

**Gonzales v City of New York**

2010 NY Slip Op 33099(U)

October 22, 2010

Supreme Court, New York County

Docket Number: 109154/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C. Justice

PART 52

Index Number : 109154/2010  
GONAZLEZ, VERONICA LEE  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. 109154/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
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 is decided in accordance with the attached decision.

**FILED**  
OCT 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/22/10

CYNTHIA S. KERN  
J.S.C. Justice

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 52

-----X  
VERONICA LEE ANNE GONZALES,

Petitioner,

Index No. 109154/10

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK,

Respondent.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers

- Notice of Motion and Affidavits Annexed.....
- Notice of Cross Motion and Answering Affidavits.....
- Affirmations in Opposition to the Cross-Motion.....
- Replying Affidavits.....
- Exhibits.....

**FILED**  
 Numbered  
 OCT 28 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

1  
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Petitioner commenced the instant action to recover damages for false arrest and imprisonment, harassment, theft of property, slander and defamation of character, assault, battery, malicious prosecution and violations of her civil rights stemming from an arrest that took place on February 2, 2009. Petitioner now seeks leave to serve a late Notice of Claim. For the reasons set forth below, her motion is denied.

The relevant facts are as follows. Petitioner was arrested on February 2, 2009 and released from jail approximately one week later. The charges against her were dismissed on August 5, 2009. Petitioner filed a Notice of Claim on December 1, 2009 and was notified that her claim was disallowed because it was not filed within the 90 day statutory period on Januray

14, 2010. Petitioner petitioned the Court for leave to serve a late Notice of Claim on July 12, 2010.

As an initial matter, petitioner's claims for false arrest and imprisonment, harassment, slander, defamation of character, assault, battery and personal injuries are time-barred. Prospective plaintiffs must commence an action against a municipality within one year and ninety days of the date the cause of action accrues. *See* General Municipal Law §50-i. G.M.L. §50-i(1) provides that "[n]o action or special proceeding shall be prosecuted or maintained against a city...unless, (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based." It is well-settled that the Court may not grant a petitioner leave to serve a late Notice of Claim after the expiration of the statute of limitations for that claim. *See Hochberg v. City of New York*, 63 N.Y.2d 665, 665-666 (1984).

In the instant case, all of petitioner's claims other than her claim for malicious prosecution accrued more than one year and ninety days before she brought the present application. Petitioner's claims for assault and battery accrued on the day of her arrest on February 2, 2009. Her claims for false arrest and imprisonment, harassment and theft of property accrued on the day of her release. That date is not specified in petitioner's moving papers but because the Notice of Claim that she filed on December 1, 2009 states that she was in jail for one week the Court will assume that she was released on or about February 9, 2009. While petitioner's moving papers do not specify when the alleged slander and defamation of character took place, the description of her arrest and its consequences in her disallowed Notice of Claim indicate that these claims also accrued either at the time of her arrest or her release. Petitioner

sought leave to file a late Notice of Claim over seventeen months after these events, after the one year and ninety day statute of limitations expired. These claims are therefore time-barred and the Court cannot consider petitioner's application for leave to file a late Notice of Claim with respect to these claims.

However, petitioner's claim for malicious prosecution is not time-barred because it accrued on the day the charges against her were dismissed, August 5, 2009, and plaintiff filed the instant petition on July 12, 2010, within one year and ninety days of that date. The Court will therefore consider petitioner's application for leave to serve a late Notice of Claim on her malicious prosecution claim on its merits.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within 90 days after the claim arises. *See* General Municipal Law ("GML") §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his or her delay, whether the delay prejudiced the municipality's defense and whether the municipality acquired "actual knowledge of the essential facts constituting the claim" within 90 days after the claim arose or within a reasonable time thereafter. *See* GML §50-e(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1<sup>st</sup> Dept 1993). It is plaintiff's burden to prove each of these elements, including lack of prejudice to the defendant. *See Delgado v City of New York*, 39 A.D.3d 387 (1<sup>st</sup> Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1<sup>st</sup> Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See Justiniano v New York*

*City Housing Authority Police*, 191 A.D.2d 252 (1<sup>st</sup> Dept 1993). The lack of a reasonable excuse alone is not fatal. See *Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1<sup>st</sup> Dept 2010). However, where a plaintiff has not provided a reasonable excuse and the defendant did not have actual knowledge of the claim, the courts have declined to grant plaintiff leave to file a late notice of claim. See *Gitis v City of New York*, 68 A.D.3d 489 (1<sup>st</sup> Dept 2009).

Considering all the above factors together, petitioner's motion to serve a late notice of claim is denied. Plaintiff fails to satisfy the first factor, the existence of a reasonable excuse. Her only excuse is her claim that she did not know of the deadline for filing a Notice of Claim. However, ignorance of the law and, in particular, of the 90-day deadline for filing a Notice of Claim, does not constitute a reasonable excuse. See *Gaudio v City of New York*, 235 A.D.2d 228 (1<sup>st</sup> Dept 1997). Moreover, the inaction or ignorance of an attorney upon whom a petitioner relies for advice also does not constitute a reasonable excuse. See *Fenimore v. State*, 28 A.D.2d 626 (3<sup>rd</sup> Dept 1967); see also *Sevillia v. State*, 91 A.D.2d 792 (3<sup>rd</sup> Dept 1982). Furthermore, petitioner received a letter from the City informing her that she was late in filing her Notice of Claim on January 14, 2010. She waited almost seven months after receiving that notification to petition the Court for leave to serve a late notice of claim.

Moreover, the City did not acquire actual knowledge of the claim within the statutory period or shortly thereafter. Petitioner only filed the instant petition eleven months after the day the action accrued and eight months after the end of the statutory period, far outside the statutory period. Indeed, the delay of eight months was more than twice the length of the original statutory period. Furthermore, petitioner failed to show that the City was not prejudiced by the delay. Because the City did not gain knowledge of the facts underlying petitioner's claim until eleven

