Rush v County of Suffolk
2007 NY Slip Op 31044(U)
April 27, 2007
Supreme Court, Suffolk County
Docket Number: 0001831/2006
Judge: Sandra L. Sgroi
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PUBLISH

INDEX NO. 1831-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 005 MD

CASEDISPOSED

Present:
Hon SANDRA L. SGROI

Adj'd Date: 4-19-07
Return Date: 4-6-07

JAMES RUSH,
Plaintiff,

-against-

THE COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, SUFFOLK COUNTY DISTRICT ATTORNEY and DISTRICT ATTORNEY THOMAS SPOTA,
Defendants.

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Upon the following papers numbered 1 to 33 read on this motion: Notice of Motion and supporting papers 1-16; Affirmation in opposition and supporting papers 17-31; Affirmation in reply and supporting papers 32-33; it is,

ORDERED that the motion by the Plaintiff to reargue an order of this Court dated February 1, 2007 dismissing the Plaintiff's action for his failure to file a proper Notice of Claim is denied; and it is further

ORDERED that the motion of the Plaintiff for leave to amend the notice of claim is denied.

General Municipal Law § 50-e mandates that the Plaintiff serve a Notice of Claim within ninety days after the claim arises in a specific form upon municipal Defendants in any action based upon a tort(see, ***Pierson v. City of New York***, 56 N.Y.2d 950, 453 N.Y.S.2d 615, 439 N.E.2d 331). Although the service of a properly drafted and timely Notice of Claim is a condition precedent to the commencement of any tort action against a municipal Defendant, the Court of Appeals in ***Pierson v City of New York*** (supra, p. 954, 616) specifically permits service of a late Notice of Claim in some circumstances.[1]

In October of 2005, James Rush, by his attorney, commenced a special proceeding under a separate index number wherein he sought leave to file a late Notice of Claim against the Defendants herein. On November 14, 2005, this Court denied the motion of James Rush for leave to serve a late notice of claim. On February 22, 2006, the Court denied Rush's motion for the reargument of that decision. Prior to the second decision but after the first decision denying the request for leave to file a late Notice of Claim, the attorney for James Rush commenced a separate civil action alleging various causes of action arising from the 2005 arrest and subsequent acquittal of the Plaintiff in Suffolk County.[2] The verified complaint served by the Plaintiff on the Defendants in this action alleged nine separate claims. Included in the complaint were causes of action for abuse of process, false arrest, false imprisonment, malicious prosecution, assault and battery, defamation and intentional infliction of emotional harm.

The attorney for James Rush appealed the 2005 decision of this Court denying the motion for leave to serve a late Notice of Claim and on December 12, 2006, the Appellate Division Second Department issued a decision affirming the decision of this Court denying leave to file a late Notice of Claim. In that opinion the Appellate Court stated:

> In December 2005 this court decided ***Matter of Rush v. County of Nassau,*** 24 A.D.3d 560, 806 N.Y.S.2d 232, hereinafter Rush I, a proceeding in which the same petitioner sought the same type of relief pursuant to General Municipal Law § 50-e(5) based on a distinct incident on February 1, 2003, in which the petitioner asserted he was arrested by police officers. In that prior proceeding the Supreme Court, Nassau County, in an order dated August 10, 2004, inter alia, denied those branches of the petition which were for leave to serve a late notice of claim with respect to the causes of action alleging false arrest and false imprisonment. Therefore,

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[1]***Pierson v City of New York*** (supra, p. 954, 616) stated that "***the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled (***General Municipal Law***, § 50- i subd. 1; ***Cohen v. Pearl Riv. Union Free School Dist.***, 51 N.Y.2d 256, 262-263, 434 N.Y.S.2d 138, 414 N.E.2d 639)."

[2]More than one year and ninety days have run from the acquittal of the Plaintiff and the Plaintiff may not move now for leave to file a late Notice of Claim (see, ***Vasquez v. City of Newburgh***, --- N.Y.S.2d ----, 2006 WL 3630844, 2006 N.Y. Slip Op. 09479 (N.Y.A.D. 2 Dept. Dec 12, 2006)).

> at the time of his April 3, 2005, arrest and incarceration (which serve as the basis for the instant claims), the appellant and his attorney (who represented him in the prior appeal in Rush I) clearly knew of the requirements of General Municipal Law § 50-e-contrary to their statements herein to the Supreme Court that the petitioner "did not know that he may have had to file a notice of claim within ninety days of the happening of the accident." Indeed, the papers upon the subject proceeding appear to have been adapted from those used in the earlier proceeding, as evidenced by the fact that the original incident date of "February 1, 2003" appears at one point in the subject record.
>
> In this case there was something more than a failure to demonstrate a reasonable excuse; there was a patently false excuse proffered in an effort to cast the petitioner as unaware of the 90-day requirement. While the lack of reasonable excuse alone has been found insufficient to warrant denial in certain other cases (see e.g., ***Matter of Porcaro v. City of New York***, 20 A.D.3d 357, 799 N.Y.S.2d 450; ***Gibbs v. City of New York***, 22 A.D.3d 717, 804 N.Y.S.2d 393), the Supreme Court's denial of the relief requested was a provident exercise of its "broad discretion" (***Bollerman v. New York City School Const. Auth.***, 247 A.D.2d 469, 668 N.Y.S.2d 709) under the circumstances herein (see ***Matter of Rush v. County of Nassau***, supra***).

Of critical importance to this Court's present decision addressing the sufficiency of the Notice of Claim is the language that immediately follows wherein the Appellate Court stated:

> [w]e note, furthermore, that the proposed notice of claim herein was insufficient under General Municipal Law § 50-e(2) (see ***Mollerson v. City of New York***, 8 A.D.3d 70, 778 N.Y.S.2d 475; *cf.* ***Hudson v. New York City Tr. Auth.***, 19 A.D.3d 648, 798 N.Y.S.2d 105).

In light of the clear holding by the Appellate Division, Second Department, the motion to reargue is denied. More than one year and ninety days has transpired since the acquittal of the Plaintiff in Suffolk County District Court and therefore this motion to reargue and to amend the notice of claim must be denied.

Dated: 4/27/07

SANDRA L. SGROI, J. S. C.