

Liriano v City of N.Y.
2010 NY Slip Op 31773(U)
June 30, 2010
Supreme Court, New York County
Docket Number: 106199/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C. Justice

PART 5

Jorge Luciano
- v -
City of New York

INDEX NO. 1061099/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion ~~to~~ for leave to file late N/C

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

PAPERS NUMBERED	
_____	<u>1</u>
_____	<u>2</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided by attached decision / order

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 1-18).

Dated: 6/30/10
JUN 30 2010

BARBARA JAFFE
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 : PART 5

-----X
JORGE LIRIANO,

Petitioner,

-against-

Index No. 106199/10
Motion Date:
Argued: 6/8/10
Cal. No.

DECISION & JUDGMENT

THE CITY OF NEW YORK, P.O. NELSON BAIS
(Shield #12074) and P.O. ELVIN GOMEZ
(Shield #9911),

Respondents.

-----X
BARBARA JAFFE, JSC:

For petitioner:
Michael T. Ridge, Esq.
910 Grand Concourse Suite 1D
Bronx, NY 10451
718-0590-5400

For respondent:
Andrew Lucas, Esq.
Michael A. Carbone
Corporation Counsel
100 Church Street
New York, NY 10007

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based thereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
7225)

By notice of petition dated May 12, 2010, petitioner requests, pursuant to General Municipal Law (GML) § 50-e, an order granting him leave to serve respondent City with a late notice of claim and deeming the notice timely served *nunc pro tunc* in accordance with GML § 50-e. Respondent City opposes the petition.

I. CONTENTIONS

Petitioner alleges that on March 6, 2009, at approximately 7 pm near the intersection of Edgecombe Avenue and West 163rd Street in Manhattan, respondents Batista and Gomez “viciously” beat him while he was lying on the ground “in a position of complete submission and surrender.” (Affirmation of Michael T. Ridge, Esq., dated May 10, 2010 [Ridge Aff.], Exh. A). After pleading with the police officers to stop beating him because he had recently undergone open-heart surgery, and after he was handcuffed, the officers continued to attack him.

Approximately 45 minutes later, petitioner was taken to the 33rd Precinct stationhouse where he was processed and placed in a holding cell. He repeatedly requested medical attention for the injuries he sustained during the arrest and asked to take his daily prescription medicine. According to petitioner, he was ignored and mocked even when he explained that when he last skipped a dose he had had a stroke. (*Id.*).

Approximately two hours later, petitioner was taken to Columbia Presbyterian Hospital for treatment, but remained in custody for four days. (*Id.*). He was prosecuted and charged with resisting arrest (Penal Law 205.30) and criminal possession of marijuana in the fifth degree (Penal Law 221.10[1]). (*Id.*, Exh. C). On December 3, 2009, the charges were dismissed on speedy trial grounds. (Affirmation of Andrew Lucas, ACC, dated June 4, 2010 [Lucas Aff.]).

Petitioner seeks compensatory and punitive damages for false arrest, unlawful imprisonment, malicious prosecution, assault, battery, excessive force, violation of state and federal civil and constitutional rights, personal injuries, pain and suffering, embarrassment, humiliation, and emotional distress due to the negligence, recklessness and/or want of care by respondents. (Ridge Aff., Exh. A).

On or about March 19, 2010, petitioner retained counsel to represent him in this action. (Ridge Aff.).

Notwithstanding his 14-month delay in filing a notice of claim, petitioner maintains that the delay is excused, that City had actual knowledge of the facts giving rise to the claim, and that City is not prejudiced by the delay. He explains his delay as resulting from fear, ignorance of his rights, inability to speak English, unfamiliarity with the legal system, and preoccupation with defending himself in the criminal action. (Ridge Aff.). Once the charges were dismissed and he learned about his rights, petitioner contends, he immediately began looking for an attorney to

represent him. (*Id.*). He also asserts that as respondent police officers and other officers were present at the scene of his arrest, as City's police department possesses the officers' memo book entries, the arrest report, the complaint report, Batista's affidavit detailing the facts of the incident, and the criminal complaint, and as the Office of the District Attorney prosecuted the criminal case, City has actual knowledge of the facts of his claim and is therefore, not prejudiced by the late notice. (*Id.*).

Respondent denies that it obtained actual notice of the claim, arguing that it cannot anticipate a lawsuit every time an officer arrests someone. (Lucas Aff.). Granting leave here, it maintains, will prejudice it because more than a year has passed since the incident which would not afford it a proper opportunity to investigate. It distinguishes between a criminal investigation and that required to defend a civil suit, and asserts that petitioner's ignorance of the law does not constitute a reasonable excuse for the late notice. (*Id.*).

II. ANALYSIS

Pursuant to General Municipal Law (GML) § 50-1(a), a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the date on which the claim arose. The court may extend the time to file the notice, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e; *Grant v Nassau County Indus. Dev. Agcy.*, 60 AD3d 946, 947 [2d Dept 2009]). In considering these factors, none alone is dispositive. (*Barnes v County of Onondaga*, 103 AD2d 624, 628 [4th Dept 1984], *affd* 65 NY2d 664 [1985], *citing*

Bay Terrace Co-op. Section IV v New York State Employees' Retirement System Policemen's & Firemen's Retirement System, 55 NY2d 979 [1982]). The standards are flexible and the court may consider all other relevant facts and circumstances (*Beary v City of Rye*, 44 NY2d 398, 407 [1960]), and given the remedial nature of the statute, it is liberally construed (*Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]; *Camacho v City of New York*, 187 AD2d 262 [1st Dept 1992]).

However, leave should be denied if the claim is patently meritless. (*Eg Swinton v City of New York*, 61 AD3d 557 [1st Dept 2009] [denying leave to file late notice of claim because conviction is conclusive evidence of probable cause]).

A cause of action for false arrest and false imprisonment accrues when an individual is released from physical custody or confinement. (*Palmer v City of New York*, 226 AD2d 149 [1st Dept 1996]). A cause of action for malicious prosecution accrues when the action has been terminated in favor of defendant. (*Beary*, 44 NY2d at 408). The remaining causes of action accrue upon the occurrence of the incident in question.

A. Actual knowledge

A municipality receives actual knowledge of the essential facts constituting a claim when it acquires actual knowledge of the facts underlying the theory on which liability is predicated (*Grande v City of New York*, 48 AD3d 565 [2d Dept 2008]), not merely knowledge of the facts underlying the incident (*Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *lv denied* 76 NY2d 875).

Here, there can be little, if any, question of the theory on which liability is predicated as petitioner was charged with, *inter alia*, resisting arrest, and the charges against him were ultimately dismissed, thereby affording City actual knowledge of some of the essential facts

underlying some of the theories on which liability is predicated. (*See Schiffman v City of New York*, 19 AD3d 206, 207 [1st Dept 2005] [City acquired notice of essential facts as police were called to scene and were directly involved in all aspects of claims emanating from death of plaintiff's decedent]). Here too, the individual officers' memo books and official departmental reports confirm such knowledge.

B. Prejudice

The passage of time alone does not result in substantial prejudice. (*Holmes v City of New York*, 189 AD2d 676 [1st Dept 1993], *citing Trejo v City of New York*, 156 AD2d 164 [1st Dept 1989] [notice filed 13 years after injury]).

Here, the notice of claim for assault, battery, false arrest, and false imprisonment was filed one year and two months after accrual, and the malicious prosecution claim was filed six months after accrual. And, given the knowledge imputed to City, there can be no substantial prejudice.

C. Reasonable Excuse

While petitioner's ignorance of the law and lack of fluency in English are insufficient excuses for failure to file a timely notice of claim (*Turkenitz v City of New York*, 213 AD2d 266 [1st Dept 1995]; *Landa v City of New York*, 252 AD2d 525 [2d Dept 1998] [ignorance of notice of claim requirement and lack of knowledge of English are insufficient excuses for late filing]), a lack of a reasonable excuse for not filing a timely notice of claim does not necessitate denying leave to file the late notice, especially where the municipality has actual knowledge of the facts constituting the claim and cannot show prejudice resulting from the delay (*Matter of Ansong*, 308 AD2d 333, 334 [1st Dept 2003]).

D. Meritorious claim

That the charges against petitioner were dismissed on speedy trial grounds and not on the merits does not prove that petitioner's claim of malicious prosecution is patently meritless.

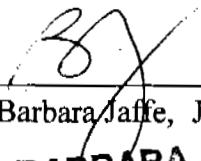
III. CONCLUSION

As neither a lack of a reasonable excuse nor a delay alone are dispositive, given respondent's actual knowledge of the essential facts, the absence of substantial prejudice, and in view of the preferred liberal construction of the statute, leave to file a late notice of claim is granted. Accordingly, it is hereby

ADJUDGED, that the petition for leave to serve a late notice of claim is granted and the annexed notice of claim is deemed timely served, *nunc pro tunc*, upon service of notice of entry of this order; and it is further

ORDERED, that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

This constitutes the decision and judgment of the court.


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 30, 2010
New York, New York

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).
JUN 30 2010