1 of 1 DOCUMENT

[*1] **Aly Abdelrehim and Hala Morsy, Petitioners, against The City of New York, Respondent.**

103264/06

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2006 NY Slip Op 51522U; 2006 N.Y. Misc. LEXIS 2112

August 3, 2006, Decided

NOTICE: [**1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

COUNSEL: For Petitioners: Worby, Groner, Edelman & Napoli & Bern, LLP, Denise A. Rubin, of Counsel, New York, New York.

For Respondent: Michael A. Cardozo, Esq., Corporation Counsel of the City of New York, Peter E. Weiss, of Counsel, New York, New York.

JUDGES: MICHAEL D. STALLMAN, J.S.C.

OPINIONBY: Michael D. Stallman

OPINION: Michael D. Stallman, J.

Petitioners' application to serve a late Notice of Claim upon the City of New York is granted, and the Notice of Claim attached as Exhibit A to the petition is deemed served timely *nunc pro tunc* upon entry of the decision, judgment and order, without prejudice to the City's right to conduct a *GML § 50-h* examination, at a time and place to be arranged with petitioners' counsel.

Petitioners seek leave to file a late notice of claim with the City of New York alleging personal injuries and alleging derivative claims arising from alleged exposure to toxic substances during rescue/recovery, construction, and demolition [**2] operations at Ground Zero, following terrorist attacks on the World Trade Center on September 11, 2001. Having considered the factors in granting leave to file a late notice of claim (*see General Municipal Law § 50-e [5]*), the Court exercises its discretion to grant such leave.

General Municipal Law § 50-e(5) "should not operate as a device to defeat the rights of persons with legitimate claims." *Matter of Annis v New York City Tr. Auth., 108 A.D.2d 643, 644, 485 N.Y.S.2d 529 (1st Dept 1985)*. "The presence or absence of any one of the foregoing factors is not determinative . . . and the absence of a reasonable excuse is not, standing alone, fatal to the application." *Matter of Porcaro v City of New York, 20 A.D.3d 357, 358, 799 N.Y.S.2d 450 (1st Dept 2005)* (internal citations omitted). Here, the City had actual notice of the essential facts constituting petitioners' claim of exposure to toxic substances. *See e.g. Matter of Edwards v City of New York, 2 A.D.3d 110, 767 N.Y.S.2d 608 (1st Dept 2003)*; *see also Matter of O'Halloran v City of New York,1 Misc 3d 568, 770 N.Y.S.2d 583 (Sup Ct, NY County 2003)*. The City also has not shown [**3] any prejudice.

Contrary to the City's argument, an affidavit from petitioners or from a physician attesting to the injuries is not required in this case. The notice of claim is verified on petitioners' behalf. "As a general rule, the merits of a petitioner's claim are not a factor to be considered in determining an application for leave to serve a late notice of claim.'" *Matter of State Farm Fire & Cas. Co. v Village of Bronxville, 24 A.D.3d 453, 454, 805 N.Y.S.2d 651 (2d Dept 2005)*; *Weiss v City of New York, 237 A.D.2d 212, 213, 655 N.Y.S.2d 34 (1st Dept 1997)*. As petitioners point out, courts have insisted on a physician's affidavit in cases where the petitioner has invoked medical problems as the reason for the delay in filing a timely notice of claim, because "such an excuse cannot be accepted in the absence of supporting medical evidence." *Matter of Gomez v City of New York, 250 A.D.2d* [*2] *443, 443, 673 N.Y.S.2d 109 (1st Dept 1998)*. Such is not the case here. The Court respectfully declines to follow *Augustine v City of New York*, Sup Ct, NY County, Aug 5, 2006, DeGrasse, J., Index No. 109144/2005.

In light of the decision of the United States Court of Appeals for the [**4] Second Circuit in *McNally v Port Auth. [In re: WTC Disaster Site], (414 F.3d 352 [2d Cir 2005])*, it would be presumptuous for this Court to pass on the City's argument that petitioners' claims are patently meritless due to immunity or are otherwise time-barred. In *McNally*, the Second Circuit held that the federal cause of action created by *Section 408 (b)* the Air Transportation

Safety and System Stabilization Act of 2001 (ATSSSA) (*49 USC § 40101*) is the exclusive remedy for "claims of respiratory injuries by workers in sifting, removing, transporting, or disposing of [World Trade Center] debris." *414 F.3d at 377*. *Section 408 (b)(3)* provides that the federal District Court in the Southern District of New York shall have exclusive jurisdiction over ATSSSA claims.

Thus, this Court lacks subject matter jurisdiction to decide whether petitioners' claims, which are governed by the ATSSSA, are patently meritless. It is not for this Court to determine which limitations period applies, or whether the instant claims are barred by the immunity asserted by the City. The validity of the Court's decision in *Matter of Daly v Port Auth. of NY & NJ,(7 Misc 3d 299, 793 N.Y.S.2d 712 [Sup Ct, NY County 2005])* [**5] is not for this Court to determine, because *Matter of Daly* was decided under state law principles briefed by the parties before the Second Circuit's decision in *McNally*.

This decision constitutes the order of the Court.

Dated: August 3, 2006 ENTER:

New York, New York

s/

MICHAEL D. STALLMAN, J.S.C.