

Martinez v City of New York

2008 NY Slip Op 32496(U)

September 11, 2008

Supreme Court, New York County

Docket Number: 0107363/2008

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

MARIANO MARTINEZ

- v -

CITY OF NY

INDEX NO. 107363/08
MOTION DATE 7-11-08
MOTION SEQ. NO. 001
MOTION CAL. NO. 63

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

Notice of Motion/ Order to Show Cause — Affidavts — Exhibts ...

Answering Affidavts — Exhibits _____

Replying Affidavts _____

PAPERS NUMBERED

1

2

3

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: 9/11/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X

MARIANO MARTINEZ,
Petitioner,

-against-

Index Number 107363/08
Submission Date July 11, 2008
Mot. Seq. No. 001
Cal. No. 63

DECISION AND ORDER

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, POLICE OFFICER DAVID
STAGLIANO, shield number 18736, in both his
individual capacity and his official capacity as a New
York City Police Officer, and Police Officer Joseph
1-10, true identities presently unknown, in both
individual capacities and as New York City Police
Officers,

Respondents.

-----X

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1419).

For the Plaintiff:
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For the Defendant:
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Corporation Counsel of City of New York
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Papers considered in review of this petition for permission to file late notice of claim:

Papers	Numbered
Order to Show Cause	1
Affirmation in Opposition	2
Replying Affirmation	3

PAUL G. FEINMAN, J.

Petitioner seeks leave to serve a late notice of claim pursuant to General Municipal Law

§ 50-e(5).¹ For the reasons set forth below, the application is granted.

Factual and Procedural Background

¹Although this proceeding was commenced as an action, the court will deem it converted pursuant to CPLR 103 (c) into a special proceeding, and will refer hereafter to petitioner and respondents.

On September 27, 2007, Mariano Martinez was allegedly singing in Union Square Park in New York County, New York. (OSC, Gambino Aff. ¶ 3.) Although Martinez alleges he was “lawfully within the confines” of the park, Defendant Police Officer David Stagliano approached him at approximately 1:30 p.m. and “demanded, without just cause,” that he leave the park. (OSC, Gambino Aff. ¶ 4.) Martinez, an older man who did not speak English was unable to communicate with Stagliano. (*Id.* at ¶ 5.) Although witnesses to the interaction between the two “offered to interpret for the officer,” Martinez claims “Stagliano forced [him] to the ground, punched, kicked and kneed [him] without . . . provocation” and arrested him “without probable cause.” (*Id.* at ¶¶ 5-6.)

That same day, a witness to the events in Union Square filed a complaint against Stagliano with the New York City Civilian Complaint Review Board (CCRB); on September 30, 2007 another witness filed a complaint against the officer with the CCRB; on October 1, 2007 petitioner himself, with the help of someone who speaks English, also filed a complaint with the CCRB. (OSC, Gambino Aff. Ex. B at 2.[CCRB Complaint Report].) Martinez later consulted a “Hispanic Help Group” to obtain legal assistance. (OSC Gambino Aff. ¶ 9.) He now seeks permission, by order to show cause, to serve a late notice of claim upon the City of New York, and the New York City Police Department, as the 90-day period of time in which to file a notice has expired. Defendants oppose.

Legal Analysis

Pursuant to General Municipal Law § 50-e(1) (a), a notice of a claim in tort against a municipality must be served within 90 days after the claim arises. See Jordan v City of New York, 41 AD3d 658, 659 (2d Dep’t 2007). The notice of claim has been termed a condition precedent to commencing a suit against a public corporation. See, e.g., Williams v Nassau

County Med. Ctr., 6 NY3d 531, 535 (2006). However, upon application by the would-be plaintiff, the court has the discretion to extend the time to serve a notice of claim. See Gen. Mun. L. § 50-e(5); Williams, 6 NY3d at 535.

The factors the court must consider when determining whether to allow service of a late notice of claim are whether:

“(1) the movant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, (2) the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) the delay would substantially prejudice the municipality in its defense.”

See Gen. Mun. L. § 50-e(5); Jordan, 41 AD3d at 659. It is well established that “[t]he presence or absence of any one of these factors is not necessarily determinative . . . and the absence of reasonable excuse is not necessarily fatal.” Matter of Brownstein v Incorporated Village of Hempstead, ___ AD3d ___, 859 NYS2d 682, 685 (2d Dep’t 2008).

In support of his motion, petitioner claims his “language barrier, his unfamiliarity with the legal process of this state and inherent fear of police” serve as a reasonable excuse for failure to provide timely notice of claim. (OSC Gambino Aff. ¶ 9.) However, it is well established that a claimant may not cite ignorance of the law or limited English proficiency as a reasonable excuse for his failure to serve a timely notice of claim. Figueroa v City of New York, 92 AD2d 908, 909 (2d Dep’t 1983). Further, it has been held that a claimant’s fear of retaliation is not a reasonable excuse to delay petitioner’s notice of claim. Doukas v East Meadow Union Free Sch. Dist., 187 AD2d 552, 553 (2d Dep’t 1992). Accordingly, petitioner cannot be found to have established a reasonable excuse for his delay in filing a late notice of claim.

Petitioner argues that the City of New York acquired knowledge of the essential facts in support of the claim within 90 days of the alleged injury. Approximately three hours following petitioner’s alleged injury, a witness to the events filed an online complaint with the CCRB.

(OSC Gambino Aff. Ex. B at 3.) In his complaint, this witness provided the CCRB with sufficient facts that give rise to the petitioner's cause of action before this court. Furthermore, on September 30, 2007, October 1, 2007, and October 2, 2007 three additional complaints were filed with the CCRB, providing additional facts in support of petitioner's claim. (OSC Gambino Aff. Ex. B at 2.)

Without question, the CCRB is under the purview and control of the City of New York. (See Gambino Reply Aff. Ex C & D [copies of "nyc.gov" downloads].) The City argues that because petitioner had the wherewithal to file a complaint with the CCRB within days of the alleged occurrence, he could just as easily have filed a notice of claim with the Comptroller's office, and that the delay prejudices the City and undermines the purpose of the 90-day statutory requirement. The City does not delineate what prejudice it has actually suffered as concerns this incident. Given that it acquired actual knowledge of the essential facts of the claim within days if not hours, after their occurrence, and has the names of witnesses, and the details of each person's recount, as well as the name and badge number of the officer involved, the Court finds that respondents are not substantially prejudiced by allowing service of a late notice of claim. Thus, the two other factors the court must consider (actual knowledge and lack of prejudice) weigh in favor of granting the petition.

In weighing the various factors when considering a late notice of claim, no single factor is dispositive. Kelli v Galway Centr. Sch. Dist., 241 AD2d 883, F884 (3d Dep't 1997). The court must bear in mind that the statute permitting the court to allow the late filing of a notice of claim is a remedial one meant to be construed to allow, when possible, a claim to be heard on its merits. See, Matter of Schiffman v City of N.Y., 19 AD3d 206, 207 (1st Dep't 2007). On

balance, after careful consideration of the three factors set forth in Gen. Mun. L. § 50-e(5), the court finds the application should be granted. It is therefore

ORDERED AND ADJUDGED that petitioner's motion for leave to file a late notice of claim is granted, and that petitioner shall immediately served a signed copy of the proposed notice of claim upon the City's Comptroller together with a copy of this decision, order and judgment within fifteen days of its entry.

This is the court's decision, order and judgment. Petitioner is reminded that this constitutes a final disposition and that upon commencement of an action, he must purchase a new index number.

Dated: September 11, 2008
New York, New York



J.S.C.

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