

Guowei Li v City of New York

2009 NY Slip Op 31969(U)

August 28, 2009

Supreme Court, New York County

Docket Number: 110719/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

GUOWET LI
- v -
CITY OF NY

INDEX NO. 110179/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 3 1 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/28/09

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
GUOWEI LI,

Petitioner,

- against -

THE CITY OF NEW YORK,

Respondent

-----X
HON. EILEEN A. RAKOWER, J.

FILED

AUG 3 1 2009

COUNTY CLERK'S OFFICE
NEW YORK

Index No.
110719/09

**DECISION
and ORDER**

Mot. Seq. 001

Petitioner moves by order to show cause pursuant to General Municipal Law (“GML”) §50-e for leave to file a late notice of claim (“NOC”) for allegations of false arrest and imprisonment; malicious prosecution; civil rights violations; negligent hiring, training, retention and supervision; and intentional and/or negligent infliction of emotional distress surrounding Petitioner’s arrest on October 18, 2007. Petitioner was arrested and charged with criminal possession of stolen property, “detained for several days,” and was released after “several days.”¹ The charges against Petitioner were dismissed on April 22, 2008.

Petitioner commenced the instant petition on July 17, 2009 by purchasing an index number (*see* CPLR §304). Petitioner submits an affirmation and a petition in support. Petitioner states that the reason Petitioner failed to file a NOC within the 90 day limit set forth by the GML was that Petitioner feared retaliation by the police during the pendency of his criminal action. After the dismissal of Petitioner’s charges, Petitioner states that he did not immediately attempt to file a NOC thereafter because Petitioner “was so happy that [he] didn’t think about anything else other than [his] freedom,” and because he “did not want to start up any new trouble with the police.” Petitioner further states that after speaking with friends and family, he consulted with an attorney in early March 2009, and he was apprised of his legal

¹Petitioner does not state the date upon which he was released. That information remains unavailable since the records were sealed.

rights as to his alleged false arrest and wrongful prosecution, as well as the filing requirements under the GML.

Petitioner argues that the foregoing constitutes a reasonable excuse for his delay in filing a NOC, and that the City cannot show that it has been prejudiced because, by virtue of police records pertaining to his arrest, the City had actual notice of the events underlying Petitioner's claim.

The City has submitted an affirmation in opposition of the petition, and the Petitioner has submitted a reply affirmation.

Generally, a NOC must be filed within 90 days of the date in which a claim upon a municipality arises (GML §50-e(1)(a)). GML §50-e(5) provides that the court has discretion to extend the time to serve a notice of claim where a claimant demonstrates a reasonable excuse for his or her failure to timely file the NOC; that the municipality received actual and timely notice of the claim; and that the municipality was not prejudiced by the delay (*see Ocasio v. New York City Health & Hosps. Corp.*, 14 A.D.3d 361, 362 [1st Dept. 2005]). However, leave to file a late NOC cannot be granted by a court where leave is sought after the expiration of the applicable statute of limitations of one year and ninety days (*see* GML §§50-e(5) and 50-i).

Even if the court were inclined to grant Petitioner leave to file a late NOC, the court lacks discretion to grant Petitioner leave to file a late NOC with respect to acts concerning his October 18, 2007 arrest and subsequent detention. These include Petitioner's claims of false arrest and imprisonment; negligent hiring, training, supervision, and/or retention; civil rights violations; and claims of negligent and/or intention infliction of emotional distress. This is because it is well settled that a cause of action for false arrest and imprisonment accrues at the moment the confinement ceases (*see Bumbury v. City of New York*, 2009 NY Slip Op 4167, *1 [1st Dept. 2009]). Accordingly, where Petitioner was arrested 638 days prior to commencing the instant Petition, and was held only for "several days" (the ambiguous figure provided by Petitioner), it is safe to conclude that the instant Petition was commenced well past the year-and-ninety-day mark.

Leave to file a late NOC with respect to Petitioner's malicious prosecution claim, on the other hand, falls within the court's discretion, as the instant petition was commenced within one year and ninety days of dismissal of the criminal proceeding (*see id.*) (a claim for malicious prosecution accrues when the criminal proceeding

terminates in favor of the accused). The court finds, however, that Petitioner has failed to make the requisite showing of entitlement to file a late NOC pursuant to GML §50-e(5). Petitioner advances two justifications for his failure to timely serve a NOC: (1) his unawareness of the GML's ninety day filing requirement; and (2) his fear that pursuing civil remedies during the pendency of his prosecution would lead to retaliatory action by the alleged tortfeasors.

It is well settled that a petitioner's ignorance of the requirements and time constraints of the GML does not constitute a reasonable excuse for noncompliance therewith (*see Alper v. City of New York*, 228 A.D.2d 390 [1st Dept. 1996]; *Figueroa v. New York*, 92 A.D.2d 908 [2nd Dept. 1983]). Moreover, there is nothing in the record which would allow the court to conclude that Petitioner's fear that he would face retaliation for pursuing available civil remedies during the pendency of his criminal proceeding was reasonable (*see Formisano v. Eastchester Union Free School Dist.*, 2009 NY Slip Op 1118 [2nd Dept. 2009] (petitioner's unspecified claim that he feared retaliation by school authorities were he to file a claim unreasonable).

As to whether the City had actual notice of the claim and/or was prejudiced by the late notice, *Powell v. City of New York*, 2006 NY Slip Op 6133 [1st Dept. 2006] is controlling, and requires that the petition be denied. In *Powell*, the First Department reversed the Supreme Court, Bronx County, which granted the petitioner's motion for leave to file a late NOC asserting a malicious prosecution claim.² In holding that granting leave constituted an improvident exercise of discretion, the First Department noted that "the extent to which respondents may have acquired actual notice of the essential facts of the claim within 90 days is questionable," while finding that the City's claims of prejudice were supported by petitioner's "unreasonable delay in providing notice of the malicious prosecution claim." Further, the First Department found that the asserted prejudice was "exacerbated both by the vague and conclusory nature of petitioner's proposed notice of claim and by respondents' lack of access to relevant but sealed criminal court records."³

²Like Petitioner herein, the petitioner's proposed NOC also asserted a false arrest claim, but that claim was barred since the statute of limitations had run.

³Similarly, Petitioner's proposed NOC, with respect to his malicious prosecution claim, merely states that "claimant was maliciously prosecuted by the Office of The District Attorney of New York County, under Docket Number 2007NY079629, until April 22, 2009, when all charges against the Claimant were dismissed and the Court's action sealed (see attached)." In

Accordingly, Petitioner has failed to demonstrate his entitlement to file a late NOC.

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. All other relief requested is denied.

Dated: August 28, 2009


EILEEN A. RAKOWER, J.S.C.

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AUG 31 2009
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NEW YORK

addition, Petitioner's records relating to the allegations in the proposed NOC are sealed pursuant to CPL §160.50.