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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT
Justice

PART 5

Jinnie Cochran

-v-

City of New York

INDEX NO. 400737/13

MOTION DATE

MOTION SEQ. NO. 001

CAL. # 19

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

OCT 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9-19-13
SEP 19 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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JIMMIE COCHRAN,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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DECISION/ORDER
Index No. 400737/2013
Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	3
REPLYING AFFIDAVITS	
EXHIBITS	
OTHER	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff *pro se*, an inmate at Marcy Correctional Facility in Marcy, New York, moves for an Order permitting him to serve a late Notice of Claim for personal injuries as a result of the negligent operation, management, conduct, control and supervision by the New York State of Corrections in the County of Rockland. The City opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the instant Order To Show Cause.

Factual and procedural background:

According to plaintiff, on January 4, 2012, he was en route from Rikers Island to Ulster

County in bus #361B operated by the New York City Department of Corrections. He was handcuffed and shackled to another person. Due to the negligence of the bus operator, "the vehicle brushed, banged up against a guard rail, came off, brushed/ banged against the guard rail two or three more times, then veered off, hit the divider and flipped over, the vehicle landed on the other side of the road..." (O.S.C. p.2). Plaintiff contends that his shoulder hit a seat and he landed on top of other passengers. As a result, he began feeling sharp pains throughout his left leg and back. Petitioner was then removed from the wreckage and ordered to walk. However, he was unable to walk without assistance, and was helped into an ambulance which transported him to a hospital.

Plaintiff argues that the driver of bus #361B was negligent in his failure to exercise reasonable care in avoiding striking the guard rail and flipping over. He asserts that he still suffers pain and discomfort, and is depressed over his inability to continue engaging in activities that he did prior to the accident. He also asserts that twelve months have elapsed since the accident, and he has not been advised as to whether or not an investigation into the facts of said crash has been conducted or completed.

Plaintiff also argues that he has been unable to file a Notice of Claim sooner because he has been "traumatized by said negligent crash, the emotional and mental shock which Claimant experience (*sic*) caused Claimant to suffer the phobia of the probability of having to travel to a Court Appointment concerning this matter." (Plaintiff's Aff. in Support, p. 3). Plaintiff asserts that it is his belief that he has a good cause of action against the New York City Department of Corrections. Plaintiff also alleges that he suffered serious injury as defined by Insurance Law§ 5102(d), despite the fact that he neglects to apprise the Court of the injuries he allegedly sustained. He also argues that he was unsure of whom said claim should have been filed against, and opted to file against Corrections because he was a ward of the State at the time of the negligent crash, and continues to

remain a ward of the State.

The City argues that plaintiff's petition warrants denial based on the fact that this Court is devoid of discretion to grant petitioner leave to file a late Notice of Claim. It argues that pursuant to General Municipal Law §50-e(1), the filing of a late notice of claim is a condition precedent without which an action against a municipal entity is barred. The City argues that while the courts are vested with broad discretion to grant leave to file a late notice of claim, said discretion ends upon the expiration of the one year and ninety day statute of limitations period pursuant to GML§ 50-e(5).

The City additionally argues that in an ordinary negligence action like this one, the date of the injury is the benchmark for determining the accrual of a cause of action. Thus, in the instant case, because the alleged accident occurred on January 4, 2012, the Court's discretion to permit plaintiff leave to file a late notice of claim expired on April 3, 2013. Plaintiff's Affidavit in Support and proposed Notice of Claim are dated April 23, 2013. The City asserts that since it received the instant Order to Show Cause and Affidavit in Support on May 20, 2013, the instant petition comes after the one year and ninety day period has passed. The City further argues that even if the Court determines that it has discretion to grant petitioner's request, the instant petition still warrants denial as petitioner has failed to comply with GML§ 50-e(5).

Conclusions of law:

It is well settled that in order to commence a tort action against a municipality, the claimant is required to serve a Notice of Claim within 90 days of the alleged injury (see GML§ 50-e(1)(a); *Jordan v. City of New York*, 41 A.D.3d 658, 659 [2d Dept. 2007]). The filing of a Notice of Claim is a condition precedent without which an action against a municipality is barred.

However, GML§ 50-e(5) confers upon a court discretion whether to permit the filing of a late Notice of Claim. In making this determination, the court must consider the factors set forth in said

statute which include: (1) whether the claimant had a reasonable excuse for the failure to timely serve a notice of claim; (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter; and whether (3) the delay would substantially prejudice the public corporation in maintaining its defense on the merits (GML§ 50-e(5); see also *Bazile v. City of New York*, 94 A.D.3d 929-30 [2d Dept. 2013]; *Matter of Henriques v. City of New York*, 22 A.D.3d 847, 848 [2d Dept. 2005]; *Acosta v. City of New York*, 39 A.D.3d 629, 631 [2d Dept. 2007]; *Schiffman v. City of New York*, 19 A.D.3d 206, 208 [1st Dept. 2005]).

In the case at bar, the Court finds that petitioner has failed to proffer a reasonable excuse for serving a late Notice of Claim. Indeed, this alone has been deemed sufficient to deny leave to serve a late Notice of Claim (see *Resto v. City of New York*, 240 A.D.2d 499 [2d Dept. 1997], *lv denied* 91 N.Y.2d 847 [1997]). Here, petitioner contends that he failed to file in a timely manner because he was "traumatized" and suffered a phobia of probability of having to travel to a Court appointment concerning the matter." (See Aff. in Support, p. 3). However, since petitioner fails to submit even a scintilla of evidence, (ie. any medical documentation), to support his contentions, this excuse fails (see *Lefkowitz v. City of New York*, 272 A.D.2d 56 [1st Dept. 2000]; *Turkenitz v.City of New York*, 213 A.D.2d 266 [1st Dept. 1995]; *Rivera v. New York City Housing Auth.*, 25 A.D.3d 450 [1st Dept. 2006]).

Additionally, the Court finds that petitioner has failed to show that the City possessed actual knowledge of the essential facts constituting his claim. While he merely asserts that the alleged accident occurred "in the County of Rockland, City of Spring Valley, State of New York," (*id.* at ¶ 1), he again fails to submit any evidence which proves that this alleged accident even occurred, notwithstanding its exact location. In consideration of this fact, it seems clear that the City could not

possibly have possessed any semblance of knowledge regarding this alleged accident. The Court particularly notes that petitioner's own statement that "[he] has not been advised was to whether or not an investigation into the facts of the negligent crash has been conducted or completed" supports the City's position.

Indeed, even if the accident actually did occur and an investigation followed, it is well established that "[a]ctual knowledge of the essential facts of the claim must have been acquired by the City, not just knowledge of the occurrence" (*Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 533 [2006]).

Finally, the Court rejects petitioner's glib and conclusory statement that the City would not be prejudiced by his late Notice of Claim. The Court agrees with the City that it would certainly and unequivocally incur prejudice if the Court granted petitioner's request, in that the City has been denied a fair opportunity to investigate and explore the merits of the alleged accident and the circumstances surrounding it.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that petitioner's request to file a late Notice of Claim is denied; and it is further

ORDERED that the City is to file a copy of this order on petitioner and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: September 19, 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT