEW YORK and the NEW YORK CITY TRANSIT AUTHORITY (NYSCEF Doc. #11). The 1953 lease agreement has regularly been held to establish that the subway stations were leased by THE CITY OF NEW YORK to the NEW YORK CITY TRANSIT AUTHORITY and that Respondent THE CITY OF NEW YORK, as an out-of-possession landlord, is not responsible for any negligence on the part of the NEW YORK CITY TRANSIT AUTHORITY. (*Arteaga v. City of New York*, 101 A.D.3d 454, 454, 956 N.Y.S.2d 9, 10 [1<sup>st</sup> Dept 2012]). It is also well settled that it is an abuse of discretion to permit a late filing of a notice of claim pursuant to General Municipal Law § 50-e (5) when the claim is meritless. (*see Catherine G. v. Cnty. of Essex*, 3 N.Y.3d 175, 179, 818 N.E.2d 1110 (2004); *Swinton v. City of New York*, 61 A.D.3d 557, 558, 877 N.Y.S.2d 68, 69 [1<sup>st</sup> Dept 2009]; *Alladice v. City of New York*, 111 A.D.3d 477, 478, 974 N.Y.S.2d 437, 438 [1<sup>st</sup> Dept 2013] "Petitioner's application for leave to file a late notice of claim was properly denied. Respondent the City of New York is an out-of-possession landlord that does not have responsibility for the allegedly hazardous condition of the subway platform, and therefore, petitioner's claim against it lacks merit").

Upon review, this Court finds that Respondent THE CITY OF NEW YORK has shown that it is an out of possession landlord and not in control in or responsible for the subject subway station and tunnel. Therefore, the Petitioners do not have a meritorious claim against Respondent THE CITY OF NEW YORK. Accordingly, that portion of the petition and motion by order to show cause seeking leave to file a late notice of claim as against THE CITY OF NEW YORK is denied.

Accordingly, it is hereby ORDERED that the motion by order to show cause seeking to serve a late notice of claim upon Respondent THE CITY OF NEW YORK is denied; and it is further

ORDERED that the motion by order to show cause seeking to serve a late notice of claim upon Respondents METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY is granted.

5/26/2023  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

**HON. DENISE M. DOMINGUEZ**  
J.S.C.