

<b>Matter of Pil-Yong Yoo v County of Suffolk</b>
2020 NY Slip Op 33251(U)
May 5, 2020
Supreme Court, Suffolk County
Docket Number: 600798/20
Judge: Carmen Victoria St. George
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 56 SUFFOLK COUNTY**

**ORIGINAL**

**PRESENT:**

*Hon. Carmen Victoria St. George*  
**Justice of the Supreme Court**

\_\_\_\_\_ x

**In the Matter of the Application of**

**Index No.:**  
**600798/20**

**PIL-YONG YOO,**

**Petitioner,**

**Motion Seq:**  
**001 Mot D**

**Decision/Order**

**For leave to file a late Notice of Claim, pursuant to  
Section 50-e (5) of the General Municipal Law,**

**-against-**

**COUNTY OF SUFFOLK, SUFFOLK COUNTY  
POLICE DEPARTMENT and SUFFOLK COUNTY  
DISTRICT ATTORNEY’S OFFICE,**

**Respondents.**

\_\_\_\_\_ x

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	1-12
Answering Papers.....	15-16
Reply.....	17-20

Petitioner seeks leave to file a late notice of claim against the Suffolk County defendants. Petitioner has apparently not yet commenced a civil action against these defendants, but he intends to do so in order to recover damages for alleged false arrest, false imprisonment, illegal search, the violation of his civil rights, and defamation. The incident giving rise to this petition occurred on September 7, 2016 when petitioner was arrested by the Suffolk County Police Department and charged with weapons possession. Petitioner was prosecuted by the Suffolk County District Attorney’s Office and convicted of Criminal Possession of a Weapon in the

Third Degree, a class D violent felony, on March 14, 2018. He was sentenced to two years in prison following his earlier guilty plea on November 16, 2017.<sup>1</sup>

Petitioner mailed his notice of claim dated October 23, 2019 to the Suffolk County County Attorney's Office, the Suffolk County Police Department, and the Suffolk County District Attorney's Office. At that time, petitioner was still incarcerated. The Suffolk County Attorney rejected the notice of claim by letter dated November 7, 2019 because it "was not served within (90) days of the date of the alleged incident."

Petitioner's counsel sent a letter to the County Attorney dated November 19, 2019 asserting that "[t]he tortious conduct has continued during the period of his incarceration and the ninety (90) day rule will not be triggered until he is released. The statute is tolled until then." Petitioner was conditionally released to parole on November 27, 2019. This petition then ensued.

Service of a Notice of Claim is a condition precedent to commencing an action against defendants here. Furthermore, a plaintiff who has not timely served a Notice of Claim, but who seeks leave to file a late notice of claim is required to move within one year and 90 days of the accrual date of the claim, unless the statute of limitations has been tolled. Failure to make such a motion within the applicable statute of limitations period divests courts of authority to grant such relief (*General Municipal Law § 50-e (5)*; *Pierson v. City of New York*, 56 NY2d 950, 954 [1982]; *Argudo v. New York City Health and Hospitals Corporation*, 81 AD3d 575 [2d Dept 2011]; *McShane v. Town of Hempstead*, 66 AD3d 652 [2d Dept 2009]; *Small v. New York City Transit Authority*, 14 AD3d 690 [2d Dept 2005]; *Santiago v. City of New York*, 294 AD2d 483 [2d Dept 2002]).

The year-and-90-day provision contained in General Municipal Law (GML) § 50-i has been consistently treated as a statute of limitations that is subject to the tolls of Article 2 of the CPLR (*Campbell v. City of New York*, 4 NY3d 200 [2005]).

GML § 50-e (5) provides 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. . . 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 [90 days] or within a reasonable time thereafter. The Court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the

---

<sup>1</sup> Petitioner has commenced an action against his former criminal attorneys sounding in legal malpractice. Petitioner has also filed a motion in Suffolk County, County Court, seeking to set aside his conviction pursuant to CPL § 440, which may be undecided as of the date of this Decision and Order. It also appears that petitioner has filed a notice of appeal of his conviction in the Appellate Division, Second Department. It is unknown to this Court whether that appeal has been perfected.

notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

The trial court has broad discretion whether to grant leave to file a late notice of claim. (*General Municipal Law § 50-e [5]*; *Matter of John P. v. Plainedge Union Free School District*, 165 AD3d 1263 [2d Dept 2018]; *Corvera v. Nassau County Health Care Corporation*, 38 AD3d 775 [2d Dept 2007]; see also *Keyes v. City of New York*, 89 AD3d 1086 [2d Dept 2011]). Among the factors to be accorded great weight in determining whether to permit the filing of a late notice of claim is whether the public corporation received actual knowledge of the facts constituting the claim in a timely manner (see *Kellman v. Hauppauge Union Free School District*, 120 AD3d 634 [2d Dept 2014]; *Battle v. City of New York*, 261 AD2d 614 [2d Dept 1999]).

#### Petitioner's Claims

As set forth in the notice of claim that was rejected by the County defendants, the petitioner asserts: “[w]rongful arrest, prosecution and conviction following an illegal search and seizure of his home;” “in violation of his State and Federal Constitutional rights;” [h]e has been falsely imprisoned in Suffolk County and New York State prisons since approximately March, 2018; abuse of process; malicious prosecution, and defamation.

Respondents assert that all of petitioner's claims are time barred, except for his false imprisonment claim. The respondents concede that petitioner's claim for false imprisonment is not time barred because petitioner was incarcerated when his counsel sought to file the notice of claim. Contrary to respondents' assertion, petitioner's false arrest claim is likewise not time barred. The claims alleging false arrest and false imprisonment accrued upon the plaintiff's release from confinement at Riverview Correctional Facility on November 27, 2019 (*Williams v. City of New York*, 153 AD3d 1301, 1305 [2d Dept 2017]). “In an action for *false arrest* or false imprisonment the 90-day period within which one must serve a notice of claim (see, *General Municipal Law § 50-e [1] [a]*) commences on the day the plaintiff is released from actual custody” (emphasis added) (*Bennett v. City of New York*, 204 AD2d 587, 587 [2d Dept 1994]).

Respondents further claim that despite the false imprisonment claim being timely, it should, nevertheless, be disallowed because petitioner consented to his confinement. The Court notes that petitioner asserts in his notice of claim that his plea, conviction and sentence were based upon prosecutorial misconduct, ineffective assistance of counsel and judicial error. The motion to vacate his conviction is apparently still pending, as is his appeal; therefore, it is premature to determine the merits of petitioner's claims of false imprisonment, false arrest and malicious prosecution. Specifically as to the malicious prosecution claim, one of the elements of malicious prosecution is the absence of probable cause (*Avgush v. Town of Yorktown*, 303

AD2d 340 [2d Dept 2003]), which is apparently under judicial review. Moreover, a cause of action for malicious prosecution begins to accrue for statute of limitations purposes upon the favorable termination of the underlying criminal proceeding (*Williams v. CVS Pharmacy, Inc.*, 126 AD3d 890 [2d Dept 2015]). At this juncture, the proceeding was not terminated in petitioner's favor due to his guilty plea, but he is actively seeking to vacate that plea. Nothing determined herein shall preclude the respondents from making any appropriate motion to dismiss in the future.

Petitioner's anticipated federal civil rights claims that he has alleged in his notice of claim (i.e., that his guns were wrongfully seized in violation of his . . . Federal Constitutional rights) are subject to a three-year statute of limitation and in any event claims made pursuant to 42 USC § 1983 are not subject to the notice of claim requirement (*Mompoin v. City of New York*, 299 AD2d 527 [2d Dept 2002]).

The two claims that this Court does view as being time barred are those sounding in abuse of process and defamation. Both of those claims accrued, at the latest, on March 14, 2018, when the petitioner was sentenced. There is nothing to suggest that the respondents had any discussion or communication concerning petitioner's arrest, charges, plea and/or conviction after that date as relates to the claimed defamation, and the statute of limitations for the abuse of process claim begins to run upon termination of the underlying action (*Benyo v. Sikorjak*, 50 AD3d 1074, 1077 [2d Dept 2008]). It is undisputed that the criminal proceeding against the petitioner concluded on March 14, 2018. Thus, these claims were asserted well beyond the one-year-and-90-day statute of limitations.

#### Factors Considered in the Court's Discretion

Although there is no allegation that petitioner is an infant or mentally or physically incapacitated, or that he justifiably relied upon settlement representations, or that he was mistaken concerning the identity of the public corporation against which the claim should be asserted, the enumerated list is not exhaustive (*see Matter of Felice v. Eastport/South Manor Central School District*, 50 AD3d 138 [2d Dept 2008]). The Court considers the fact that the petitioner was not represented by counsel after his March 2018 sentencing until present counsel's intervention, and that petitioner is presently pursuing courses of action challenging his guilty plea and conviction and seeking damages for legal malpractice against his former criminal defense attorneys.

Moreover, this Court finds the respondents' assertion that they have been prejudiced by this late notice to be conclusory and unavailing. Respondents state that since notice was not timely provided, they have not had the opportunity to conduct a full and comprehensive investigation, that "memories have faded," that "evidence may have been altered over time," and that "witnesses may no longer be available." Respondents make no specific statements concerning unavailability of witnesses or evidence. Most importantly, at least two Suffolk County agencies (the police and district attorney) were directly involved in and responsible for the investigation, arrest and prosecution of the petitioner, for which this Court presumes written records exist (*see Sanchez v. County of Westchester*, 146 AD2d 620 [2d Dept 1989]). "A factor

of considerable significance in this regard arises when it is the acts of the police which give rise to the very claim set forth in the proposed notice” (*Ragland v. New York City Housing Authority*, 201 AD2d 7, 11 [2d Dept 1994]).

Accordingly, in this Court’s discretion, petitioner is granted leave to file a late notice of claim for false arrest, false imprisonment, malicious prosecution and federal civil rights violations pursuant to 42 USC § 1983.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 5, 2020  
Riverhead, NY

**HON. CARMEN VICTORIA ST. GEORGE**  
CARMEN VICTORIA ST. GEORGE, J.S.C.



FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [ X ]