

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

RECEIVED NYSCEF: 03/28/2014

Disp x Dec _____ Seq. No. 1 Type late notice of claim

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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In the Matter of the Claim of,

HARLEYSVILLE INSURANCE COMPANY OF NEW
YORK a/s/o TIFFANY TOWERS, LTD.,

Claimant,

Index No. 50073/114

-against-

DECISION AND ORDER

THE CITY OF WHITE PLAINS,

Respondent.

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The following papers numbered 1 to 3 were read on this motion:

<u>Paper</u>	<u>Number</u>
Order to Show Cause, Affirmation, Memorandum of Law and Exhibits	1
Affirmation and Exhibits in Opposition	2
Reply Memorandum of Law ¹	3

Claimant brings its motion seeking leave to file a late Notice of Claim against the City of White Plains (the "City") pursuant to General Municipal Law § 50-e. The accident in question occurred on August 21, 2013, when a City employee backed a City truck into claimant's subrogee's building, damaging it. On September 4, 2013, claimant sent a letter to the City's

¹Claimant failed to submit a Working Copy of this Reply to the Court. Counsel is warned that Working Copies are required by the Part Rules, and any future failure to submit a Working Copy will result in the Court's disregarding the document.

Department of Sanitation, informing it of the accident. The letter apparently was forwarded to the City's Department of Law, because on September 16, 2013, the Senior Assistant Corporation Counsel responded to the letter. The response enclosed a copy of instructions on "how to file a proper claim against the City of White Plains." For an unknown reason, claimant did not comply with those instructions, and never filed the proper claim against the City. Thereafter, the instant motion was filed on January 3, 2014, a period of 135 days after the accident. That means that claimant was 45 days too late to file the Notice of Claim pursuant to Gen. Mun. Law § 50-a ("the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.").

The fact that the Notice of Claim was late is not fatal, however, as Gen. Mun. Law § 50-e gives a court discretion to extend the time to serve a Notice of Claim. "In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney . . . acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances. . . ."

As the Second Department just held in the case of *Hampson v. Connetquot Cent. School Dist.*, 114 A.D.3d 790, 980 N.Y.S.2d 132 (2d Dept. 2014), "In determining whether to grant leave to serve a late notice of claim . . . the court must consider whether . . . the [city] acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, . . . the petitioner demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and . . . [the city] was substantially prejudiced by the delay in its ability to maintain its defense on the merits." The Second Department also explained that "While the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance." *Placido v. County of Orange*, 112 A.D.3d 722, 977 N.Y.S.2d 64 (2d Dept. 2013).

Here, claimant does not pretend to have a reasonable excuse for its failure to respond to the City's letter informing it of the proper way to file a Notice of Claim. Instead, it focuses on the fact that the City had actual knowledge of the essential facts constituting the claim, and the lack of any prejudice. Although the City argues that it had no notice because claimant's initial letter went to the Department of Sanitation and not the Department of Law, the fact that the Department of Law responded

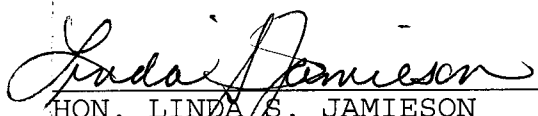
to the letter indicates that the Department of Law certainly did receive it. Moreover, it is relevant to the issue of knowledge that the accident was caused by a City employee, using a City truck, and was written up by a City police officer - and that claimant did send a letter about the incident to the City (albeit to an incorrect department). Although the City argues that it has 57,000 residents, and owns hundreds of vehicles (and thus cannot be aware of everything that occurs in the City each day), this was not a slip and fall on a random sidewalk, or some other incident that would never have come to the City's attention absent a Notice of Claim. The City did have unofficial notice of the matter, from both the improper letter and its own personnel, and alleges no real prejudice from the 45-day delay in claimant filing this motion. The City could have investigated the building back in September 2013, when it received the letter from claimant.

The Second Department has stated that "While the petitioners' excuses for their failure to serve a timely notice of claim were not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and an absence of prejudice." *Viola v. Ronkonkoma Middle School*, 107 A.D.3d 1009, 968 N.Y.S.2d 876 (2d Dept. 2013). This applies here as well, since there was actual notice and an absence of prejudice. Accordingly, the Court grants the

application, and allows the late Notice of Claim. Claimant must serve the City according to the procedures set forth in its September 16, 2013 letter within five business days of receipt of this Decision and Order.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
March 25, 2014


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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