

Matter of Williams v City of New York

2008 NY Slip Op 32248(U)

August 7, 2008

Supreme Court, New York County

Docket Number: 0107025/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

PAUL G. FEINMAN

PRESENT: FEINMAN
Justice

PART 52

WILLIAMS, PAUL
- v -
CITY OF New York

INDEX NO. 107025/08
MOTION DATE 6/5/08
MOTION SEQ. NO. 01
MOTION CAL. NO. 119

The following papers, numbered 1 to 4 were read on this motion to/for LSNC

| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ... | <u>1,2</u> |
| Answering Affidavits - Exhibits | <u>3</u> |
| Replying Affidavits | <u>4</u> |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~
**PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 8/7/08 SHZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
In the Matter of
PAUL WILLIAMS,
Petitioner,

against

CITY OF NEW YORK,
Respondent.
-----X

Index Number 107025/2008
Submission Date June 5, 2008
Mot. Seq. No. 001
Mot. Cal. No. 119
**DECISION, ORDER AND
JUDGMENT**

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Papers considered in review of this petition to seek leave to serve a late notice of claim:

Papers
Order to Show Cause and Application
Affidavit of Service
Affirmation in Opposition
Replying Affirmation

Numbered

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

PAUL G. FEINMAN, J.:

Pursuant to GML §50-e(5), petitioner Paul Williams seeks leave to serve a late notice of claim upon respondent City of New York. For the reasons which follow, the petition is granted.

Factual and Procedural Background

Petitioner alleges that he was assaulted by two New York City police officers on March 21, 2007 when they arrested him at his home. Petitioner claims that one of the officers struck him in the head with a blunt object. He was taken to Metropolitan Hospital Center, a City hospital, and treated for lacerations to the head (OSC Bonthuis Aff. Ex. C). According to the hospital Chart Review Print, petitioner complained to the hospital staff that he was struck by a

police officer (*id.* ["36 [year old] male [brought in by the] police with c/o cut to right side of scalp after being hit with club by police.")). Petitioner claims that he suffers from "headaches and other side effects" as a result of his injuries (OSC Bonthius Aff. Ex. B).

On May 1, 2007, petitioner's girlfriend, with whom he lives, filed a notice of claim against the City for property damage to her apartment, claimed that the police confiscated \$1200, and that she and her "family" suffered "emotional distress and mental anguish . . . as a result of being physically and unlawfully assaulted and publicly embarrassed" (OSC Bonthius Aff. Ex. A). Petitioner asserts that he "was unable to retain counsel within ninety days of the assault because of his indigent status, and had to wait until a lawyer agreed to take his case on a *pro bono* basis" (OSC Bonthius Aff. ¶ 19). On April 7, 2008, after he met with counsel, petitioner filed a notice claim against the City (OSC Bonthius Aff. Ex. B). Petitioner now seeks permission to serve a late notice of claim against respondent.

Petitioner's attorney argues that the delay in filing the notice of claim is reasonable. Petitioner asserts that he initially believed that his girlfriend's Notice of Claim was sufficient to protect his potential claim. Petitioner argues that there is no prejudice against the City because it had actual notice of the claim through: (1) the hospital records that stated he alleged that he was struck in the head by the police officer, (2) another police officer who witnessed the accusation at the hospital, (3) the officers who allegedly assaulted the petitioner, and (4) the girlfriend's Notice of Claim (OSC Bonthius Aff. ¶¶ 12-17).

The City opposes the petitioner's application seeking permission to file a late notice of claim. The City first argues that the application should be denied because the petitioner fails to articulate an adequate excuse for his delay. The City asserts that petitioner's excuse "amounts to

nothing more than being unaware of the statutory requirement,” and that “[m]erely being unaware of the ‘statutory requirement for serving a timely notice of claim’ is an ‘unacceptable excuse’” (Res. Aff. ¶ 10 [quoting *Pico v City of New York*, 8 AD3d 287, 288 [2d Dept. 2004]]).

The City next argues that the application should be denied because it never acquired actual knowledge of the claim within the statutory period. The City argues that even if it had knowledge of the occurrence of the accident and injury, this does not constitute actual knowledge of the claim. The City additionally argues that the application should be denied because it did not have an opportunity to investigate the allegations in a timely fashion. The City asserts that “[a]t this delayed point in time, all investigative efforts would prove inadequate. Thus, the City claims it is deprived of any opportunity to investigate the allegations” (Res. Aff. ¶ 19).

Discussion

Pursuant to General Municipal Law § 50-e(1)(a), “any case founded upon tort” where the City is a defendant, “the notice of claim shall be . . . served . . . within ninety days after the claim arises.” “It is well settled that General Municipal Law § 50-e(5) permits the court to consider all relevant factors and to exercise considerable discretion in determining whether to permit late service of claim” (*Baldeo v City of N.Y.*, 127 AD2d 809, 809 [2d Dept. 1987]).

In making this determination the Court first considers whether “the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim” (*Matter of Chambers v Nassau County Health Care Corp.*, 50 AD3d 1134, 1134 [2d Dept. 2008]; see General Municipal Law § 50-e[5]). Suffering a debilitating injury resulting from an alleged accident has been seen as a reasonable excuse for filing a late notice of claim (*Matter of Strauss*

v New York City Trans. Auth., 195 AD2d 322, 322 [1st Dept. 1993] [noting that the petitioner's injuries prevented her from filing a timely notice of claim]). Failure to identify the proper public corporation against which the claim should have been brought has also been found to be a reasonable excuse (*Baldeo*, 127 AD2d at 809). However, simply being "unfamiliar with statutory requirement for serving a timely notice of claim" is not a reasonable excuse for filing a late notice of claim (*Pico v City of N.Y.*, 8 AD3d 287, 287 [2d Dept. 2004]). Similarly, merely waiting to retain counsel is not a reasonable excuse (*Matter of Gilliam v City of N.Y.*, 250 AD2d 680, 680 [2d Dept. 1998]).

The Court also considers whether "the [City] acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or a reasonable time thereafter" (*Chambers*, 50 AD3d at 1134; *see* General Municipal Law § 50-e[5]). "The relevant inquiry is whether the [City] had actual knowledge of the facts--as opposed to the legal theory--underlying the claim" (*Matter of Dumancela v New York City Health & Hosp. Corp.*, 32 AD3d 515, 516 [2d Dept. 2006]). The petitioner has the burden of establishing this element (*Washington v City of N.Y.*, 72 NY2d 881, 883 [1988]). "Where . . . members of the municipality's police department participate in the acts giving rise to the claim, and *reports and complaints have been filed by the police*, the municipality will be held to have actual notice of the essential facts of the claim" (*Matter of Ragland v New York City Hous. Auth.*, 201 AD2d 7, 11 [2d Dept. 1994] [emphasis in original]). The City may also acquire actual of the facts constituting petitioner's claim from another party's notice of claim (*see Heredia v City of N.Y.*, 141 AD2d 473, 474 [1st Dept. 1988] [holding that the City had actual knowledge of a shooting victim's claim from another victim's notice]). City records may also provide actual knowledge (*but see Williams v Nassau County*

Medical Center, 6 NY3d 531, 583 [2006] [“Merely having or creating hospital records, *without more*, does not establish actual knowledge of the facts--as opposed to the legal theory--underlying the claim.”] [emphasis added]).

Finally the Court will consider whether “the delay would substantially prejudice the public corporation in defending on the merits” (*Chambers*, 50 AD3d at 1134; *see* General Municipal Law § 50-e[5]). The application to amend must be made within one year and 90 days of the accident (*Matter of Sanders v New York City Hous. Auth.*, 170 AD2d 607, 608 [2d Dept. 1991]). “The purpose of the statutory notice of claim requirement (General Municipal Law § 50-e) is to provide a public corporation with an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while the information is still readily available” (*Barno v New York Hous. Auth.*, 185 AD2d 292, 293 [2d Dept. 1992]). The petitioner has the burden of proving that the delay has not prejudiced the City by depriving it of the opportunity to investigate the incident (*see Matter of Cattell v Town of Brookhaven*, 21 AD3d 896, 897 [2d Dept. 2005]).

“The presence or absence of any one factor, including the absence of a reasonable excuse, is not necessarily fatal” (*Chambers*, 50 AD3d at 1135).

Turning to the facts of this case, to the extent petitioner argues that the girlfriend’s Notice of Claim of “property damage” is sufficient to provide notice of his claim for personal injury, his argument is unavailing. This amounts to simply being unaware of the statutory requirements of General Municipal Law § 50-e and is an unacceptable excuse for his failure to timely serve a notice of claim (*Pico*, 8 AD3d at 287). His claim that his delay resulted from an inability to retain counsel until he was able to find an attorney to take the case on a *pro bono* basis is also

insufficient to satisfy the need to show a reasonable excuse for the delay – this is particularly true given that this kind of action is typically brought on a contingency basis. Although petitioner fails to provide a reasonable excuse for his delay, this error is not fatal (*Jordan v City of N. Y.*, 41 AD3d 658, 660 [2d Dept. 2007]).

The City asserts that although it had knowledge of the “accident and injury,” this “without more, does not constitute actual knowledge of the essential facts constituting the claim” (Res. Aff. ¶ 13). The City first relies on *Felice v Eastport/South Manor Central School District*, 50 AD3d 138 (2d. Dept. 2008) to oppose petitioner’s assertion that the City received actual knowledge of the underlying facts of the claim. In that case a student, who was injured in a cheerleading accident, sought permission to file a late notice of claim against a school district alleging negligent supervision and control of the stunt team. (*id.* at 139). The court rejected her contention that the district received actual knowledge of the claim of negligent supervision through an accident report because “[n]owhere in the injury report is there any recitation or allegation that the ‘basers’ were either too small to catch a ‘flyer’ such as [the student], or that [the student] had made known to the coach her dissatisfaction with the team members assigned as ‘basers’” (*id.* at 150).

Similarly, the City also relies on *Chattergoon v New York City Housing Authority*, 161 AD2d 141 (1st Dept. 1990). There, in a wrongful death action an estate administrator claimed that the public corporation had actual notice of his claim of negligence through the police department’s investigation of his father’s murder (*id.* at 142). The court held that although there was knowledge of the occurrence there was not knowledge of the claim because “[t]he police investigation into the murder of the petitioner's decedent was geared toward finding the murderer

and not toward preparation of a possible claim for pain and suffering on the basis of alleged negligence by the respondent” (*id.*).

These two cases involved official reports that failed to state the facts that were the bases for the claims. Here, however, unlike *Felice* and *Chattergoon*, the petitioner’s statements to the City hospital personnel, which were made in front of another police officer, specifically alleged that the arresting police officers struck him with a blunt object, which is the basis for his claim. Thus, the City can be deemed to have had actual knowledge of the facts underlying the claim within 90 days of the incident (*Dumancela*, 32 AD3d at 516).

The City further contends that the girlfriend’s Notice is insufficient to give the City actual knowledge of the facts underlying the claim because it only notifies the City of property damage. Even assuming, however unlikely, that the City’s investigation of the girlfriend’s Notice did not uncover the facts underlying petitioner’s claim, the petitioner has still met his burden of establishing that the City had actual knowledge of the facts of the claim within 90 days of the incident (*Washington*, 72 NY2d at 883). Accordingly, there is no need to address petitioner’s additional assertion that the City gained actual knowledge of the facts underlying the claim through the two arresting police officers.

The City finally argues that it will be extremely prejudiced in their defense if petitioner is allowed to file a late notice of claim because at this delayed point in time, all investigative efforts would prove inadequate. This bald assertion is unsupported by any facts. There is no suggestion that the City cannot interview both the police officers involved in the arrest and the police officer present in the hospital, all of whom presumably documented the underlying facts in their memo books (*see Schiffman v City of N.Y.*, 19 AD3d 206, 206 [1st Dept. 2005]). The

City also has the hospital records and can interview members of the hospital staff who were present when petitioner made his allegations. Moreover, it is likely that an investigation of the girlfriend's Notice would have uncovered the underlying facts that give rise to petitioner's claim (*see Dumancela*, 32 AD3d at 515). The City's conclusory assertions of prejudice, based solely on the petitioner's delay in serving notice of claim, are insufficient (*Jordan v City of New York*, 41 AD3d 658, 660 [2d Dept. 2007]). Thus, petitioner has met his burden showing a lack of prejudice because the City has not been denied an opportunity to investigate the incident (*Cattell*, 21 AD3d at 897).

While the petitioner fails to provide a reasonable excuse for the delay in filing a notice of claim, the City did in fact gain actual knowledge of the facts underlying his claim, and has shown no prejudice resulting from the delay. Balancing all the relevant factors and the remedial purpose to be served by allowing a late notice of claim, the petition seeking permission to serve a late notice of claim should be granted. Accordingly it is,

ADJUDGED and ORDERED that the petition is granted and the notice of claim previously served on the City on April 7, 2008, and attached as Exhibit B of petitioner's motion, is deemed timely filed *nun pro tunc* to the 90th day after the claim accrued..

This is the decision, order and judgment of this court. This is a final disposition of this index number and any subsequently filed action requires the purchase of a new index number.

Dated: Aug. 7, 2008
New York, New York

ENTER:

Paul A. Feinma

J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).