

Lavan v New York City Dept. of Sanitation
2010 NY Slip Op 33615(U)
December 24, 2010
Supreme Court, New York County
Docket Number: 401931/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Lavan, A

INDEX NO. 401931/10

- v -

MOTION DATE _____

NYC Sanitation

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

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

FILED

JAN 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/24/10

CK
CYNTHIA S. KERN 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 52

-----X
ALBERTA LAVAN,

Petitioner,

Index No. 401931/10

-against-

DECISION/ORDER

NEW YORK CITY DEPARTMENT OF SANITATION,

FILED

Respondents.

JAN 04 2011

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered by the court in the review of this motion for : _____
NEW YORK COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Petitioner commenced the instant petition for leave to file a late Notice of Claim on an action for alleged damages to her car caused by a Department of Sanitation mechanical sweeper on February 8, 2010. For the reasons set forth below, petitioner's motion is granted.

The relevant facts are as follows. On February 8, 2010, petitioner's car was parked on 129th Street between Adam Clayton Powell Boulevard and Frederick Douglass Boulevard when it was struck by a Department of Sanitation ("DOS") vehicle driven by Damon Denis. On the day of the accident, Mr. Denis's supervisor, Patricia Elliott, arrived at the scene to investigate and take an accident report. In the accident report, Mr. Denis states that he clipped the bumper of petitioner's car while turning to sweep garbage near a fire hydrant. Petitioner filed a Notice of

Claim for her vehicular property damage on May 13, 2010, five days after the expiration of the statutory time period to file a timely Notice of Claim for her action. Petitioner states in her verified petition that she was late because she was waiting for Ms. Elliott to provide her with correct information identifying the vehicle that struck her car and the diagram of the incident that she drew that day. She also states in her affidavit that during the 90 day statutory period, she was physically incapable of preparing the Notice of Claim because of her medical condition.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* Gen. Municipal Law §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to G.M.L. §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the delay prejudiced the municipality's defense and whether the municipality acquired "actual knowledge of the essential facts constituting the claim" within ninety days after the claim arose or within a reasonable time thereafter. *See* Gen. Mun. Law §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993). It is petitioner's burden to prove each of these elements, including lack of prejudice to the respondents. *See Delgado v City of New York*, 39 A.D.3d 387 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the respondents acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See Justiniano v New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993). The lack of a reasonable excuse alone is not fatal. *See Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1st Dept 2010).

Considering all the above factors together, petitioner's motion to serve a late Notice of Claim is granted. Petitioner does not have a reasonable excuse for her failure to file a timely notice of claim. A petitioner claiming medical incapacity as an excuse for failing a timely Notice of Claim must provide medical documentation of his or her inability to file. *Rivera v New York City Housing Authority*, 26 A.D.3d 297 (1st Dept 2006). While petitioner has provided evidence that she was being treated for a medical condition during the statutory time period for her claim, her evidence does not show that the condition precluded her from timely filing a Notice of Claim. Moreover, the tardiness of DOS staff in providing petitioner with documentary evidence for her Notice of Claim also does not constitute a reasonable excuse because petitioner could have filed a timely Notice of Claim that included only her personal knowledge. However, the lack of a reasonable excuse is not by itself fatal to an application for leave to file a late Notice of Claim. *See Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1st Dept 2010).

Moreover, while it is true that the City did not acquire actual knowledge of the claim within the statutory period, the City did acquire actual knowledge when petitioner sought leave to file a late Notice of Claim within 5 days of the end of the statutory period, which is a reasonable time thereafter. *See GML §50-(e)(5)*. Finally, the fact that petitioner moved for leave to file a late Notice of Claim only 5 days late and that the accident was thoroughly documented by DOS in records that are still in existence makes it unlikely that respondent was prejudiced by the delay. *See Silva v City of New York*, 246 A.D.465 (1st Dept 1998).

Accordingly, petitioner's motion to serve a late Notice of Claim is granted. This

constitutes the decision and order of the court.

Dated: 12/24/10

Enter: PK
 J.S.C.

CYNTHIA S. KERN
 J.S.C.

FILED

JAN 04 2011

NEW YORK
COUNTY CLERK'S OFFICE