Rodriguez v City of New York
2012 NY Slip Op 30514(U)
March 2, 2012
Sup Ct, NY County
Docket Number: 111436/11
Judge: Barbara Jaffe
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[* 1]

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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Justice

Edison Rodriguez

-v-

City of NY

INDEX NO. 111436/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for leave to serve late notice of claim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/2/12
MAR 02 2012

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

EDISON RODRIGUEZ,

Petitioner,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

----------x

Index No.: 111436/11

Argued: 11/22/11

DECISION & JUDGMENT

BARBARA JAFFE, J.S.C.:

For petitioner:
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The Garcia Law Firm, P.C.
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For respondents:
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By order to show cause dated October 7, 2011, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order granting him leave to file a late notice of claim. Respondents oppose.

I. BACKGROUND

On November 12, 2010, petitioner, an employee of the Times Square Alliance (Alliance), was cleaning fixtures in the TKTS store in Duffy Square, located at the intersection of Broadway, Seventh Avenue, and West 46th Street in Manhattan, when he fell from the ladder on which he stood and allegedly sustained physical injuries. (Affirmation of Rene G. Garcia, Esq., dated Oct. 2, 2011 [Garcia Aff.], Exh. A).

Sometime thereafter, petitioner retained his current counsel, who searched the Automated City Register Information System and was unable to determine either the store's exact address or

its owner. (*Id.*, Exh. C). Counsel also searched the internet for the store and found a press release and New York Times article about its opening. (*Id.*, Exhs. H, I). While both identify Alliance, the Theater Development Fund (TDF), and the Coalition for Father Duffy (Coalition) as the developers of the site, the article also characterizes Duffy Square as "technically city parkland." (*Id.*)

In a "Times Square DMA, Inc. Workers' Compensation Accident Report," dated November 13, 2010, petitioner's supervisor described the accident as follows: "When he was climbing to get down, Mr. E. Rodriguez slid down of[f] machinery and the ladder[h]it in back of right leg. (Then fell on left thigh area)." (*Id.*, Exh. M).

In a State of New York-Workers' Compensation Board Employee Claim dated November 22, 2010, petitioner described his accident as follows: "I sl[id] from top of machinery as I was clim[b]ing down and fell on floor." (*Id.*, Exh. L).

In a State of New York-Workers' Compensation Board "Employer's Report of Work-Related Injury/Illness" dated November 24, 2010, it is reported that petitioner "fell off [a] machine" and sustained physical injuries. (*Id.*, Exh. K).

On December 6, 2010, Chartis, Alliance's Workers' Compensation insurance carrier, completed a "Notice to Chair of Carrier's Action on Claim for Benefits." (*Id.*, Exh. N).

By affidavit dated April 5, 2011, Jeffrey Katz, a member of Coalition, denies that the Coalition owns, leases, controls, manages, maintains or operates the TKTS booth and that he "believe[s] that the entity currently owning or managing the TKTS booth is [ ] [TDF]." (*Id.*, Exh.J).

By affidavit dated September 6, 2011, Thomas J. Harris, Senior Vice President of

Security and Operations for Alliance, states that Alliance entered into an agreement with respondent New York City Department of Parks and Recreation whereby it agreed to maintain Duffy Square and that Alliance has never contracted with TDF. (*Id.*, Exh. B).

On September 19, 2011, Chartis performed an independent medical examination of petitioner. (*Id.*, Exh. O).

By affidavit dated October 5, 2011, petitioner states that, before the accident, Alliance and TKTS employees had always told him that Alliance owned the store, he never saw City employees at the store, and he could only gain access to the store by obtaining permission and a key from TKTS employees. (*Id.*, Exh. A). According to him, the "broken" ladder from which he fell was owned by TKTS, provided to him by TKTS employees, and known as "the TKTS ladder." (*Id.*). He maintains that although no one witnessed his accident, "given that the accident happened in a glass building in Times Square[,] the numerous cameras in the area would have recorded [it]." (*Id.*).

By affidavit dated October 5, 2011, Maria Rivera, paralegal for petitioner's counsel, states that on December 20, 2010, she inspected the accident site. There, a TKTS employee was unable to give her an exact address for the store, and she saw no address posted at the premises but saw a sign reading, "Welcome to the TKTS booth for same-day discounts to Broadway, Off Broadway, music and dance productions. Operated with the cooperation of The Broadway League and The City of New York. TKTS is a service of Theatre Development Fund, a not-for-profit service organization for the performing arts. . . ." She saw no sign reflecting that respondents own the store. (*Id.*, Exh. C).

II. CONTENTIONS

Petitioner explains his failure to file a notice of claim as resulting from his mistaken belief that entities other than respondents own the premises and maintains that he filed the instant motion shortly after determining, based on Harris's affidavit, that Duffy Square is City property. (*Id.*). He asserts that, in addition to Chartis, insurance carriers for TDF and Coalition are aware of the accident and that actual knowledge of the facts underlying his claim may thereby be imputed to respondent, as City was likely named as an additional insured on pertinent insurance contracts. (*Id.*). He also claims that respondents obtained actual knowledge through the November 13 accident report, Alliance's presumed obligation to report accidents to them, and surveillance camera footage. (*Id.*). And he maintains that respondents will not be prejudiced by his late filing, as no one witnessed the accident and the accident site remains unchanged. (*Id.*).

In opposition, respondents deny that petitioner has provided a reasonable excuse, as he failed to perform a title search, and a simple "Google" search reveals that Duffy Square is City parkland. (Affirmation of Stacey L. Cohen, ACC, in Opposition, dated Nov. 4, 2011). Moreover, they deny having obtained actual knowledge before receiving the instant motion, and claim that petitioner has failed to demonstrate the absence of prejudice, as his delay has hindered their ability to investigate the accident and, if City is an additional insured on Alliance's, TDF's, and Coalition's policies, to submit a claim to their insurers. (*Id.*).

In reply, petitioner asks that I disregard respondents' opposition papers as they were submitted six days after the deadline set forth in the order to show cause. (Affirmation of Rene G. Garcia, Esq., in Reply, dated Nov. 16, 2011). In any event, he contends that he performed a sufficient investigation of the ownership of the site, as it was impossible to determine its actual

address, there was no indication in the information available to him that Duffy Square is City parkland, and he was not required to perform a title search. (*Id.*). He also argues that respondents offer no evidence demonstrating that the accident was not video taped or deny that City was an additional insured on Alliance's, TDF's, and Coalition's insurance contracts. (*Id.*). And, he maintains that respondents' assertions of prejudice are insufficient as no one witnessed the accident and the accident scene remains unchanged. (*Id.*).

III. ANALYSIS

A. Consideration of oppositon

Pursuant to CPLR 2214(c), a court may consider untimely papers if there is no prejudice to the nonmoving party. (*Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]). Therefore, a party waives his objection to late service of papers by opposing them on the merits. (*Jones v LeFrance Leasing Ltd. Partnership*, 81 AD3d 900, 903 [2d Dept 2011]; *Piquette v City of New York*, 4 AD3d 402, 403 [2d Dept 2004]; *Adler v Gordon*, 243 AD2d 365, 365 [1st Dept 1997]).

Here, although respondents' opposition was served after the deadline set forth in the order to show cause, petitioner waived his right to contest late service by replying on the merits.

B. Standard for granting leave to serve late notice of claim

Pursuant to GML §§ 50-e(l)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. The court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality or agency acquired actual knowledge of the essential facts constituting the claim

within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality or agency in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

1. Actual knowledge

A claimant bears the burden of demonstrating the public entity's actual knowledge of the essential facts underlying her claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). A public entity has such knowledge when it has knowledge of the facts underlying the theory on which liability is predicated. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the entity. (*Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1027 [2d Dept 2010]). The entity must have notice or knowledge of the specific claim and not merely general knowledge that a wrong was committed. (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009]; *Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York*, 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]).

Absent any evidence that the November 13 accident report or the Workers' Compensation documents were transmitted to respondents, or that Alliance reported the accident to respondents, petitioner has failed to establish respondents' actual knowledge. (*See Washington v New York,* 72 NY2d 881 [1988] [plaintiff failed to demonstrate actual knowledge in "conclusorily alleging the existence of an accident report and offering no reliable basis to support his claim that the accident was reported to [municipal employees"]; *Matter of Liebman v New York City Dept. of Educ.,* 69 AD3d 633 [2d Dept 2010] [petitioner failed to demonstrate actual knowledge absent evidence that respondents were served with accident report]; *Matter of Bruzzese v City of NewYork*, 34 AD3d 577 [2d Dept 2006] [petitioner failed to demonstrate actual knowledge where his "assertion that an incident report was filed with the City is completely unsubstantiated by the record and was refuted by evidence submitted by the City"]; *Matter of Martinez v New York City Hous. Auth.*, 250 AD2d 686 [2d Dept 1998] [petitioner failed to demonstrate actual knowledge where there was no evidence reflecting that police report was disclosed to municipal respondent]). Moreover, even if these documents were disclosed to respondents, as they reflect only that petitioner fell from a ladder while cleaning machinery, they contain no indication of wrongdoing on respondents' part and are thus insufficient to demonstrate actual knowledge. (*See Matter of Moore v New York City Hous. Auth.,* 89 AD3d 1088 [2d Dept 2011] [ambulance report insufficient to provide actual knowledge, as it "did not connect the petitioner's injuries to any alleged negligence" on part of respondent]; *Delgado v City of New York*, 39 AD3d 387 [1st Dept 2007] [report insufficient to show actual knowledge as it failed to "give information from which notice of a claim of negligence on respondent's part could have been readily gleaned"]).

And, absent any proof that City was an additional insured and learned of the facts underlying petitioner's accident as a result or that there exists surveillance video footage of the accident, petitioner has failed to establish actual knowledge obtained therefrom as well.

2. Prejudice

A claimant also bears the burden of establishing a lack of prejudice. (*Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010]). "Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay." (*Williams ex rel Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]).

Although petitioner maintains that there were no witnesses to his accident, as he has failed to demonstrate actual knowledge or provide any proof that the accident site remains unchanged, he has failed to show that his 11-month delay has not prejudiced respondents' ability to investigate his claim. (*See Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628 [1st Dept 2011] [where petitioner failed to establish actual knowledge, his unsupported assertion that the accident-causing condition remained unchanged seven months after accident insufficient to demonstrate absence of prejudice]; *cf. Presley v City of New York*, 254 AD2d 490 [2d Dept 1998] [no prejudice where petitioner delayed only 15 days, no one witnessed accident, and accident site remained unchanged]).

3. Reasonable excuse

"[L]aw office failure, whether premised on an inadvertent clerical mishap or on an error in ascertaining the correct party to sue," does not constitute a reasonable excuse for failing to file timely a notice of claim. (*Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [1st Dept 2000]).

Although petitioner's counsel attempted to determine who owns Duffy Square, given that the New York Times article on which petitioner relies expressly provides that it is City parkland and that Rivera saw a sign at the premises indicating City's involvement in the store, petitioner's counsel failed to conduct a proper investigation, and petitioner's delayed filing may not be excused on this basis. (*See Matter of Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009] [petitioner failed to provide reasonable excuse for delay, as failure to ascertain owner of property was due to lack of diligence in investigating matter]; *Bridgeview at Babylon Cove Homeowners Assn., Inc. v Inc. Vil. of Babylon*, 41 AD3d 404 [2d Dept 2007] [petitioner's failure to properly research boat's ownership does not constitute reasonable excuse]; *Lugo v New York City Hous. Auth.*, 282 AD2d 229 [1st Dept 2001] [as identity of property owner was easily ascertainable, delay not excused]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for leave to serve a late notice of claim is denied.

FILED
MAR 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C

DATED: March 2, 2012
New York, New York

MAR 02 2012