

**Maigah v City of New York**

2008 NY Slip Op 31451(U)

May 21, 2008

Supreme Court, New York County

Docket Number: 0105459/2008

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**EILEEN A. RAKOWER**

PRESENT: J.S.C.  
Justice

PART 5

Hamidu Jamal Maigah

INDEX NO. 105459/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

City of New York

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
MAY 27 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: May 21, 2008

  
**EILEEN A. RAKOWER** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
HAMIDU JAMAL MAIGAH, an infant by his father and  
natural guardian, Hamidu Bawa, and HAMIDU BAWA,  
individually,

Index No.  
105459/08

Petitioners,

DECISION  
and ORDER

-against-

CITY OF NEW YORK and NEW YORK CITY POLICE  
DEPARTMENT,

Respondents.

-----X  
HON. EILEEN A. RAKOWER:

On April 18, 2007, Sonia Taylor, her companion and a home health care worker were murdered by Taylor’s twenty year old son, Jimmy Dawkins, who killed himself after the murders. Petitioner Hamidu Maigah is the decedent Taylor’s seven year old son, who was not present at the murder; and petitioner Hamidu Bawa is Maigah’s father. Petitioners move for leave of the court to file a late notice of claim alleging, *inter alia*, infliction of emotional distress, negligent supervision and gross negligence on behalf of the New York City Police Department. The City of New York (City) opposes the petition as it pertains to all causes of action other than the wrongful death claim. City conceded that petitioner is still within the proscribed time period to file a notice of claim on the wrongful death claim, because an administrator was recently appointed for Taylor’s estate on April 15, 2008.

A notice of claim must be filed within 90 days of when the claim arose.(General Municipal Law 50-e(1)(a)). The court has discretion to grant leave to file a late notice of claim within one year and ninety days of accrual. (General Municipal Law 50-e(5)). Key factors to be considered include whether the petitioner has demonstrated a reasonable excuse for failing to file such notice timely, whether the public corporation acquired actual notice of the essential facts within 90 days after the claim arose or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in defending on the merits. No one of these factors is determinative. (*Nieves v. New York Health and Hospitals Corp*, 34 AD3d 336 [1<sup>st</sup> Dept. 2006]).The infancy of plaintiff Maigah is another factor to be considered. (*Juli F. V City of New York*, – NYS2d– 2008, 2008WL1031310 [NYAD 2<sup>nd</sup> Dept.]; 2008 NY Slip Op. 03215). The burden to prove lack of prejudice rests with petitioner. (*Williams v. Nassau County Medical Center*, 6 NY3d 531 [2006]).

Here, petitioners state that they did not file a timely notice of claim because Maigah is an infant and Bawa only became aware that they could file an action against City in April, 2008, when they engaged counsel to assist with estate matters pertaining to Taylor's death. Petitioners state that City will not be prejudiced because it had actual knowledge of the essential facts that constitute the claim as it is in possession of all relevant records pertaining to the incident and City's negligence. They state that extensive media coverage of the incident made City aware of the occurrence.

City argues that petitioners do not offer a reasonable excuse for the delay in filing a notice of claim. It states that knowledge of an incident cannot be imputed to City as actual knowledge of the essential facts of a claim. (*Chattergoon v. New York City Housing Authority*, 161 AD2d 141 [1st Dept. 1990]). City argues that petitioners have failed to meet their burden to show that City will not be prejudiced by the late filing of the notice of claim. It states that City may not be held liable in the absence of a "special relationship" between Taylor, the deceased, and the police and petitioners have failed to establish that special relationship.

"Petitioner's ignorance of the law is not an acceptable excuse for failing to serve a timely notice of claim . . ." (*Gaudio v. City of New York*, 235 AD2d 228 [1<sup>st</sup> Dept. 1997] *internal citations omitted*). This alone, however, is insufficient to defeat the application to file a late notice of claim. The court must also consider that the purpose of the statutory notice provision is to permit City "an opportunity to make an early investigation of the claim while the facts surrounding the alleged claim are still fresh." (*Adkins v. City of New York*, 43 NY2d 346 [1977]).

While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, where the proposed claim is patently without merit, leave to serve a late notice of claim should be denied. (*Besedia v. New York City Transit Authority*, 47 AD3d 924 [2<sup>nd</sup> Dept. 2008]). The existence of a "special relationship" must be established between "the claimant and the municipality before the latter may be held liable to the former for the negligent exercise of a governmental function such as providing police protection . . ." (*Kircher v. City of Jamestown*, 74 NY2d 251 [1989]). "The elements of this 'special relationship' are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." (*Larato v. City of New York*, 8 NY3d 79

[2006], quoting *Cuffy v. City of New York*, 69 NY2d 255 [1987]).

Petitioners state that the decedent's local precinct had both extensive contact and an on-going personal relationship with the family. They argue that it is implausible that the decedent did not rely on police department promises for her protection. Petitioners argue that the decedent's circumstances are much like those in *Sorichetti by Sorichetti v. City of New York*, (65 NY2d 461[1985]) where the court found a special relationship existed between the deceased Sorichetti and the police.

However, the decedent's circumstances differ substantially from that in *Sorichetti, supra*, because in that case multiple orders of protection had been issued by the court. Sorichetti went to her local precinct, showed an order of protection to the officer on duty and he told her to go away. There, the Court of Appeals found "a special duty of protection" existed which "arose . . . upon presentment of the order of protection to the police along with the allegation that it had been violated." (*Id.* at 468). The Court further stated that such a duty exists in "extraordinary circumstances" (*Id.*).

Here, petitioners state that they expect their Freedom of Information request to reveal the extent to which the police were aware of the decedent's problem with her son Jimmy Dawkins. Petitioners state that there is "presumptive evidence" that police knew that the son had been removed to a psychiatric facility before. In *Sorichetti, supra*, the court found that "a critical factor in the creation of a special duty of protection" was the police lack of action when Sorichetti went to the precinct, presented the Order of Protection and police sent her away. Petitioners herein concede that the decedent did not have an Order of Protection against her son and there is no evidence that police were aware of any imminent threat from the decedent's son. As such, petitioners have failed to establish a special relationship between the decedent and the police. ( *Chattergoon v. New York City Housing Authority, supra*).

Moreover, petitioners herein seek to file suit against City in the names of Hamidu Maigah and Hamidu Bawa. A cause of action to recover damages for wrongful death is brought exclusively for the benefit of decedent's distributees. Other causes of action sought to be filed by petitioners are, in fact, "personal to the deceased." (*Hidalgo v. New York City Health and Hospitals Corp.*, 210 AD2d 481 [2<sup>nd</sup>

Dept. 1994]). A cause of action for wrongful death is “designed to compensate those who suffer pecuniary loss as a result of a wrongful act.” (*Kemp v. City of New York*, 208 AD2d 684 [2<sup>nd</sup> Dept. 1994]). The petitioners herein have not demonstrated that they had any “special relationship” with the police department that would permit them to sue the City of New York and the New York City Police Department for causes of action beyond wrongful death. Wherefore, it is hereby

ORDERED that petitioner’s application for leave to file a late notice of claim is denied.

This constitutes the decision and order of the court.

Dated: May 21, 2008

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
MAY 27 2008  
COUNTY CLERK'S OFFICE  
NEW YORK