

**Matter of Clifford v Metropolitan Transp. Auth.**

2008 NY Slip Op 31064(U)

April 3, 2008

Supreme Court, Nassau County

Docket Number: 2417-07/

Judge: William R. LaMarca

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**DECISION AND JUDGMENT**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

*SEAN*

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**In the Matter of the Application of JOHN A.  
CLIFFORD, to file a Late Notice of Claim,  
  
Applicant,**

**Motion Sequence #01  
Submitted January 7, 2008  
XXX**

**-against-**

**INDEX NO: 22417/07**

**METROPOLITAN TRANSPORTATION  
AUTHORITY(MTA), METROPOLITAN  
TRANSPORTATION AUTHORITY POLICE  
DEPARTMENT (MTAPD), DISTRICT ATTORNEY  
COUNTY OF NASSAU and COUNTY OF NASSAU,**

**Respondents.**

**The following papers were read on this motion:**

- Notice of Motion/Order to Show Cause.....1**
- Affirmation in Opposition.....2**
- Affidavit in Reply .....3**

**Requested Relief**

*Pro se* applicant, JOHN A. CLIFFORD, an attorney and retired New York City Police Department (NYCPD) sergeant, moves for an order, pursuant to General Municipal Law (GML)50-e, permitting service of a late Notice of Claim upon respondents, METROPOLITAN TRANSPORTATION AUTHORITY (hereinafter referred to as the "MTA"), METROPOLITAN TRANSPORTATION AUTHORITY POLICE DEPARTMENT

("MTAPD"), DISTRICT ATTORNEY COUNTY OF NASSAU and the COUNTY OF NASSAU (hereinafter collectively referred to as the "COUNTY"). The COUNTY opposes the motion, which is determined as follows: .

### Background

*Pro se* applicant, CLIFFORD, relates that he is 59 years of age and retired from the NYCPD on a 3/4 disability since 1980. He claims that he was engaged in the general practice of law from 1984 through 1998, and has been practicing part time since 1998 when he accepted a job with Home Box Office (HBO) investigating the national commercial theft of HBO television programming by hotel and motel operators. He states that the position required that he commute to the city on a daily basis, when not on the road, and it appears that during the years that he commuted to work, he was arrested seven (7) times by the MTAPD for altercations that occurred on the trains. CLIFFORD states that HBO terminated his services in 2007 as a result of his involvement with law enforcement (the MTAPD) over the past four (4) years, and that the "false arrests" resulted in seven (7) dismissals. He claims that he has filed four (4) *pro se* law suits over the years, two (2) of which he did not follow through on, and two (2) which stem from a single incident on October 5, 2006, the incident to which this motion is addressed.

CLIFFORD asserts that he seeks to file a late Notice of Claim against the COUNTY because two (2) Nassau Assistant District Attorneys (ADAs), who participated in an investigation of him, allegedly told two (2) MTAPD supervisors that it was permissible to arrest him in Nassau County for menacing after he had already been arrested in Queens County for disorderly conduct in connection with the October 5, 2006 incident. It is

CLIFFORD's position that the only appropriate legal way to bring the menacing charge was to add the charge to the charges pending in Queens County, pursuant to the joinder provisions of the Criminal Procedure Law §200.20 (2)(a) and CPL §40.10(2), and that his unlawful incarceration for almost three (3) days resulted in injury to his right shoulder. He states that both charges were eventually dismissed. He states that his decision to take a strong stand against the rude people who annoy him and every other commuter who want to read or sleep on the train into the city has taken a toll on him, and he complains of back pain, a broken shoulder and surgery in November 2005, back surgery in June 2007, as well as numerous problems resulting from the toxic environment of 9/11 Ground Zero where he was a volunteer. Also, during this period of time, he claims that his 31 year old son-in-law died of cancer and he mortgaged his home to help his daughter and grand daughter financially, which has put a great strain on him. It appears to be his position that, all of these stresses, have distracted him and left him unable to timely discover that the COUNTY, the DISTRICT ATTORNEY and the two (2) ADA's were not protected by immunity defenses before the time to file a Notice of Claim against them had expired. CLIFFORD claims that the public corporations are not prejudiced by the late filing as they have enough information preserved in their records to allow for a full investigation, and the statute of limitations on the action has not expired.

In opposition to the motion, the counsel for the COUNTY clarifies that CLIFFORD appears to be asserting that he was initially arrested by the MTAPD in Queens County, on October 5, 2006, and, based upon unnamed ADA's who allegedly told the MTAPD to arrest and charge him again in Nassau Count, he was arrested for the second time on October 9, 2006. Therefore, for the purposes of calculating the applicable time periods, the alleged

cause of action for false arrest accrued on October 9, 2006, and the time to file a Notice of Claim expired on January 7, 2007. The initiating order to show cause herein, dated December 19, 2007, is interposed more than fourteen (14) months after the accrual of the action. With respect to the cause of action for malicious prosecution, the cause of action accrued on March 16, 2006, the date the criminal charges were allegedly dismissed, and the time to file a Notice of Claim expired on June 14, 2006. As to alleged Civil Rights Violations, the action accrued on October 9, 2006 and is being pursued more than fourteen (14) months after accrual. It is the COUNTY's position that CLIFFORD has not provided a valid excuse for filing a late Notice of Claim. Counsel for the COUNTY points out that CLIFFORD, a former police officer, is an experienced attorney who has handled many lawsuits over the years. Moreover, the COUNTY claims that, despite CLIFFORD's arrest and prosecution, the files maintained by the Police Department, the District Attorney and the Criminal Clerk are sealed and unavailable to the County Attorney, and do not form the basis for a claim of actual notice to the COUNTY, citing *Brown v County of Westchester*, 293 AD2d 748, 741 NYS2d 281 (2<sup>nd</sup> Dept. 2002), and *Shapiro v County of Nassau*, 208 AD2d 545, 616 NYS2d 786 (2<sup>nd</sup> Dept. 1994). The COUNTY states that it will be prejudiced in its investigation of this matter as the claim is stale and it is harder to locate witnesses. Counsel for the COUNTY urges that the motion be denied.

#### The Law

General Municipal Law (GML) § 50-e requires that before a plaintiff may sue a municipality, a Notice of Claim must be filed within ninety (90) days after the claim arises. Service of the Notice of Claim is a condition precedent to the commencement of an action

or special proceeding. GML § 50-e. The statutory pre-condition serves “to enable municipalities to pass upon the merits of a claim before the initiation of a law suit and thereby forestall unnecessary law suits”. *Alford v City of New York*, 115 AD2d 420, 496 NYS2d 224 (1<sup>st</sup> Dept. 1985) *affd.* 67 NY2d 1019, 503 NYS2d 324, 494 NE2d 455 (C.A. 1986). A petitioner’s failure to file a Notice of Claim within 90 days of accrual of the cause of action, and the failure to seek leave to file a late Notice of Claim prior to the expiration of the Statute of Limitations period to commence an action against the municipality requires that the Complaint be dismissed. See, *Hardie v New York City Health and Hospital Corp.*, 278 AD2d 453, 719 NYS2d 256 (2<sup>nd</sup> Dept. 2000); *Hall v City of New York*, AD3d 254, 768 NYS2d 2 (1<sup>st</sup> Dept. 2003); *Hall v Niagra Frontier Transportation Authority*, 206 AD2d 853, 615 NYS2d 205 (4<sup>th</sup> Dept. 1994). The Court has no discretion to extend the time once the Statute of Limitations has expired. See, *Hall v City of New York*, *supra*.

“It is well settled that in determining whether to permit service of a late notice under General Municipal Law §50-e, a court should consider all relevant facts and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the public corporations defense would be substantially prejudiced by the delay”. *Matarrese v New York City Health and Hospital Corporation*, 215 AD2d 7, 633 NYS2d 837 (2<sup>nd</sup> Dept. 1995); *Acosta v City of New York*, 283 AD2d 489, 725 NYS2d 208 (2<sup>nd</sup> Dept. 2001); GML §50 (e)(5). While all of the above noted factors are relevant, a petitioner is not required to demonstrate that all four factors weigh in petitioners favor. Even where there is no reasonable excuse

for petitioners delay, that does not compel denial of the application where respondent fails to prove that the delay was prejudicial to its defense particularly when it had actual knowledge of the facts within ninety (90) days of the incident. *Sloan v County of Westchester*, 175 AD2d 838, 573 NYS2d 310 (2<sup>nd</sup> Dept ).

**Conclusion**

After a careful reading of the submissions and consideration of all the relevant facts and circumstances herein, it is the judgment of the Court that applicant has not provided a reasonable excuse for the delay in filing the Notice of Claim and there is no basis to grant the requested. Although, with respect to the COUNTY, CLIFFORD has filed the application approximately twenty (20) days prior to the expiration of the one (1) year and ninety (90) day Statute of Limitations, the Court finds that counsel has not provided a reasonable excuse for the delay, that the respondents did not have actual knowledge of the allegations within the 90 day time frame, that no infant is involved and that the respondents have demonstrated that they would be prejudiced in defending an action brought at this late date. Accordingly, it is hereby


**ORDERED**, that the petition to file a late Notice of Claim upon the respondents is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 3, 2008

**ENTERED**

  
WILLIAM R. LaMARCA, J.S.C.

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**NASSAU COUNTY 6  
COUNTY CLERK'S OFFICE**

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