

Matter of Alvarado v City of New York

2010 NY Slip Op 33345(U)

December 1, 2010

Supreme Court, New York County

Docket Number: 111475/10

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

In re: Jonathan Cilverack
- v -
The City of New York

INDEX NO. 111475/10
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the annexed decision.*

FILED

DEC 02 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/1/10 CK
J.S.C.

CYNTHIA S. KERN

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
In the Matter of the Claim of JONATHAN
ALVARADO,

Petitioner,

Index No. 111475/10

-against-

DECISION/ORDER

FILED

THE CITY OF NEW YORK,

DEC 02 2010

Respondent.

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

NEW YORK
COUNTY CLERK'S OFFICE

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Petitioner brought the instant petition to serve a late Notice of Claim for his action to recover damages for false arrest, malicious prosecution and violations of his civil rights stemming from an arrest that took place on April 15, 2009. For the reasons set forth below, his motion is granted.

The relevant facts are as follows. Petitioner was arrested on April 15, 2009 on charges of criminal sale of marijuana in the fourth degree and criminal possession of marijuana in the fifth degree. He was released from jail on July 26, 2009. The charges against him were dismissed on

October 8, 2009. Petitioner petitioned the Court for leave to serve a late Notice of Claim on September 29, 2010, over fourteen months after his claim for false imprisonment accrued and over eleven months after his claim for malicious prosecution accrued.

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 (1st 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 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1st 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 (1st 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 (1st Dept 2010).

Considering all the above factors together, petitioner’s motion to serve a late notice of claim is granted. Plaintiff fails to satisfy the first factor, the existence of a reasonable excuse. He has offered no excuse for his failure to file a timely Notice of Claim. However, the absence of a

reasonable excuse is not by itself fatal to an application for leave to file a late Notice of Claim. See *Velasquez v City of New York Health and Hospitals Corp.*, 69 A.D.3d 441 (1st Dept 2010), *supra*.

The courts have found actual knowledge on the part of the City where the police are directly involved in the underlying claim. See *Schiffman v City of New York*, 19 A.D.3d 206 (1st Dept 2005); see also *In re Ansong v City of New York*, 308 A.D.2d 333 (1st Dept 2003). In *Schiffman v City of New York*, the Court held that the City acquired notice of the essential facts underlying the claim “based upon the facts that police were called to the scene and were directly involved in all aspects of the claims emanating from the death of petitioner’s decedent...Such knowledge is documented in the individual officers’ memo books and official Police Department reports.” In *In re Ansong v City of New York*, the Court held that “[r]espondent’s claimed lack of actual knowledge is completely refuted by the fact that the officers who allegedly assaulted petitioner would, as respondent’s employees, have had immediate knowledge of the events giving rise to this dispute.” The Court also held that there was no prejudice to the City since “police and criminal records pertaining to petitioner’s arrest, as well as the favorable disposition of charges against him, are presumably still in existence.” *Id.*

In the instant case, the City acquired actual knowledge of the claim within the statutory time frame or shortly thereafter based upon the facts that it was the police who arrested petitioner for selling marijuana and it is the actions of the police in arresting petitioner which form the basis of petitioner’s claim. The officers involved in petitioner’s arrest had immediate knowledge of the essential facts of his claim and their knowledge would be documented in their memo books as well as police and Criminal Court records. Therefore, pursuant to the First Department

