SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. BRUCE D. ALPERT

Justice
TRIAL/IAS, PART 4
NASSAU COUNTY

In the Matter of the Application of
JASON BOUDREAU,

Motion Sequence No. 1

Petitioner,

Index No. 11485/05

-against-

Motion Date: August 19, 2005

COUNTY OF NASSAU, NASSAU COUNTY
POLICE DEPARTMENT and
BARBARA CONNOLLY,

Respondents.

The following papers read on this application for relief under GML § 50-e:

Order to Show Cause	X
Opposing Submission	X
Reply Papers	X

Upon the foregoing papers, the instant application is determined as hereinafter articulated.

As gleaned from a review of the petitioner's initial Notice of Claim as well as the proposed Notice of Claim, the underlying personal injury claim stems from a motor vehicle accident that is asserted to have occurred at the intersection of South Oyster Bay

and Old Country Roads on August 23, 2004, when the radio motor patrol car registered to respondent, Nassau County Police Department, and operated by co-respondent, Barbara Connolly, a police officer, came into contact with a motor vehicle owned and operated by the petitioner.

The petitioner alleges and the corresponding MV104A (Police Accident Report) indicates that the contact between the front of the respondents' patrol car and the left front quarter panel of the petitioner's vehicle occurred as Officer Connolly made a left turn.

Within one month of the subject accident counsel retained by the petitioner prepared and endeavored to serve a Notice of Claim. The Notice of Claim, dated September 16, 2004, was directed to the Nassau County Police Department by certified mail and, as gleaned from a perusal of the executed return receipt, was received by the Department on September 18, 2004. The Notice of Claim was also transmitted to the County of Nassau. Though the exhibited letter of transmittal suggests that it, too, was sent by certified mail, the corresponding certified form is blank and is not accompanied by an executed return receipt.

It merits mention, however, that the documentation included within the opposing submission supports the respondents' assertion that the copy of the Notice of Claim directed to the County of Nassau, in contradistinction to the Nassau County Police

Department, was sent by an express mail carrier (DHL) and not by certified mail.

By correspondence dated October 13, 2004, the Notice of Claim was rejected due, inter alia, to improper service.

Pursuant to General Municipal Law § 50-i, the service of a Notice of Claim is a condition precedent to the maintenance of cause of action or special proceeding against a public corporation or its agencies and departments.

General Municipal Law § 50-e (3) (a) provides: "The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation."

Pursuant to CPLR 311 (a) (4), personal service upon a county or its subdivisions may be made by delivery to the chair or clerk of its board of supervisors, if any, its clerk, attorney or treasurer.

Section 11-4.0 of the Nassau County Administrative Code provides, in pertinent part, as follows: " All process and papers for the commencement of actions and legal proceedings against the County of Nassau or any agency, commission, department or bureau thereof, shall be served either upon the County Executive, the Clerk of the Board

of Supervisors [now Legislature], the County Clerk, the County Treasurer or the County Attorney."

The Notice of Claim served upon the Nassau County Police Department was ineffective, as it is not a proper recipient under either CPLR 311 (a) (4) or § 11-4.0 of the Administrative Code.

While the Nassau County Attorney has been designated as an appropriate recipient of a Notice of Claim, the method of service employed was at variance with General Municipal Law § 50-e (3) (a) and, therefore, jurisdictionally flawed. Significantly, neither of the savings provisions enunciated in GML § 50-e (3) (c) apply, as the Notice of Claim was rejected and the County eschewed its right to a municipal hearing.

Moreover, the verification signed by the petitioner was not notarized, and thus failed to conform to GML § 50-e (2).

In view of the foregoing, it would be an injudicious exercise of discretion to deem the Notice of Claim previously served sufficient under the controlling statute.

Accordingly, petitioner's prayer to deem the initial Notice of Claim timely and proper is denied.

Petitioner's prayer for amendment relief under GML § 50-e (6) is also denied, as a timely and properly served Notice of Claim is a prerequisite to relief thereunder. (see,

Ayotte v Board of Education of the Plattsburgh City School District, 12 AD2d 562 [3d Dept.])

The petitioner's prayer for late notice relief stands on firmer ground.

"In determining whether to permit service of a late notice of claim, the court must consider all relevant facts and circumstances, including whether (1) the movant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, (2) the municipality or public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (3) the delay would substantially prejudice the municipality or public corporation in defending on the merits (see General Municipal Law § 50-e[5]; Matter of Hicks v City of New York, supra at 566-567; Matter of Fierro v City of New York, 271 AD2d 608, 609; Matter of Gaffney v Town of Hempstead, 226 AD2d 721, 722)." (Matter of Morales v New York City Transit Authority, 15 AD3d 580, 581)

In resolving applications for late notice relief, the Court, imbued with broad discretionary authority, strives to achieve an equitable balance between a public corporation's reasonable need for prompt notice and an injured party's interest in due compensation. (see, Camarella v East Irondequoit Central School Board, 34 NY2d 139, 142-143; see also, Matter of Callahan v City of New York, 75 NY2d 899, 901)

No reasonable explanation for the failure to abide by the provisions of GML § 50-e (1 & 3) has been proffered. Though the default appears attributable to the failings of predecessor counsel, law office failure, standing alone, will not support an extension of late notice relief. (see, Matter of Baglivi v Town of Southold, 301 AD2d 597; Matter of Valestil v City of New York,295 AD2d 619, lv den 98 NY2d 615)

However, it is not the presence or absence of any one factor that is dispositive. "Rather, all relevant factors are to be considered, including the prejudice to the municipality and whether it obtained actual knowledge within the 90-day statutory period or shortly thereafter (Matter of Cicio v City of New York, 98 AD2d 38, 39)." (Matter of Morgan v New York City Housing Authority, 181 AD2d 890, 891)

Though the lack of a reasonable excuse is not necessarily preclusive (see, Nardi v County of Nassau, 18 AD3d 520; Nardi v County of Westchester, 18 AD3d 521), late notice relief may not be exended, unless the municipal body had notice of the essential elements of the claim within the statutory ninety (90) day period or a reasonable time thereafter and has not been substantially prejudiced by the delay. (see, Gibbs v City of New York, __ AD3d __, __ NYS2d __, 2005 WL 2786997; Bovich v East Meadow Public Library, 16 AD3d 11; cf., Matter of Welch v New York City Housing Authority, 7 AD3d 805; Hasmath v Cameb, 5 AD3d 438; Harris v City of New York, 297 AD2d 473,

lv den 99 NY2d 503)

Though the imperfect attempts to serve the initial Notice of Claim within a month of the underlying motor vehicle accident were insufficient under GML § 50-e (1 & 3), the efforts made provided the respondents with notice of the essential elements of the petitioner's claim well within the temporal parameters of GML § 50-e (1).

Moreover, where, as here, the municipal agency charged with tortious conduct, conducted an investigation and issued a report based thereon, its contents must be reviewed to determine whether it provided the agency and the municipality with notice of the essential facts of the claim. (see, Matter of Johnson v City of New York, 302 AD2d 463; Matter of Garcia v New York City Housing Authority, 195 AD2d 557)

Notably, the comprehensive Police Accident Report (MV104A) prepared by the local authorities on the date of the occurrence contained the names and addresses of the respective motorists, described the make and model of each vehicle involved, set forth a verbal description of the accident and a corresponding diagram, delineated the respective points of impact, noted the petitioner's "most severe physical complaint" and identified the investigating officer by name, rank, precinct, sector and number.

Based thereon, the respondents were afforded contemporaneous notice of the facts on which the petitioner's claim is premised. (see, Gibbs v City of New York, supra;

Schiffman v City of New York, 19 AD3d 206 [1st Dept.]; Matter of Johnson v City of New York, supra)

The same circumstances undermine the claim of prejudice.

Significantly, the respondents' contention on the subject is far from persuasive, as their counsel failed to specify the manner in which the preparation of a defense on the merits has been compromised or hindered and did not identify the supportive measures that they have been prevented from taking. (see, Loomis v Civetta Corinno Construction Corp., 54 NY2d 18, 23-24)

Opposing counsel's failure to indicate the level and nature of the investigatory activity undertaken since the receipt of the initial Notice of Claim further attenuates the claim of prejudice. (see, Matter of Speed v A. Holly Patterson Extended Care Facility, 10 AD3d 400)

Noticeably lacking from the respondents' submission is any indication that co-respondent, Barbara Connolly, or the investigating officer, Sgt. Timothy Gibson, have been consulted in an effort to assess and evaluate the petitioner's allegations.

Notably, there is no indication that the information currently available to the respondents is qualitatively different than that which would have been available had a timely a Notice of Claim been properly served. (see, generally, Matter of Harris v

Dormitory Authority of the State of New York, 168 AD2d 560; Rosenblatt v City of New York, 160 AD2d 927, 928)

In the absence of a sufficient factually supported demonstration the respondents' concerns cannot be credited, as prejudice may not be inferred from a silent record.(see, Matter of Berko v City of New York, 302 AD2d 594, mot for lv dsmd 100 NY2d 535; Santiago v County of Suffolk, 280 AD2d 594)

The respondents' attempt to shift the burden of persuasion on this issue to the petitioner is unavailing, as "[i]t is generally inappropriate to place the burden of proof on a party in the case where the facts governing the resolution of the controversy are within the exclusive knowledge of the opposing party (see Tenkate v Moore, 274 AD2d 934; Speirs v Not Fade Away Tie Dye Co., 236 AD2d 531)." (Matter of Johnson v City of New York, supra at p. 464; see also, Matter of Cruz v Westchester County Health Care Corp., 9 AD3d 460, 461)

Accordingly, petitioner's prayer for late notice relief is granted. Upon the service of a copy of this Order with notice of entry, the Notice of Claim, in the form annexed to the moving papers as Exhibit 5, shall be deemed to have been timely served.

This concludes the special proceeding commenced under Index Number 11485/05.

In the event that the petitioner is unable to resolve the claim at this stage and is

constrained to litigate the matter, such litigation shall be initiated under a separate index number. (see, Harris v Niagara Falls Board of Education, Niagara Falls City School District, 16 AD3d 1165, 1166 [4th Dept.])

In light of the incipient expiration of the governing limitations period and the specific pleading requirement attendant to actions brought under GML § 50-I, it may be necessary to initiate the litigation by the filing of a summons with notice and defer the filing and service of the complaint until expiration of the thirty (30) day adjustment period. (see, generally, Corey v County of Rensselaer, 88 AD2d 1104, 1105, lv den 57 NY2d 602)

Dated: November 10, 2005

J.S.C.
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