

**Matter of Smith v New York City Police Dept.**

2009 NY Slip Op 33060(U)

December 15, 2009

Supreme Court, New York County

Docket Number: 112309/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 5

Index Number : 112309/2009

**SMITH, BRIAN**

VS.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2

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

**FILED**

DEC 30 2009

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 12/15/07

  
 \_\_\_\_\_  
 HON. EILEEN A. RAKOWER 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

In the Matter of the Claim on BRIAN SMITH,

Petitioner,

Index No.  
112309/09

- against -

**DECISION  
and ORDER**

For leave to file a late Notice of Claim upon THE  
NEW YORK CITY POLICE DEPARTMENT, THE  
NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION AND THE NEW YORK CITY  
DEPARTMENT OF CORRECTIONS,

Mot. Seq.  
002

Respondents.

**FILED**

DEC 30 2009

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HON. EILEEN A. RAKOWER, J. S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner brings this action for, among other things, police brutality, excessive force, assault, civil rights violations and failure to provide prompt and adequate medical treatment. The alleged incident occurred while petitioner was confined in the 18<sup>th</sup> Precinct Stationhouse on January 14, 2009. Petitioner now brings this application pursuant to CPLR §2221(e) for leave to renew his earlier Petition for leave to serve a late notice of claim pursuant to General Municipal Law §50-e(5). Petitioner also seeks to amend the caption, removing the New York City Health and Hospitals Corporation (“HHC”) therefrom. Defendants the New York City Police Department and the New York City Department of Corrections (“City”) oppose Petitioner’s motion for leave to renew, while taking no position with that portion of Petitioner’s motion which seeks to amend the caption.

Petitioner initially moved by order to show cause for leave to serve a late notice of claim. By order of this court dated October 9, 2009 (“the prior order”), Petitioner’s motion was denied on the grounds that the proposed notice of claim annexed to the moving papers is impermissibly vague as to the location of the incident. Further, the court noted that, although Petitioner claimed that no prejudice resulted from the delay because Petitioner complained to the New York City Civilian Complaint Review Board shortly after the incident, Petitioner failed to demonstrate that the City was

given proper notice of the claim thereby. Specifically, the court found that (1) Petitioner did not include a copy of his CCRB complaint (which would allow the court to determine if Petitioner reported the event to CCRB with any greater specificity); and (2) that there was no indication that CCRB actually undertook an investigation into Petitioner's allegations.

A motion for renewal pursuant to CPLR §2221(e) is properly made to draw the court's attention to material facts which, although in existence at the time of the original motion, were not known to the party seeking renewal and could not have been ascertained through the exercise of ordinary diligence. Counsel for Petitioner states that he has recently obtained records from the CCRB investigation, which were previously confidential and could not be released during the pendency of the investigation. In a CCRB Complaint Report annexed to the present motion, the 18<sup>th</sup> Precinct Stationhouse is listed as the location of the incident, and Plaintiff's allegations are recounted in a segment titled "Initial Complaint Narrative." The Complaint Report further states that Petitioner's complaint was received on January 20, 2009. Petitioner also annexes a letter from CCRB to Petitioner dated September 29, 2009 stating that, "[f]ollowing a thorough and impartial investigation," CCRB found Petitioner's allegations to be unsubstantiated.

As mentioned in this court's prior order, the purpose of the notice of claim is to provide the opportunity for prompt investigation and preservation of evidence of the facts and circumstances of claims asserted against municipalities. (*Heredia v. City of New York*, 141 A.D.2d 473 [1st Dept. 1988]). A notice of claim must be filed within 90 days of when the claim arose. (General Municipal Law 50-e(1)(a)). Key factors to be considered in deciding whether to permit a late filing of the notice 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]).

In *Goodall v. City of New York*, 179 AD2d 481 [1st Dept. 1992], a police brutality case, the court found that:

The facts and circumstances surrounding the incident were

investigated by the Civilian Complaint Review Board after a Civilian Complaint Report was filed. . . . Accordingly, knowledge of the facts constituting the plaintiffs' claims may be imputed to the defendants who will not be prejudiced by the delay in filing the notice of claim.

Here, Petitioner has demonstrated that the City received actual notice of the essential facts within 90 days after the claim arose in the form of Petitioner's CCRB complaint. Further, Petitioner has demonstrated that the information necessary to adequately formulate his notice of claim (contained in the CCRB investigation) was previously unavailable to him<sup>1</sup>, despite diligent attempts by counsel to obtain this information.

Wherefore it is hereby

ORDERED that Petitioner's motion to renew is granted; and it is further

ORDERED that Petitioner's motion to file a late notice of claim is granted and the proposed notice of claim dated November 4, 2009, annexed to Petitioner's moving papers, shall be deemed timely served *nunc pro tunc* upon service of a copy of this order with notice of entry; and it is further

ORDERED that respondent shall serve a demand for petitioner to submit to a 50-h hearing within 90 days of service as above; and it is further

ORDERED that Petitioner's motion to amend the caption is granted without opposition and the amended caption shall appear as follows:

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<sup>1</sup> Petitioner claims that he was previously unable to identify the location of the incident with specificity because he was rendered unconscious by the alleged assault, regained consciousness in a hospital, and was "left confused as to the events prior thereto."

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

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In the Matter of the Claim on BRIAN SMITH,

Petitioner,

Index No.  
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- against -

For leave to file a late Notice of Claim upon  
THE NEW YORK CITY POLICE DEPARTMENT,  
AND THE NEW YORK CITY DEPARTMENT OF  
CORRECTIONS,

Respondents.

-----X

This constitutes the decision and order of the court. All other relief requested  
is denied.

DATED: December 15, 2009



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EILEEN A. RAKOWER, J.S.C.

**FILED**  
DEC 30 2009  
NEW YORK  
COUNTY CLERK'S OFFICE