

Nunez v City of New York

2009 NY Slip Op 32568(U)

October 29, 2009

Supreme Court, New York County

Docket Number: 110493/09

Judge: Walter B. Tolub

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

PRESENT: Tolub

PART 15

Index Number : 110493/2009
NUNEZ, JOSE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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).

Dated: 10/29/08

Tolub 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
NEW YORK COUNTY: IAS PART 15

JOSE NUNEZ,

Petitioner,

INDEX NO. 110493/09

-against-

THE CITY OF NEW YORK,

Respondent.

UNFILED JUDGMENT
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Tolub, J.:

Petitioner Jose Nunez (Nunez) brings this petition, filed on or about July 23, 2009, for leave to extend the time to serve a notice of claim on respondent The City of New York (City).

BACKGROUND

Mr. Nunez claims that on July 4, 2008, he went outside of his building in Manhattan, where he observed an ambulance and a man on a stretcher. Mr. Nunez thought the man might be his father. He also saw two woman who he thought were his mother and his aunt. The police officers, present on the scene, were allegedly pushing his mother and his aunt and asked Mr. Nunez to leave the scene. Mr. Nunez claims that he tried to leave the scene but that he wanted to inquire about the nature of the problem. In response, Mr. Nunez claims that the police officers pushed, punched, and beat his face and body, breaking his nose and injuring his legs. Mr. Nunez was treated at Beth Israel Hospital and New York Downtown Hospital for his injuries.

Mr. Nunez was arrested and charged with assault in the

second degree, obstruction of governmental administration in the second degree, and resisting arrest. On February 5, 2009, in Criminal Court, New York County, the charges against him were dismissed.

In his proposed notice of claim, Mr. Nunez asserts alleges for "false arrest, false and unlawful detention, malicious prosecution, violation of 42 USC 1983, assault and battery, imprisonment, humiliation, embarrassment, and serious personal and physical injuries" (07/21/09 Seener Aff., exhibit A). Mr. Nunez also alleges violations of his rights under; (1) the 5th and 14th Amendments of the US Constitution; (2) the New York State Constitution; and (3) New York Penal Law sections 120.00, 120.04, 120.05, and 120.010 (*id.*).

DISCUSSION

The General Municipal Law provides that a notice of claim must be served "within ninety days after the claim arises" (General Municipal Law § 50-e [1] [a]). The statute provides that the court may extend the time to file a notice of claim within the applicable statute of limitations, which is usually one year and 90 days of accrual of the claim (*id.*, §§ 50-e [5], 50-i [1]; see also *Nunez v City of New York*, 307 AD2d 218, 219 [1st Dept 2003]).

For the purposes of claim accrual, the record on this motion does not show when Mr. Nunez was released from prison. The City,

however, argues, and Mr. Nunez does not dispute, that the 90-day period to file a notice of claim for his false arrest, unlawful detention, and personal injury claims expired on October 2, 2008 (see *Burrows Carpenter Aff.*, ¶ 3). Mr. Nunez's malicious prosecution claim accrued on February 5, 2009, when the criminal proceeding was terminated in his favor by dismissal (see *e.g. Nunez*, 307 AD2d at 219). Accordingly, the 90-day period to file a notice of claim expired on or about May 6, 2009.¹ Mr. Nunez filed his request for leave to file the late notice of claim on or about July 23, 2009, which is within the applicable statute of limitations and, hence, timely.

Reasonable Excuse

The City argues that Mr. Nunez has failed to demonstrate a reasonable excuse for his failure to serve a timely notice of claim.

New York courts consider, as one of the factors in determining such applications, whether a petitioner offered a satisfactory explanation for failing to file a timely notice of claim (see *e.g. Perkins v New York City Health & Hosps. Corp.*, 167 AD2d 150, 151 [1st Dept 1990]; see also *Bullard v City of New York*, 118 AD2d 447, 448-450 [1st Dept 1986] ["the party seeking relief must give a satisfactory explanation for the delay"]).

¹The court notes that mr. Nunez may not sue the City for the alleged violation of 42 USC 1983 (see *e.g. Adekalu v New York City*, 431 F Supp 812, 817 [SD NY 1977]).

[*5]

In his petition, Mr. Nunez offers no explanation for his failure to timely file a notice of claim. In reply, he claims that he was unaware of his legal rights and that he was not "adequately advised by his criminal defense attorney of the need to file the ninety day notice" (08/29/09 Seener Aff., ¶ 3). However, "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, 228 [1st Dept 1997]).

Mr. Nunez alleges that he was treated for his injuries at two hospitals (see Nunez Aff.). However, he does not claim that he was hospitalized for an extensive period of time or suffered from mental disability that would prevent him from obtaining legal advice (cf. *Flynn v City of Long Beach*, 94 AD2d 713, 713-714 [2d Dept 1983] [where a petitioner was hospitalized for eight months following an accident]). The medical records provided by Mr. Nunez show that on July 7, 2008, he was examined at the emergency room of Beth Israel hospital and was discharged on the same day (07/21/09 Seener Aff., exhibit C). Accordingly, Mr. Nunez has failed to offer a reasonable excuse for his delay in filing a notice of claim.

Actual Knowledge

The General Municipal Law provides that

[i]n determining whether to grant the extension, the court shall consider ... whether the public corporation or its attorney ... acquired actual knowledge of the

essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter

(General Municipal Law § 50-e [5]).

Mr. Nunez argues that the City had actual knowledge of the essential facts constituting his claim, because the police officers, who are the City's employees, were involved in his arrest, investigation, and prosecution of the case against him.

However, "[g]enerally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim" (*Caselli v City of New York*, 105 AD2d 251, 255 [2d Dept 1984]). The courts require that additional factors be present in order to impute actual knowledge to a municipality (see e.g. *Flynn*, 94 AD2d at 713-714 [where the police conducted an investigation of the accident, including taking into possession a pole struck by the petitioner's vehicle, taking pictures of the scene, and administering blood alcohol test, the court held that the city had actual notice of the facts underlying the petitioner's claim]; *Grullon v City of New York*, 222 AD2d 257, 258 [1st Dept 1995] [where a petitioner was imprisoned for two years on the charges of two counts of murder and the police conducted an extensive investigation of the alleged crime, the court held that knowledge of the facts constituting the claims of false arrest and imprisonment, within the statutory period, can

be imputed to the municipality, but that the municipality did not have a timely notice of claims of assault and negligence at the time of the arrest]).

Here, Mr. Nunez does not allege any special factors that would allow the court to impute actual knowledge of the facts constituting his claims tot the City.

Prejudice

The General Municipal Law provides that "[t]he court shall also consider all other relevant facts and circumstances, including: ... whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits" (General Municipal Law § 50-e [5]).

Mr. Nunez contends that the City would not suffer prejudice as a result of a late filing of a notice of claim.

"The only legitimate purpose served by the notice is prompt investigation and preservation of evidence of the facts and circumstances out of which claims arise" (*King v New York*, 90 AD2d 714, 715 [1st Dept 1982] [citation and internal quotation marks omitted]). The City argues that it would suffer prejudice, because Mr. Nunez's criminal proceeding records were sealed on February 5, 2008 (07/21/09 Seener Aff., exhibit B), thereby preventing it from conducting an investigation into the circumstances of his arrest which took place over a year before Mr. Nunez filed this petition. The City claims, and Mr. Nunez

does not dispute, that he did not provide releases to the City to access his sealed records.

Mr. Nunez failed to contest the existence of prejudice to the City.

After considering all of the relevant factors for leave to file a late notice of claim, it is clear that the petitioner has failed to meet his burden. Accordingly, the petition must be and is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that the petition of Jose Nunez for leave to extend the time to file a notice of claim is denied and the petition is dismissed.

This constitutes the decision and judgment of the court.

Dated: 10/22/03

ENTER:

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Walter B. Tolub 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).