

**Savarese v City of New York**

2010 NY Slip Op 32983(U)

October 21, 2010

Supreme Court, New York County

Docket Number: 111479/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 111479/2010

**SAVARESE, EMANUEL**

vs.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 001

LEAVE SERVE LATE NOTICE OF CLAIM

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

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

MOTION SEQ. NO. 001

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

**FILED**  
**OCT 25 2010**  
 COUNTY CLERK'S OFFICE  
 NEW YORK

motion (s) and cross-motion(s)  
 decided in accordance with  
 the annexed decision/order  
 of even date.

Dated: 10/21/10

J. GISCHE  
HON. JUDITH J. GISCHE 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: IAS PART 10**

-----X

Emanuel Savarese,  
Petitioner (s),

**-against-**

The City of New York,  
Respondent (s).  
-----X

DECISION/ ORDER  
Index No : 111479/2010  
Seq. No : 001

**FILED**  
OCT 23 2010  
PRESENT:  
Hon. Judith J. Giache  
J.S.C.  
COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pet motion w/ ES petition, JL affirm, exhs .....	1
Pet aff'd of svc .....	2

-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

This petition by Emanuel Savarese, ("Petitioner"), is brought pursuant to General Municipal Law § 50-e. Petitioner seeks an order giving him leave to serve a late notice of claim. The City of New York ("Respondent") has not opposed the petition, despite making an appearance in this action, and also stipulating to adjourning the motion. Petitioner has filed due proof of service. Therefore, this petition is decided on default.

**Background**

Petitioner seeks to bring an action against the City for the following: false arrest, malicious prosecution, reckless indifference, negligence, battery, assault, and intentional infliction of emotional distress.

Petitioner was arrested and incarcerated at Rikers Island, and claims that he suffered from a mental condition throughout his incarceration that prevented him from obtaining counsel and pursuing his civil rights in a timely manner. According to petitioner, while incarcerated at Rikers Island, and awaiting trial from June 25, 2009 through May 14, 2010, he was not adequately diagnosed and treated for his ongoing psychiatric conditions, which included depression, claustrophobia, agoraphobia, panic attacks, and bipolar disorder. Petitioner attributes the late filing of his petition to the aggravating factors surrounding his treatment while at Rikers and claims that he did not fully understand the nature, extent, and seriousness of the injuries he sustained until he received proper psychiatric care.

#### Discussion

Pursuant to General Municipal Law § 50-e(1), in an action against a municipality seeking to recover damages for personal injury or property damages, a claimant must serve a notice of claim against the municipality within ninety days after the claim arises. Nunez v. City of New York, 307 AD2d 218 (1st Dept 2003). A timely notice of claim is required to proceed against a municipality, and cannot be waived. Kroin v. City of New York, 210 AD2d 95 (1st Dept 1994). The purpose of a notice of claim is to provide the public corporation to whom it is directed with notice of a proposed petitioner's claim so that the proposed respondent can conduct a proper investigation and evaluate the merits of the claim asserted. See Viruet v. City of New York, 97 NY2d 171 (2001).

General Municipal Law 50-e(5) provides that a putative plaintiff can seek leave from the court to serve a late notice of claim within one year and ninety days of accrual. Among the factors to be considered by a court in determining whether leave to serve a

late notice of claim should be granted is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter, whether the petitioner had a reasonable excuse for the failure to serve a timely notice of claim, and whether the delay would substantially prejudice the public corporation in maintaining its defense (see General Municipal Law § 50-e[5]; Matter of Vicari v. Grand Ave. Middle School, 52 AD3d 838 [2008]). Also to be considered is whether, among other things, the claimant is an infant, or mentally or physically incapacitated. While the presence or absence of any one of the factors is not necessarily determinative, the issue of whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance. Wright v. City of New York, 66 AD3d 1037 (2d Dept 2009).

Under these circumstances, where petitioner claims to have notified authority figures, including staff members and doctors, for proper attention and treatment concerning his condition, respondent is deemed to have actual knowledge of the facts constituting petitioner's claim. Therefore, the requirements of General Municipal Law 50-e(5) have been satisfied, as the public corporation has acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose, or within a reasonable time thereafter. Further, petitioner alleges that he became mentally incapacitated as a result of the conditions he was subjected to while at Rikers Island, and that he was so incapacitated that he was unable to engage counsel during his incarceration.


Accordingly, where employees of Rikers Island were directly involved in the acts

giving rise to the petitioner's claims, the delay was justified by petitioner's mental incapacity, and there is no indication that the delay will result in prejudice to the municipality, the petitioner's application is granted. Petitioner has leave of court to serve a late notice of claim upon the respondent as to all claims as against the City of New York within thirty days from the date of entry of this decision and order, and that upon such service, the notice of claim will be deemed timely served.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
October 21, 2010

So Ordered:

  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
OCT 25 2010  
COUNTY CLERK'S OFFICE  
NEW YORK