

Da Li v City of New York
2010 NY Slip Op 31835(U)
June 29, 2010
Supreme Court, New York County
Docket Number: 104551/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 52

LI, DA

INDEX NO.

104551/10

MOTION DATE

CITY OF NEW YORK,
ET AL.

MOTION SEQ. NO.

01

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

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
JUL 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/29/10

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
DA LI,

Petitioner,

Index No. 104551/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK; NEW YORK POLICE DEPARTMENT; NEW YORK POLICE OFFICER JOSEPH VERDEROSA (SHIELD #17399); NEW YORK POLICE OFFICER BRYAN MICCIO (SHIELD #19594); NEW YORK POLICE OFFICER BRIAN CORRIGAN (SHIELD #17596); NEW YORK POLICE OFFICER DAVID GONZALEZ (SHIELD #17332).

Respondents.

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

FILED
JUL 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

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

Petitioner has brought the present petition for leave to serve a late Notice of Claim based on his false arrest and for an order compelling respondents (collectively, the "City") to produce any and all reports related to the arrest. For the reasons set forth below, his petition for leave to file a late Notice of Claim is granted but his request for pre-action discovery is denied.

The relevant facts are as follows. On November 18, 2009, petitioner was placed under arrest by the defendant officers and charged with reckless driving, criminal mischief in the first

and fourth degrees, attempted assault of a police officer, assault in the second degree and resisting arrest. Petitioner allegedly sustained injuries during the arrest. Petitioner was immediately hospitalized after he was arrested at the Bellevue Forensic Unit until November 27, 2009. He was then transferred to the Bellevue Psychiatric In-Patient Unit, where he continued to be hospitalized until December 11, 2009 while he was treated for bipolar disorder, manic with psychosis.

It is undisputed that petitioner failed to serve respondent City of New York (the "City") with a timely notice of claim. On or about March 6, 2010, petitioner brought an Order to Show Cause seeking leave to serve a late Notice of Claim, together with a proposed Notice of Claim. In his Order to Show Cause, petitioner states that he spent the weeks immediately following his arrest hospitalized at Bellevue Hospital and that he failed to serve a timely Notice of Claim after being released from the hospital because he was adjusting to the treatment for his new diagnosis.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law ("GML") §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §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* GML §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993). It is plaintiff's burden to prove each of these elements, including lack of prejudice to the defendant. *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 defendant 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).

Petitioner has demonstrated a reasonable excuse for his failure to serve a timely Notice of Claim. It is undisputed that petitioner was hospitalized for bipolar disorder, manic with psychosis for the first three weeks of the period to file a Notice of Claim. After petitioner was released from the hospital, he was adjusting to a new psychiatric treatment and condition. His extreme mental health condition during the time period immediately following his arrest is a reasonable excuse for his failure to serve a timely Notice of Claim.

Petitioner also shows that the City acquired actual knowledge of the claim because its officers made the arrest. Actual knowledge of a false arrest claim may be imputed to a municipality through its officers who made the arrest. *See Justiniano v. New York City Hous. Auth. Police*, 191 A.D.2d 252 (1st Dept 1993); *see also Goodall v. City of New York*, 179 A.D.2d 481 (1st Dept 1992). In the instant case, petitioner was arrested by New York City Police officers and their knowledge may be imputed to the City.

Finally, petitioner shows that the City did not suffer prejudice due to the delay in filing a Notice of Claim. Where the municipality had actual knowledge of the claim, as here, it is less likely that it could have suffered prejudice because of petitioner's failure to file a formal Notice of Claim. *See Williams v Nassau County Medical Center*, 6 N.Y.3d 531, 539 (2006); *Bertone*

