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New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

LUIS JAIME,

Petitioner-Respondent,

against

THE CITY OF NEW YORK,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

COUNTER-ISSUES PRESENTED 1

1. WHETHER THE RESPONDENT-APPELLANT OBTAINED ACTUAL NOTICE OF THE CLAIM WITHIN 90 DAYS OF THE INCIDENT 1

2. WHETHER PETITIONER-RESPONDENT'S EXCUSE FOR5 THE LATE FILING WAS REASONABLE 2

3. WHETHER THE RESPONDENT-APPELLANT WAS PREJUDICED BY THE DELAY 2

COUNTER-STATEMENT OF FACTS 2

ARGUMENTS 3

I. STANDARD TO FILE LATE NOTICE OF CLAIM 3

A. THE CITY DID RECEIVE NOTICE OF THE CLAIM WITHIN 90 DAYS OF THE ACCIDENT 7

B. PETITIONER-RESPONDENT PROFFERED A REASONABLE EXCUSE FOR THE DELAY 9

C. RESPONDENT-APPELLANT WILL NOT BE PREJUDICED 10

CONCLUSION 16

PRINTING SPECIFICATIONS STATEMENT 17

TABLE OF AUTHORITIES

Cases **Page No.**

Acosta v New York,
39 AD3d 629 [2d Dept 2007] 4

Ansaldo v City of New York,
92 AD2d 557 [2d Dept 1983] 8

Barnes v County of Onondaga,
103 AD2d 624 [4th Dept 1984] 6

Barnes v County of Onondaga, 65 NY2d 664 [1985] 6

Bay Terrace Cooperative Section IV, Inc. v New York State Employees' Retirement System Policemen's & Firemen's Retirement System,
55 NY2d 979 [1982] 6

Beary v City of Rye,
44 NY2d 398 [1978] 6,7

Catherine G. v Essex County,
3 NY3d 175 [2004] 4

Christoforatos v City of New York,
285 AD2d 622 [2d Dept 2001] 4

Cicio v City of New York,
98 AD2d 38 [2d Dept 1983] 9

Cohen v Pearl River Union Free School District,
51 NY2d 256 [1980] 7

Corvetti v Town of Lake Pleasant,
227 AD2d 821 [3d Dept 1996] 14

Felder v Casey,
487 US 131 [1988] 14

Feuer v Nychhc,
170 Misc 2d 838 [Sup Ct, Bronx County 1996] 14

TABLE OF AUTHORITIES

Cases **Page No.**

Frith v New York City Hous. Auth,
4 AD3d 390 [2d Dept 2004] 5

Grullon v City of New York,
222 AD2d 257 [1st Dept 1995].. 8

Hayden v Incorporated Village of Hempstead,
103 AD2d 765 [2d Dept 1984] 12

In re Andrew T.B,
18 AD3d 745 [2d Dept 2005] 10

In the Matter of Porcaro v City of New York,
20 AD3d 357 [1st Dept 2005]... 6

Justiniano v N.Y. City Housing Auth. Police,
191 AD2d 252 [1st Dept 1993].. 8

Lanphere v City of Washington,
301 AD2d 936 [3d Dept 2003] 11

Lawless v City of Buffalo,
177 AD2d 1007 [4th Dept 1991] 14

Liu v New York City Police Department,
216 AD2d 67 [1st Dept 1995]... 14

Lopez v Shaughnessy,
260 AD2d 551 [2d Dept 1999] 14

Matter of Canty v City of New York,
273 AD2d 467 [2d Dept 2000] 9

Matter of D'Anjou v N.Y. City Hlt. Hosp,
196 AD2d 818 [2d Dept 1993] 5

Matter of Gerzel v City of New York,
117 AD2d 549 [1st Dept 1986].. 11

TABLE OF AUTHORITIES

Cases **Page No.**

Matter of Guzman v County of Westchester,
208 AD2d 925 [2d Dept 1994] 8

Matter of Holmes v City of New York,
189 AD2d 676 [1st Dept 1993].. 10,12

Matter of Kelli A. v Galway Cent. Sch. Dist,
241 AD2d 883 [3d Dept 1997] 11

Matter of Melendez v City of New York,
245 AD2d 564 [2d Dept 1997] 8

Matter of Reisse v County of Nassau,
141 AD2d 649 [2d Dept 1988] 8

Montalto v Town of Harrison,
151 AD2d 652 [2d Dept 1989] 8

Nardi v County of Nassau,
18 AD3d 520 [2d Dept 2005] 6

Newcomb v Middle Country Cent. Sch. Dist.,
28 NY3d 455 [2016] 14-15

Omni Group Farms, Inc. v County of Cayuga,
178 AD2d 977 [4th Dept 1991] 14

Owens v Okure,
488 US 235 [1989].. 14

Rodriguez v County of Nassau,
126 AD2d 536 [2d Dept 1987] 9

Rodriguez v N.Y.C. Health and Hosp's. Corp.,
270 AD2d 110 [1st Dept 2000].. 8,15

Strobel v County of Lewis,
147 AD2d 948 [4th Dept 1989] 10

TABLE OF AUTHORITIES

Cases **Page No.**

Tatum v City of New York,
161 AD2d 580 [2d Dept 1990] 8

Teresta v City of New York,
304 NY 440 [1952] 6,12

Weinzel v County of Suffolk,
92 AD2d 545 [2d Dept 1983] 8

Welch v B.O.E. of Saratoga C.S.D,
287 AD2d 761 [3d Dept 2001] 11

Welch v State,
286 AD2d 496 [2d Dept 2001] 14

Zwecker v Clinch,
279 AD2d 572 [2d Dept 2001] 14

Statutes **Page No.**

CPLR §3212.. 4

GML §50-e.. 4,5,6,7,12

PRELIMINARY STATEMENT

Luis Jaime (hereinafter "Petitioner-Respondent"), submits this Respondent's Brief in opposition to the appeal filed by the City of New York (hereinafter Respondent-Appellant" or the "City"), by which the City seeks reversal of the Decision and Order of the Supreme Court, Bronx County (Hon. Mitchell J. Danziger, J.S.C.), dated May 27, 2021 and entered on June 2, 2021.

In this case, the Petitioner-Respondent filed a Petition to file a late Notice of Claim or in the alternative to deem the Notice of Claim previously served as timely filed *nunc pro tunc*. The trial court granted said petition and permitted the Petitioner-Respondent to serve a late notice of claim since the Petitioner-Respondent proffered: (i) a valid and reasonable excuse for the late filing of the Notice of Claim; (ii) that Respondent-Appellant acquired actual knowledge of the facts underlying the claims asserted against it by Petitioner-Respondent within 90 days after the claim arose; and (iii) no prejudice to Respondent-Appellant would result as a result of the late filing of the notice of claim. As such, the Decision and Order should be affirmed.

COUNTER-ISSUES PRESENTED

1. WHETHER THE RESPONDENT-APPELLANT OBTAINED ACTUAL NOTICE OF THE CLAIM WITHIN 90 DAYS OF THE INCIDENT

This question must be answered in the affirmative since the Respondent-Appellant obtained actual notice of the claim within 90 days following the

incident.

2. WHETHER PETITIONER-RESPONDENT'S EXCUSE FOR THE LATE FILING WAS REASONABLE

This question must be answered in the affirmative since Petitioner-Appellant proffered a reasonable excuse for the delay.

3. WHETHER THE RESPONDENT-APPELLANT WAS PREJUDICED BY THE DELAY

This question must be answered in the negative since the Respondent-Appellant was not prejudiced by any delays since it obtained notice of the claim within 90 days and Respondent-Appellant did not set forth any basis by which it would be prejudiced.

COUNTER-STATEMENT OF FACTS

This is an action to recover damages for damages sustained by Petitioner-Respondent was assaulted by corrections officers on June 21, 2019, October 10, 2019, January 30, 2020, September 11, 2020 and October 8, 2020, an inmate at Rikers Island Correctional Facility.

The City, by and through its agents and employees, namely numerous officers of the New York City Department of Corrections ("DOC"), acted unlawfully by intentionally assaulting and battering Petitioner-Respondent, denying Petitioner-Respondent access to adequate medical attention, care or treatment, subjecting him to the use of excessive force and other unconstitutional means of confinement, as well as Respondent-Appellant's demonstrative deliberate indifference to the safety and overall well-being of Petitioner-Respondent, despite

Respondent-Appellant's obligatory duty to protect Petitioner-Respondent from any and all reasonably foreseeable harm or injury. Petitioner-Respondent's claims for damages arise from the events, transactions and incidents that occurred on, or about, June 21, 2019, October 10, 2019, January 30, 2020, September 11, 2020 and October 8, 2020, while Petitioner-Respondent was a pre-trial detainee being held on Rikers Island, which is located at 16-00 Hazen Street, East Elmhurst, New York, but within the jurisdictional confines of the County of Bronx.

With respect to Petitioner-Respondent's claims, there are multiple days that incidents occurred. These dates are June 21, 2019, October 10, 2019, January 30, 2020, September 11, 2020 and October 8, 2020.

To better illustrate the subject dates of accrual with the corresponding limitations of time accounting for Gov. Cuomo's tolling orders, Petitioner-Respondent submits that the earliest date of incident was June 21, 2019. As such, the statute of limitations without the tolling of the statute instituted by Gov. Cuomo through executive order would have been September 19, 2020. However, with the tolling, the expiry of the statute of limitations would have been May 6, 2021.

ARGUMENTS

I. STANDARD TO FILE LATE NOTICE OF CLAIM

Pursuant to General Municipal Law ("GML") §50-1(a), a tort action against a municipality must be commenced by service of a notice of claim upon the

municipality within 90 days of the date on which the claim arose.

The court's role on a motion for leave to serve a late notice of claim is very different than on a summary judgment motion. Unless the court determines that the application for leave to serve a late notice of claim is "patently meritless," the court should not reach the substantive merits of the claim. *In the Matter of Catherine G. v. County of Essex*, 3 N.Y.3d 175, 818 N.E.2d 1110, 785 N.Y.S.2d 369, (2004). Therefore, the general standard used to decide a motion for summary judgment under CPLR 3212 is not the standard for deciding whether to grant leave to file a late notice of claim under GML §50-2. The applicable standard does not require the plaintiff to demonstrate entitlement to judgment. It also does not require the plaintiff to prove the existence of factual questions respecting exposure, negligence, causation, contributory conduct or injury.

A court in its discretion may extend the time under GML §50-e to service a Notice of Claim. *Acosta v. City of New York*, 39 A.D.3d 629, 834 N.Y.S.2d 267, 834 N.Y.S.2d 267 (2d Dep't 2007); *Christoforatos v. City of New York,* 285 A.D.2d 622, 728 N.Y.S.2d 675 (2d Dep't 2001). It is well-settled that when considering an application for leave to file a late notice of claim, the court should consider a number of factors, including: (i) the reasonableness of the excuse offered for the delay in filing the notice of claim; (ii) whether the municipality obtained actual knowledge of the essential facts constituting the claim within the 90-day as-of-

right filing period or within a reasonable time thereafter; and (iii) whether the municipality was prejudiced because the claimant did not file during the as-of-right period. GML §50-e. Further, the Court may consider the plaintiff's infancy.

Therefore, a Court should consider all relevant facts and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter and whether the public corporation's defense would be substantially prejudiced by the delay. *Matter of D'Anjou v. New York City Health & Hosps. Corp.*, 196 A.D.2d 818 (2d Dep't. 1993). The Court in *Frith v. New York City Housing Authority,* 4 A.D.3d 390, 771 N.Y.S.2d 392 (2d Dep't 2004), held that a court should consider all relevant facts and circumstances when determining whether to permit service of a late notice of claim. *Frith*, *supra*. This includes whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter and whether the public corporation's defense on the merits would be substantially prejudiced by the delay. *Id*. There, the Court held that leave to serve a late notice of claim on behalf of the infant should have been permitted because a reasonable excuse for the delay was proffered and the record contained evidence that NYCHA had actual knowledge of the facts underlying the

claim of the infant within the limitations period. *Id*.

It is well settled that the statute providing for a late Notice of Claim is remedial in nature and should be liberally construed. *Porcaro v. City of New York*, 20 A.D.3d 357, 357, 799 N.Y.S.2d 450 (1st Dept. 2005). The intent underlying the notice requirement is to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity to explore the merits of the claim while information is still readily available. *Porcaro,* 20 A.D.3d at 358. The *Porcaro* court, in quoting *Teresta v. City of New York,* 304 N.Y. 440, 108 N.E.2d 397 (1952), held that "the statute, however, is not intended to operate as a device to frustrate the rights of individuals with legitimate claims." *Id*. Thus, the presence or absence of any one factor under GML §50-e is not determinative, and the absence of a reasonable excuse for the delay is not fatal. *Nardi v. County of Nassau*, 18 A.D.3d 520, 795 N.Y.S.2d 300 (2d Dep't 2006). *Barnes v. County of Onondaga,* 103 A.D.2d 624, 628, 481 N.Y.S.2d 539 (4th Dep't 1984), *affirmed,* 65 N.Y.2d 664, 481 N.E.2d 245, 491 N.Y.S.2d 613 (1985), *citing Bay Terrace Co-op. Section IV v. New York State Employees' Retirement System Policemen's & Firemen's Retirement System*, 55 N.Y.2d 979, 4343 N.E.2d 254, 449 N.Y.S.2d 185 (1982). The standards are flexible and the court may consider all other relevant facts and circumstances. *Beary v. City of Rye,* 44 N.Y.2d 398, 407, 377 N.E.2d 453, 406 N.Y.S.2d 9 (1978).

A. THE CITY DID RECEIVE NOTICE OF THE CLAIM WITHIN 90 DAYS OF THE ACCIDENT

In the instant case, it is submitted that the City did in fact obtain notice of the substantial facts surrounding the multiple incidents.

New York General Municipal Law (GML) § 50-E (5), reads, in pertinent part, as follows:

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter.

The courts have an inherent power, pursuant to GML § 50-E, to permit the service of a notice of claim after the standard ninety-day time period. *See Cohen v. Pearl River Union Free School District*, 51 N.Y.2d 256 (N.Y. 1980). In *Beary v. City of Rye*, 44 N.Y.2d 398 (N.Y. 1978), the Court of Appeals explained that the standards of GML § 50-E were modified, so that the grounds upon which a court may allow a late notice of claim were expanded, and the time for serving a notice of claim was lengthened.

The First and Second Departments have consistently held that "knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City," when said claims consisted of false arrest and malicious prosecution, which were investigated by the NYPD and then prosecuted by one of the City's district attorneys. *Grullon v. City of New York*, 222 A.D.2d 257, 258 (1st Dep't 1995) (citing *Tatum v. City of New York,* 161 A.D. 580, 581 (2d Dep't 1990)); *see also Justiniano v. N.Y. City Housing Auth.,* 191 A.D. 252 (1st Dep't 1993); *Matter of Reisse v. County of Nassau*, 141 A.D.2d 649 (2d Dep't 1988); *Weinzel v. County of Suffolk*, 92 A.D.2d 545 (2d Dep't 1983); *Ansaldo v. City of New York*, 92 A.D.2d 557 (2d Dep't 1983).

Additionally, where a municipal respondent possesses records, which set forth the essential facts constituting a claim, New York State courts have frequently and consistently held that permission to serve a late notice of claim should be "freely granted." *See Rodriguez v. N.Y.C. Health & Hosp's. Corp.*, 270 A.D.2d 110 (1st Dep't 2000); *Melendez v. City of New York*, 245 A.D.2d 564 (2d Dep't 1997) (reversing the trial court's denial of claimant's application to serve a late notice of claim); *Guzman v. County of Westchester*, 208 A.D.2d 925 (2d Dep't 1994); *Montalvo v. Town of Harrison*, 151 A.D.2d 652 (2d Dep't 1989); *Reisse v. County of Nassau*, 141 A.D.2d 649 (2d Dep't 1989); *see, generally, Tatum v. City of New York*, 161 A.D.2d 580 (2d Dep't 1990).

In this case, the Respondent-Appellant had knowledge of the essential facts since the DOC, its employees and agents, including the corrections officers who participated in Petitioner-Respondent's assaults and batteries, were present at the scenes of the subject incidents and actively perpetrated the unlawful acts that now form the basis for Petitioner-Respondent's claims while he was incarcerated at Riker's Island. The Petitioner-Respondent was subjected to numerous assaults and batteries, in addition to myriad other acts violative of his civil rights and liberties.

One of the main factors that should be accorded great weight is whether the municipality involved received actual knowledge of the facts constituting the claim in a timely manner. *Mattter of Canty v. City of New York,* 273 A.D.2d 467, 711 N.Y.S.2d 750 (2d Dep't 2000).

B. PETITIONER-APPELLANT PROFFERED A REASONABLE EXCUSE FOR THE DELAY

It is well settled that even if a plaintiff failed to offer a reasonable excuse for the failure to timely file a notice of claim, it is not fatal. *Rodriguez v. County of Nassau,* 126 A.D.2d 536 (2d Dep't 1987). The Court in *In the Matter of Cicio v. City of New York,* 169 A.D.2d 38, 469 N.Y.S.2d 467 (2d Dept. 1983), held that a leave to file late notice of claim will be granted despite the fact that the attorney for petitioner inadvertently filed the claim late. The Court provided that the General Municipal Law is to be liberally construed and "the absence of an acceptable excuse is not necessarily fatal." *Id*.

In this case, the Petitioner-Respondent was, and still is, incarcerated as a pre-trial detainee as he awaits trial on the false charges that are presently pending against him. As such, petitioner understandably devoted his time and minimal resources to assisting his defense against the untrue criminal charges initiated and thereafter maintained against him. Additionally, petitioner's numerous attempts to contact and retain an attorney to represent his claims each resulted in failure until he contacted the attorney of record, who recognized the potential viability of his claims and agreed to represent petitioner despite his ongoing confinement as he awaits trial.

C. RESPONDENT-APPELLANT WILL NOT BE PREJUDICED

The mere passage of time alone does not result in substantial prejudice. *Holmes v. City of New York,* 189 A.D.2d 676, 592 N.Y.S.2d 371 (1st Dep't 1993). Additionally, "it is unlikely that any prejudice could be established" where "[t]he hospital has not shown any prejudice as a result of the delay" and "had actual notice of the facts constituting the claim by virtue of its possession of medical records pertaining to [the plaintiff]'s care and treatment at the hospital." *Strobel v. County of Lewis,* 147 A.D.2d 948, 537 N.Y.S.2d 707 (4th Dep't 1989).

In *Matter of Andrew T.B. v. Brewster Central School District,* 18 A.D.3d 745, 795 N.Y.S.2d 718 (2d Dep't 2005), the Court provided that the petitioner demonstrated a lack of substantial prejudice. *Matter of Andrew T.B.*, *supra*. There,

the Court held that the school's assertion in regard to retirement or cessation of employment of certain staff witnesses did not demonstrate a substantial prejudice since there was contemporaneous knowledge of the facts constituting the claim. *Id*.

In *Matter of Lanphere v. County of Washington,* 301 A.D.2d 936, 754 N.Y.S.2d 125 (3d Dep't 2003), the Court provided in pertinent part, as follows:

> "However, while undoubtedly this lengthy passage of time may have impacted respondents' preservation of evidence and may hinder respondents' ability to locate witnesses, as well as the ability of witnesses to recall key facts and events, they have not put forth any specific evidence to support the conclusion that they cannot adequately defend these claims. (*see Matter of Welch v Board of Educ. of Saratoga Cent. School Dist.*, 287 A.D.2d 761, 764, 731 N.Y.S.2d 94, *supra*)."

Matter of Lanphere, *supra*.

There, despite the respondents' assertion that witnesses were no longer available and that preservation of evidence with passage of time prejudiced its ability to defend the claim, the Court permitted the filing of a late notice of claim because the respondents failed to provide specific evidence of the purported claims of being prejudiced in the litigation of the case. *Id*.

In *Matter of Kelli A. v. Galaway Central School District,* 241 A.D.2d 883, 660 N.Y.S.2d 228 (3d Dep't 1997), the petitioner was sexually abused by a male teacher while a student at the school. *Matter of Kelli*, *supra*. Petitioner sought leave to file a late notice of claim. *Id*. Since there was a finding that the school had knowledge of the essential facts underlying the victim's claims within a reasonable

time after they arose, the Court held that the school district was not prejudiced by a late notice of claim. *Id*.

Petitioner-Respondent respectfully argues that the delay in serving a notice of claim will not substantially prejudice the City regarding their defense of the claims on the merits, indeed, the City will be hard-pressed to allude to any prejudice, whatsoever. In the *Matter of Gerzel v. N.Y.C. Health & Hosp's Corp.*, 117 A.D.2d 549 (1st Dep't 1986), the First Department explained that "[t]he only legitimate purpose served by [NY General Municipal Law] Section 50(e) is to protect the public corporation against spurious claims and to assure it an adequate opportunity to explore the merits of the claim while information is still readily available." *Id.* at 550 (quoting *Teresta v. City of New York*, 304 N.Y. 440, 443 (N.Y. 1952). Additionally, in *Hayden v. Incorporated Village of Hempstead*, 103 A.D.2d 765 (2d Dep't 1984), the Second Department held that the mere passage of time does not constitute substantial prejudice. *See also Holmes v. City of New York*, 189 A.D.2d 676 (1st Dep't 1993) (holding that possession of records by the municipal corporation constituted actual notice and defeated a claim of prejudice by the municipality).

It is respectfully submitted that this case is precisely the type of situation which the legislature envisioned, when it entrusted the courts with the discretion to permit the dilatory service of a notice of claim. Having endured the indignity of a

false arrest and malicious prosecution, with all the attendant stress, expenses and humiliation, it would certainly be highly prejudicial to the petitioner to be denied in his application to submit the Proposed Notice of Claim. Also, should the instant application be denied, the City will still be defending Petitioner-Respondent's analogous federal claims, pursuant to 42 U.S.C. § 1983, which will require virtually the same expenditure of time and resources to defend.

Here, the City's ability to defend Petitioner-Respondent's state law claims on the merits has remained unchanged since the date of first incident alleged, as the City and its employee corrections officers have been in possession of the essential facts ever since, by virtue their personal involvement in and subsequent memorialization of the relevant events and occurrences that now form the bases of Petitioner-Respondent's claims. In anticipation of the argument that documents or other information have been lost or made unavailable after the ninety-day limitations period, petitioner reminds the City, and its employee corrections officers, that *all* City employees are prohibited from destroying any documents, records or reports relative to the New York City Department of Corrections or the inmates detained therein without first going through multiple channels of approval, which even then will result in the information be preserved elsewhere. If the City disputes this contention, Petitioner-Appellant is prepared to submit several

affidavits from City employees, including the NYPD and its legal bureau, which state exactly that.

Moreover, it should be noted that Petitioner-Appellant maintains viable section 1983 claims, since they are not subject to New York's notice of claim requirement and are subject to a three (3) year statute of limitations. Accordingly, the City of New York will not be prejudiced, since it will be compelled to defend petitioner's analogous federal claims, nonetheless. *See Owens v. Okure*, 109 S. Ct. 573 (1989); *see also Feuer v. NYCHHC*, 170 Misc.2d 838 (1996) (citing *Felder v. Casey*, 487 U.S. 131 (1988); *Welch v. State*, 286 A.D.2d 496; *Zwecker v. Clinch*, 279 A.D.2d 572 (2d Dep't 2001); *Lopez v. Shaughnessey*, 260 A.D.2d 551 (2d Dep't 1999); *Corvetti v. Town of Lake Pleasant*, 227 A.D.2d 821 (3d Dep't 1996); *Lui v. New York City Police Dep't,* 216 A.D.2d 67 (1st Dep't 1995); *Lawless v. City of Buffalo*, 177 A.D.2d 1007 (4th Dep't 1991); *Omni Group Farms, Inc. v. County of Cayuga*, 178 A.D.2d 977 (4th Dep't 1991).

Petitioner-Respondent's delay in serving a timely notice of claim in this case does not substantially prejudice the City's ability to defend the claims on the merits. The Court of Appeals, in its reversal of a lower court's denial of an application for leave to serve a late notice of claim, held that, although, the initial burden to demonstrate a lack of prejudice rests with the petitioner, "such a showing need not be extensive, but the petitioner must present some evidence or plausible

argument that supports a finding of no substantial prejudice." *Newcomb v. Middle Country Central School District*, 28 N.Y.3d 455 (N.Y. 2016). The Court of Appeals further held that once there has been an initial showing regarding the lack of substantial prejudice toward the public corporation or municipality, the public corporation or municipality is required "to rebut that showing with particularized evidence." *Id.* Thus, the City will not be unduly prejudiced by being compelled to defend a case, in which the underlying statute of limitations for the state law claims, one-year-and-ninety-days, has not yet run and where respondent acquired timely actual notice. *See Rodriguez v. N.Y.C. Health & Hosp's Corp.,* 704 N.Y.S.2d 253*,* 270 A.D.2d 110 (1st Dep't 2000) (unanimously affirming trial court's decision to grant leave to serve late notice of claim, when respondent's agents or employees recorded the relevant facts within ninety-days).

Further, Respondent-Appellant has not submitted any admissible evidence that would demonstrate that it has been prejudiced in this case by the delay in filing a notice of claim. Instead, Respondent-Appellant merely states that a lack of prejudice would not be enough to grant leave to file a late Notice of Claim. Because nothing in the record establishes that the Respondent-Appellant would be prejudiced by the filing of a late Notice of Claim, in addition to the fact that establishes Respondent-Appellant had actual knowledge of the facts constituting the claim, this Court should therefore hold that the Respondent-Appellant would

not be prejudiced by the filing of a late Notice of Claim.

CONCLUSION

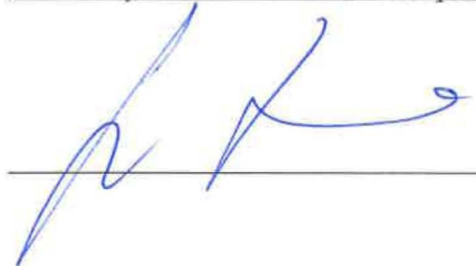
For all of the reasons set forth above, the decision and order of the lower court should be affirmed.

Petitioner-Respondent prays that this Court will grant the relief requested and provide such further relief, which the Court deems equitable and just.

Dated: Bayside, New York
March 9, 2022

Respectfully Submitted,

SIM & DEPAOLA, LLP
Attorneys for Petitioner-Respondent



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