

**Matter of Gavilanes v City of New York**

2007 NY Slip Op 33516(U)

October 26, 2007

Supreme Court, Richmond County

Docket Number: 0101082/2007

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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In the Matter of ANA GAVILANES,

PART C-2

Petitioner,

Present:

HON. THOMAS P. ALIOTTA

For Leave to File a Late Notice of Claim  
and other relief

-against-

**DECISION & ORDER**

CITY OF NEW YORK, THE NEW YORK CITY  
HOUSING AUTHORITY AND THE NEW YORK CITY  
POLICE DEPARTMENT, "JOHN DOE" #1 THROUGH  
"JOHN DOE" #10, POLICE OFFICERS WHOSE NAMES  
ARE CURRENTLY UNKNOWN,

Index No. 101082/07

Motion No. 802 - 001  
1929 - 002

Respondents.

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The following papers numbered 1 to 4 were used on these motions the 12<sup>th</sup> day of  
September, 2007:

**Papers Numbered**

<b>Notice of Motion for Leave to File a Late Notice of Claim with Supporting Papers.....</b>	<b>1</b>
<b>Notice of Cross Motion to Dismiss the Complaint with Supporting Papers.....</b>	<b>2</b>
<b>Affirmation in Opposition to Cross Motion.....</b>	<b>3</b>
<b>Reply Affirmation in Support of Cross Motion.....</b>	<b>4</b>

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Upon the foregoing papers, petitioner’s application (No. 802) for leave to file a late notice of claim is granted, and respondents’ cross motion (No. 1929) to dismiss the complaint for failure to comply with General Municipal Law §50-e(5) is denied.

Petitioner alleges that on or about March 2, 2006, her residence at 45 Warren Street, Apartment 5G, Staten Island, New York was illegally and/or negligently entered by one or

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more of the respondents. She also claims that their failure to properly safeguard or secure the front door upon leaving resulted in her personal property being stolen, removed and/or converted by persons unknown. According to petitioner, her attorneys apprised the New York City Housing Authority (“NYCHA”) of the incident in a letter dated March 22, 2006. The NYCHA is the petitioner’s landlord. In addition, the matter was subsequently investigated by the New York City Civilian Complaint Board under complaint number 2006-120-02813. Petitioner maintains that her notice of claim was prepared and verified on May 9, 2006, and then forwarded immediately to a licensed process server. However, for reasons unknown, service was not effected upon the Comptroller’s Office until June 2, 2006, two days after the statutory time period set forth in General Municipal Law §50-e had expired. The summons and complaint in this action was filed and served on or about March 13, 2007. The City of New York (hereinafter the “City”) interposed an answer on or about April 18, 2007.

In seeking leave *nunc pro tunc* to file a late notice of claim, petitioner maintains that the City could not have been prejudiced by the two-day delay in service, which is clearly de minimus.

In opposition and in support of its cross motion for dismissal of the complaint, the City argues that the late notice of claim was a nullity, and that it cannot form the basis for a tort action against the City. The City further argues that (1) petitioner has not offered any excuse for the nine-month delay in making this application, and (2) it has been prejudiced by the delay. According to the City, its ability to investigate a tort claim diminishes

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substantially with the passage of time as a consequence of memory loss and/or the inability to locate witnesses with knowledge of the events.

It is well established that General Municipal Law §50-e(5) grants this Court the discretionary authority to extend the time to serve a notice of claim (*see* Matter of Hicks v City of New York, 8 AD3d 566) as long as the statute of limitations has not expired. In this case, since the application was made less than one year and ninety days after the events in question, it is timely. Moreover, under the circumstances presented here, the City can be deemed to have acquired actual knowledge of the nature of plaintiff's claim within a reasonable period of time after the occurrence as the result of the investigation conducted by its Civilian Complaint Board (*cf.* Matter of Pico v City of New York, 8 AD3d 287). The fact of the investigation is not contested, and there has been no claim that the Board's conclusions and source materials are unavailable or inadequate (*cf.* Matter of Acosta v City of New York, 39 AD3d 629; Matter of Henriques v City of New York, 22 AD3d 847; Matter of Bruzzese v City of New York, 34 AD3d 577).

Having demonstrated both actual knowledge and the lack of prejudice to the City, the absence of a better excuse for petitioner's failure to serve a timely notice of claim is of little or no consequence (*see* Jordan v City of New York, 41 AD3d 658).

Accordingly, it is

ORDERED, that the motion for leave to serve a late notice of claim is granted; and it is further

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ORDERED, that the notice of claim annexed to the moving papers is deemed to be timely; and it is further

ORDERED, that the cross motion to dismiss the complaint for failure to comply with General Municipal Law §50-e(5) is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: OCT. 26 2007

/s/  
HON. THOMAS P. ALIOTTA, J.S.C.