

Reyneke v City of New York

2010 NY Slip Op 30281(U)

February 2, 2010

Supreme Court, New York County

Docket Number: 115052/09

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

IA PART 16
PART _____

PRESENT

Justice

Index Number : 115052/2009

REYNEKE, JOHAN

VS.

THE CITY OF NEW YORK

SEQUENCE NUMBER : # 001

LEAVE TO SERVE A LATE NOTICE OF CLAIM

INDEX NO. 115052-09

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ were read on 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 petition for leave
to serve a late Notice of Claim is granted
in accordance with the 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
210).

Dated: _____

FEB 02 2010

Alice Schlesinger
ALICE SCHLESINGER

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
 COUNTY OF NEW YORK 1A PART 16

-----X
 JOHAN REYNEKE

Petitioner,

Index No. 115052/09
 Motion Seq. No. 001

- against-

THE CITY OF NEW YORK,

Respondent.

-----X
 SCHLESINGER, J.

Petitioner Johan Reyneke has commenced this special proceeding seeking leave to serve a late Notice of Claim pursuant to General Municipal Law §50-e(5). Respondent The City of New York has opposed the petition, contending that petitioner has failed to satisfy the requisite statutory criteria.

Background Facts

Petitioner Johan Reyneke, a South African citizen, was awakened by the police in the early morning hours on March 15, 2009 while in his hotel room on Times Square.¹ Without even allowing him to dress, the Police took Mr. Reyneke into custody and brought him to the 18th Precinct where he was fingerprinted, photographed and strip searched. The detectives told Mr. Reyneke that he was being charged with Grand Larceny, a term unfamiliar to him. The following day, at his arraignment, Mr. Reyneke was charged with kidnapping in the First Degree. He was unable to pay the \$300,000 bail and remained imprisoned until approximately April 18, 2009, when he was released on his own recognizance and went home to South Africa. When he returned to New York on July 8

¹The facts set forth herein are as alleged by petitioner, but respondent made no effort to dispute them.

for his court date, he was told the case had been adjourned to October 19. On October 19, all charges were dismissed and the record was sealed.

On October 23, 2009, counsel for Mr. Reyneke filed a Notice of Claim with the City, a copy of which is attached as Exhibit 1 to the petition. In it he alleges "assault, battery, harassment, false arrest, false imprisonment, abuse of process, malicious prosecution, intentional, reckless and negligent infliction of emotional distress, negligence and gross negligence [in regard to various acts and omissions], and deprivation of privileges and immunities under the [New York State and U.S.] Constitution, 42 USC Section 1983, and other applicable federal and state laws."

Mr. Reyneke commenced this proceeding for leave to file the Notice of Claim late. As the malicious prosecution claim accrued on October 19 when the charges were dismissed, the Notice of Claim is timely as to that cause of action. See, *Nunez v. City of New York*, 307 AD2d 218, 219 (1st Dep't 2003). However, as the false arrest and unlawful imprisonment claims accrued as of the March 15, 2009 arrest, the Notice is untimely as to those claims and leave of court is required to allow the late filing.

Petitioner is Entitled to Leave to Serve a Late Notice of Claim

Pursuant to General Municipal Law §50-e, subd. 1(a), a claimant commencing a tort action against the City must serve and file a proper Notice of Claim within ninety days after the claim arises. The related action or proceeding must be commenced within one year and ninety days of the event. Gen. Mun. Law §50-i. An application for an extension of time to serve a Notice of Claim may be made before or after the action has been commenced, but not after the one-year and ninety-day statute of limitations has run, unless the statute

has been tolled. Gen. Mun. Law §50-e, subd. 5.; see also, *Pierson v. City of New York*, 56 N.Y.2d 950, 954 (1982); *Nunez*, 307 A.D.2d at 219. Here, the application is timely, as the year and ninety days does not expire until June 15, 2010.

In determining whether leave should be granted to serve a Notice of Claim after the ninety-day period, "the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether 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 whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.'" *Velazquez v. The City of New York Health and Hospitals Corp.*, 2010 WL 87387 (App. Div., 1st Dep't), quoting *Matter of Dubowy v. City of New York*, 305 AD2d 320, 321 (1st Dep't 2003).

Mr. Reyneke's delay in filing was very brief, a few months at most. Measured from his arrest in mid-March, the Notice of Claim should have been filed in mid-June, but it was filed in October. As a South African citizen, he did not know the law and believed he was required to wait until the charges were dismissed. The City claims that ignorance of the law is no excuse. Even if the brief delay were not excusable, the "failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez, supra*, citing *Matter of Ansong v. City of New York*, 308 AD2d 333, 334 (1st Dep't 2003).

Notwithstanding claims by respondent's counsel to the contrary, the City must be deemed to have actual notice of petitioner's claims. Both the First and Second Departments have repeatedly held in cases involving civil claims of false arrest and

imprisonment that where, as here, the Police and District Attorney investigated the alleged crime, "knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City." *Grullon v. City of New York*, 222 AD2d 257, 258 (1st Dep't 1995), citing *Tatum v. City of New York*, 161 AD 580, 581 (2nd Dep't 1990), *lv denied* 76 NY2d 709; *Justiniano v. NYCHA*, 191 AD2d 252 (1st Dep't 1993); and *Matter of Riese v. County of Nassau*, 141 AD2d 649 (2nd Dep't 1988).

The City's attempt to distinguish cases such as *Justiniano* is wholly unavailing in the face of the details presented by Mr. Reyneke about the thorough investigations conducted both by the Police and the District Attorney. Petitioner's counsel learned the details of these investigations through their own inquiries and by discussing the matter with Mr. Reyneke's criminal defense attorneys. The cases cited by the City are themselves distinguishable, as none involve a false arrest claim where a thorough investigation had been done before all charges were dismissed.

The City's investigation in this case included an interview with the complaining witness, a search of Mr. Reyneke's hotel room, and the confiscation of his laptop and cell phone. The District Attorney met with defense counsel, who provided information about Mr. Reyneke's legitimate business dealings. The investigation then allegedly uncovered the fact that the complaining witness had a misdemeanor fraud record and was himself the subject of an FBI investigation regarding claims of commercial fraud. Additionally, Mr. Reyneke filed a formal complaint about certain aspects of the police investigation (Report #09-52729) which purportedly led to further investigation.

Under these circumstances, the City cannot reasonably claim prejudice resulting from the short delay. Its claim that the memories of witnesses fade is purely speculative

and unsubstantiated by a single evidentiary fact. What is more, the thorough investigation conducted in this case by the Police and the District Attorney and their continuing involvement until the criminal case was dismissed "reasonably precludes substantial prejudice arising from any impediments to an investigation of the civil claim." *Nunez*, 307 AD2d at 220, citing *Santana v. City of New York*, 183 AD2d 665 (1st Dep't 1992).

The case of *Arias v. NYCHA*, 40 AD3d 298 (1st Dep't 2007) cited by the City is inapposite. *Arias* involved a slip and fall on a decorative border surrounding a tree well as petitioner was exiting a bus. Due to petitioner's delay in identifying NYCHA as the true property owner, NYCHA had no notice of any kind about the accident until it received the Notice of Claim seven months later, and it was significantly prejudiced in its ability to investigate the claim due to the passage of time and possible changes in the condition at the accident scene. Such is not the case here, where the City was involved at every stage of the process and the investigation involves people, rather than an accident scene.

In sum, petitioner has amply demonstrated his entitlement to leave to file a late Notice of Claim. Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition for leave to serve a late Notice of Claim is granted, and the Notice of Claim is deemed timely served in the proposed form annexed to the moving papers upon petitioner's service of a copy of this order and judgment with notice of entry on the respondent.

This constitutes the decision and judgment.
Dated: February 2, 2010

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 1212).

Alice Schindler
ALICE SCHINDLER
J.S.C.