Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

BRADFORD HILL, Petitioner,	Index No. 4054/08
-against-	Motion Date March 18, 2008
THE NEW YORK CITY TRANSIT AUTHORITY, Respondent.	Motion Cal. No. 12
	Motion Sequence No. S001

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits....	1-4
Affirmation in Opposition.....	5-6
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Upon the foregoing papers it is ordered that petitioner's application for leave to serve a late Notice of Claim is denied (*see* General Municipal Law § 50-e[1][a]). It is within the Court's discretion to extend the time to serve a Notice of Claim (*In the Matter of Nahema Canty v. City of New York*, 273 AD2d 467 [2d Dept 2000]). "The key factors to be considered in determining whether to grant an application to serve a late Notice of Claim are whether the [governmental unit or its attorneys or its insurance carrier] acquired actual knowledge of the essential facts of the claim within the statutory 90-day period, whether the petitioners had a reasonable excuse for the delay, and whether the delay would substantially prejudice the [governmental unit or its attorneys or its insurance carrier] in its defense on the merits." (*Matter of "Jane Doe" v. Hicksville Union Free School District*, 24 AD3d 666 [2d Dept 2005]; General Municipal Law § 50-e[5]; *Fox v. City of New York*, 91 AD2d 624 [2d Dept 1982]).

In the underlying action, petitioner, Bradford Hill seeks to recover from respondent, The New York City Transit Authority ("NYCTA") for personal injuries suffered as a result of an accident occurring on January 19, 2007, when respondent allegedly

tripped and fell and was caused to be injured as he stepped off Respondent's Q48 Bus on Ditmars Boulevard, between 103rd and 104th Street, in East Elmhurst, County of Queens onto a defective sidewalk. Pursuant to General Municipal Law § 50-e, petitioner's time to file a Notice of Claim expired 90 days after January 19, 2007. Petitioner served the instant Order to Show Cause on February 25, 2008.

Actual Knowledge of Essential Facts Underlying Claim Within 90-Day Statutory Period

Petitioner maintains that the NYCTA had actual knowledge of the accident on the day of the accident. Petitioner maintains that the Transit Authority's Bus Operator wrote up the incident and the Transit Authority's supervisor interviewed the bus operator and plaintiff at the scene of petitioner's fall. Petitioner includes an incident report and an accident report as part of its moving papers. Petitioner asserts that the reports include such things as where the petitioner was on the bus, the direction the bus was facing, the condition fo the pavement, the name of the hospital where plaintiff was taken, etc. Also, petitioner claims that the respondent took 35 mm photographs on the date of the accident and includes the photographs as part of its moving papers. Furthermore, petitioner maintains that there are contemporaneous witness statements. Finally, petitioner claims that the respondent had notice of the facts surrounding the claim and fully investigated the incident and observed plaintiff's injuries and that the bus operator actually called "911" for an ambulance for petitioner.

NYCTA asserts that it did not acquire any knowledge about the potential claims until the instant Order to Show Cause which was served nearly ten (10) months after the ninety (90) day deadline. Respondent also maintains that accident reports are not sufficient notice because they would not apprise Respondent of any possible future claims against it and because they do not connect an accident with any negligence on the part of the public corporation. Respondent asserts that accident reports would not apprise the respondent of the nature of the claim or apprise the respondent of the plaintiff's injuries. Additionally, NYCTA argues that a No-Fault application does not take the place of a notice of claim.

This Court finds that the NYCTA did not have actual knowledge of the essential facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter. The Appellate Division, Second Department has held that this factor "should be accorded great weight." (*See In the Matter of*

Nahema Canty v. City of New York, *supra*). NYCTA asserts that it had no notice as to the accident until approximately thirteen (13) months after its alleged occurrence when it received the instant Order to Show Cause. Petitioner does state that incident and accident reports were taken by the NYCTA on the day of the accident, however, such reports do not provide adequate notice to the NYCTA of the essential facts constituting the claim. "[W]hat satisfies the statute is not knowledge of the alleged wrong, but rather, knowledge of the nature of the claim." (*Matter of Shapiro v. Nassau*, 208 AD2d 545 [2d Dept 1994]). An accident report or inspector's report which fails to connect the happening of the accident with any negligence on the part of the public corporation does not serve to provide actual knowledge of the essential facts constituting the claim pursuant to the meaning of the statutory Notice of Claim requirements *(see Henriques v. City of New York,* 22 AD3d 847 [2d Dept 2005]; *Saafir v. Metro-Noth Commuter Railroad Company, et al.*, 260 AD2d 462 [2d Dept 1999]; *Matter of Morris v. County of Suffolk*, 88 AD2d 956 [2d Dept 1982], *Fox v. City of New York*, 91 AD2d 624 [2d Dept 1982]; *Caselli v. City of New York*, 105 AD2d 251 [2d Dept 1984]). In the instant case, the incident and accident reports relied on by petitioner indicate that petitioner fell because he lost his balance while disembarking the bus, and in no way indicate liability on the part of the NYCTA due to a negligent discharge of petitioner onto a defective sidewalk as is claimed in the Notice of Claim. As such, no actual or constructive notice can be said to be imputed to the NYCTA. Accordingly, petitioner has failed to demonstrate that NYCTA had actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter.

Reasonable Excuse for the Delay

Petitioner and petitioner's counsel maintain that there is a reasonable excuse for the delay in that petitioner was diagnosed with two types of cancer and was physically incapacitated because of cancer treatment during the 90 day period following his fall, which treatment left him physically debilitated and unable to pursue his claim or consult with a lawyer. Petitioner attaches to the moving papers billing records from the hospital where he was treated and petitioner maintains that during the spring of 2007, petitioner was unable to leave the house except to go to the hospital. Additionally, petitioner's counsel states that he was retained on June 5, 2007, during petitioner's recovery from treatment, at which point petitioner's counsel began investigating the accident, which included a FOIL request to the NYCTA. Finally, Petitioner's counsel maintains that he did not receive a response to the FOIL request until February 7, 2008.

Respondent asserts that the petitioner has failed to provide a satisfactory explanation for the delay in filing his Notice of Claim timely. Respondent maintains that someone could have filed the notice of claim on behalf of the claimant, and it did not have to be done through a legal representative of the petitioner. Also, petitioner's counsel should have immediately petitioned for leave to file a late notice of claim since when he was retained, it was only about a month past the 90-day deadline, and respondent maintains that it is inexcusable that petitioner's counsel waited more than 10 months past the 90-day deadline to petition the Court to file a late Notice of Claim. Respondent feels petitioner's counsel's excuse that he did not receive a response to the FOIL request is without merit. Finally, respondent questions the proof of the extent and duration of petitioner's physical incapacitation.

This Court finds that petitioner has sufficiently explained the delay in filing the application for leave to serve a late Notice of Claim. Petitioner proffers the excuse of medical incapacitation due to a diagnosis of cancer shortly after the accident and petitioner's attorney awaiting a response to his FOIL request. This Court finds that petitioner has provided sufficient documentation, including, *inter alia*, the medical billing records from the hospital where petitioner was receiving cancer treatment to substantiate the delay *(see Haeg v. County of Suffolk*, 30 AD3d 519 [2d Dept 2006]). Accordingly, petitioner has provided a reasonable excuse for the delay.

Substantial Prejudice as a Result of the Delay

Petitioner asserts that there is a lack of prejudice to the respondent as a result of the delay. Petitioner maintains that there will be no prejudice to respondent because it conducted a full investigation on the day of the accident. Petitioner maintains that since photographs were taken of the site, respondent had visual documentation of the site as it existed on the date of the accident as well as contemporaneous witness statements and accident reports prepared by the Transit Authority, and so it had notice of the facts surrounding the claim and fully investigated the incident and observed plaintiff's injuries and so there will be no prejudice in filing the late Notice of Claim.

Respondent contends that it will be prejudiced if the petitioner is allowed to file a notice of claim 13 months after the accident. Respondent maintains that even if an employee of the Authority filed an accident report, it would not apprise the authority of any future claims against it. The NYCTA asserts

that it was deprived of an opportunity "to locate and interview witnesses, conduct statutory hearings and interview its own employees for knowledge while memories [were] still fresh." Respondent further asserts that with timely notice it could have made every effort to retrieve, review, and verify all accident reports, medical records, lost earning claims, and reports related to the accident, before such records were discarded and destroyed. Additionally, the NYCTA asserts that it was not given an opportunity to investigate promptly and adequately with an eye towards future litigation. Also, respondent also cites to case law which states that where a petitioner fails to show countervailing circumstances, lack of prejudice cannot be asserted on a motion to file a late Notice of Claim, *citing Phillips v. New York*, 415 NYS2d 249 (Sup. Ct. Kings Co. 1979). Finally, respondent contends that the mere passage of time which has prevented a prompt investigation has been held sufficient to constitute prejudice, *citing, Phillips v. New York*, 415 NYS2d 349, Sup Ct. Kings Co., (1979).

This Court finds that the delay would substantially prejudice the NYCTA in maintaining its defense on the merits. The delay of approximately thirteen (13) months from the time the claim arose until the instant motion was brought substantially prejudiced the NYCTA' s ability to investigate the accident scene as well as other circumstances surrounding the accident (*Matter of Konstantinides v. City of New York*, 278 AD2d 235 [2d Dept 2000] [an over six-month delay was held to be substantially prejudicial]). Under the circumstances, "the New York City Transit Authority was clearly prejudiced by not being able to conduct a proper investigation while the facts surrounding the incident were still fresh." (*Illera v. New York City Transit Authority*, 181 AD2d 658 [2d Dept 1992]). The NYCTA was not given a sufficient opportunity to "timely and efficiently" investigate the merits of the claim (*Matter of Light v. County of Nassau*, 187 AD2d 720 [2d Dept 1992]); *see also Pelican v. New York City Transit Authority*, 225 AD2d 750 [2d Dept 1996]; *Phillips v. City of New York*, 415 NYS2d 349 [Sup. Ct., Kings Co. 1979] [holding the mere passage of time preventing a prompt investigation has been held to constitute prejudice to municipalities]; *Matter of Ryder v. Garden City School District*, 277 AD2d 388 [2d Dept 2000] [holding an 11-month delay was substantially prejudicial]); *Saafir v. Metro-North Commuter Railroad*, 260 AD2d 462 [2d Dept 1999][holding an almost one-year delay was substantially prejudicial]); *Henriques v. City of New York et al.*, 22 AD3d 847 [2d Dept 2005][holding an almost one-year delay was substantially prejudicial]). Accordingly, this Court finds that the delay would substantially prejudice the NYCTA in maintaining its defense on the merits.

Conclusion

In conclusion, the petitioner has failed to establish that the respondent had actual knowledge of the essential facts underlying the claim within the statutory 90-day period or a reasonable time thereafter, and has failed to establish that respondent would not be substantially prejudiced in defending the claim on the merits. Accordingly, under the circumstances, petitioner's application is denied.

The foregoing constitutes the decision and order of this Court.

Dated: April 24, 2008

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Howard G. Lane, J.S.C.