

Howard v City of New York

2010 NY Slip Op 32345(U)

August 26, 2010

Sup Ct, NY County

Docket Number: 104338/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 104338/2010
HOWARD, DOUGLAS
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
LEAVE SERVE LATE NOTICE OF CLAIM

CALIF 44

INDEX NO. 104338/10
MOTION DATE 7/27/10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

in this motion ~~to~~ for late N/C

~~Number of motions~~ Order to Show Cause — Affidavits — Exhibits ...
Not petition
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

UNFILED JUDGMENT
No 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).

Upon the foregoing papers, it is ordered that _____

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

Dated: 8/26/10

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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
DOUGLAS HOWARD,

Petitioner,

-against-

Index No. 104338/10

Motion Date: 7/27/10
Motion Seq. No.: 002
Calendar No.: 44

DECISION & JUDGMENT

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, NEW YORK CITY
PARKS DEPARTMENT and CARLOS RUIZ
a/k/a ALEX, a/k/a ALEJANDRO,

Respondents.

-----X
BARBARA JAFFE, JSC:

For petitioner:
Andrew J. Spinnell, Esq.
286 Madison Avenue, 21st Floor
New York, NY 10017
212-684-0317

UNFILED JUDGMENT
This judgment has not been filed with the Court Clerk, ACC
and notice of entry cannot be served based on the Court Clerk's
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).
For City respondents:
Christopher C. Deane, ACC
Nicholas A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-442-6851

By notice of petition dated June 15, 2010, petitioner seeks an order pursuant to General Municipal Law (GML) § 50-h granting leave to serve a late notice of claim *nunc pro tunc* upon respondents City, New York City Police Department (NYPD), and New York City Parks Department (Parks) (collectively, City). City opposes. For the following reasons, the petition is granted in all respects except as the claim for breach of contract.

I. ALLEGED FACTUAL BACKGROUND

Petitioner's claim arises from an incident which occurred on May 13, 2009, at the East River Parks Tennis Courts (East River Parks) at Delancey Street and FDR Drive, when petitioner was arrested after a physical altercation with Carlos Ruiz. (Affirmation of Andrew J. Spinnell, Esq., dated June 9, 2010 [Spinnell Aff.]).

Petitioner had been issued a permit to provide tennis instruction at East River Parks for the period beginning July 3, 2008 through November 21, 2010. (*Id.*, Affidavit in Support of Douglas Howard, dated June 15, 2010 [Howard Affid.]). After observing Ruiz teach tennis without a permit at East River Parks several times, petitioner notified Parks of Ruiz's "illegal operation" and "violent disposition." (*Id.*). In a series of lengthy e-mails to Parks employees from November 2008 through March 2009, he detailed instances of illegal commercial activity at East River Parks and racial discrimination directed at him by Parks employees, warned them of "aggressive" and "belligerent" teachers (Spinnell Aff., Exh. D), and allegedly informed Parks that "there is grave danger: you [are] financially liable for foreseeable, uninsured physical and mental harm to New Yorkers" (Howard Affid.). Petitioner's e-mail March 31, 2009, indicates that Parks forwarded a previous letter to his community's police precinct. (Spinnell Aff., Exh. D).

As Parks did nothing in response to his concerns, petitioner decided to inform one of Ruiz's pupils that Ruiz was illegally teaching tennis without a permit. (*Id.*). When petitioner attempted to talk to the pupil, Ruiz rushed to the court and punched and kicked him. (*Id.*). Petitioner called 911, and the police arrested both instructors. (*Id.*).

Petitioner filed a criminal complaint against Ruiz that day (*id.*; Spinnell Aff., Exh. A), but withdrew it in order to avoid staying in jail, and to pursue the instant civil case (Howard Affid.). Nevertheless, he remained in jail for 18 hours. (Spinnell Aff., Exh. B). He alleges that he filed a second complaint. (Howard Affid.).

After the incident, Ruiz threatened petitioner that he would "get him again." (Howard Affid.). Parks terminated petitioner's permit on September 9, 2009, without returning his \$750

security deposit. (*Id.*; Spinnell Aff. Exh. B).

II. PERTINENT PROCEDURAL BACKGROUND

Petitioner served a notice of claim on City on April 2, 2010, nearly eight months after the 90-day period following his arrest. He advances claims for negligence, assault, battery, breach of contract, false arrest, false imprisonment, and malicious prosecution. (Spinnell Aff., Exh. B).

III. CONTENTIONS

Petitioner contends that the petition should be granted because it was served within the statutory limitations period, and that prior thereto, City had actual notice of the events giving rise to the claims and will not be prejudiced given the availability of witnesses. (Spinnell Aff.). In support, petitioner relies on his affidavit detailing the events leading up the altercation and his arrest, his NYPD assault complaint against Ruiz, the notice of claim filed with City on April 2, 2009, e-mails sent to Parks officials, and a photograph and video of the injuries he sustained as a result of Ruiz's assault on him. (Spinnell Aff.; Howard Affid., Exhs. A, B, C, D, F).

In opposition, City argues that petitioner has not demonstrated that it received actual timely notice of the claim, that knowledge of events preceding the incident are insufficient to establish such notice, that petitioner has not offered a reasonable excuse for the delay, and that it is prejudiced by its inability to conduct a timely and adequate investigation. (Affirmation of Peter C. Lucas, Esq., dated June 22, 2010).

In reply, petitioner argues that a lack of a reasonable excuse is not a sufficient ground upon which to deny a petition to serve a late notice of claim. (Affirmation in Reply of Andrew J. Spinnell, Esq., dated June 28, 2010 [Spinnell Reply]).

IV. ANALYSIS

Pursuant to General Municipal Law (GML) § 50-e(1)(a) and 50-i, 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; *Grunt v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]). In considering these factors, none 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 N v New York State Empls.' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979 [1982]). The standards are flexible, 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]).

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).

Petitioner alleges that he notified Parks of its abusive conduct toward him and Ruiz's threatening behavior, that he warned Parks of potential physical harm, that his warnings were acknowledged by Parks and forwarded to the police, and that City became aware that the threats to his safety came to fruition when the police arrested him and Ruiz. (*See Whittaker v New York City Bd. of Educ.*, 71 AD3d 776, 777-778 [2d Dept 2010] [municipal corporation acquired actual knowledge where assault took place on school grounds, police summoned, and officials were aware of previous threats against petitioner]). Thus, City had actual knowledge of the facts and theory constituting his claim against it for negligence.

In conjunction with this knowledge, City also knew that the charges against petitioner were ultimately dismissed. Thus, City had actual knowledge of essential facts underlying petitioner's claims for false arrest, false imprisonment, and malicious prosecution. (*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]; *Ragland v New York City Hous. Auth.*, 201 AD2d 7, 10-11 [2d Dept 1994] [actual knowledge based on conduct and actions of arresting officer, reports and complaints filed by police]).

B. Prejudice

"Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by . . . a delay." (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). Absent actual knowledge, a delay in serving a notice of claim will "prejudice[] respondent's ability to investigate . . . identify witnesses, and collect their

testimony based on fresh witnesses.” (*Arias v New York City Hous. Auth.*, 40 AD3d 298 [1st Dept 2007]).

Here, having shown that City had actual knowledge of the facts constituting the claims of negligence, false arrest, false imprisonment, and malicious prosecution, petitioner has satisfied his burden of establishing an absence of prejudice which City has not rebutted beyond conclusorily asserting that key witnesses are unavailable. (*Ragland*, 201 AD2d at 11 [no prejudice, where police reports are “functional equivalent of an investigation”]; *T. Place v Beekmantown Central School Dist.*, 69 AD3d 1035, 1036 [3d Dept 2010] [key witnesses are identifiable and available; most are still employed respondents]; *Irizarry v City of New York*, 25 Misc 3d 1218(A), 2009 NY Slip Op 52169(U) [Sup Ct, Kings County 2009] [no prejudice where incidents do not arise out of transitory conditions, police officer witnesses are in control of City, police officers are required to review records and recall facts]).

C. Reasonable excuse

Fear of retaliation may constitute a reasonable excuse for failure to serve a timely notice of claim, where the fear is rational and supported by the facts. (*See Turner v City of New York*, 25 Misc 3d 1235(A), 2009 NY Slip Op 52423[U] [Sup Ct, Kings County 2009]; *Irizarry*, 25 Misc 3d 1235[A] [fear of retaliation based on three arrests, all dismissed, and traffic violation notices]).

Here, petitioner has set forth a factual basis for fearing retaliation, namely, the preceding harassment of him by Parks officials and termination of his permit following the arrest. In any event, a failure to show a reasonable excuse is not alone a ground for denying a petition to serve a late notice of claim, as petitioner has shown that City had actual knowledge of the facts and an absence of prejudice from the delay (*Matter of Ansong v City of New York*, 308 AD2d 333, 334

[1st Dept 2003]).

D. Breach of contract

Petitioner's claim for breach of contract is not subject to the written notice requirement of GML § 50-i ("personal injury, wrongful death or damage to real or personal property") or the 90-day provision of § 50-e ("any case founded upon tort"), and thus, there is no basis for granting the petition based on a breach of contract. (*Crowley v City of New York*, 189 Misc 170 [Sup Ct, New York County 1947] [denying motion to serve amended notice of claim for actions not based on tort]).

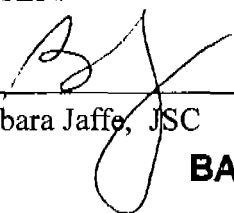
V. CONCLUSION

Having shown that City obtained actual knowledge of his claims within the statutory periods, the absence of prejudice resulting from the delay in serving the notice of claim, and a reasonable excuse for the delay, petitioner has demonstrated entitlement to relief. Accordingly, it is hereby

ADJUDGED, that the petition for leave to serve a late notice of claim is granted.

This constitutes the decision and judgment of the court.

ENTER:



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

DATED: August 26, 2010
New York, New York

AUG 26 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 141B).