

Tomasso v City of New York

2010 NY Slip Op 33400(U)

December 10, 2010

Supreme Court, New York County

Docket Number: 112141/10

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

Peter Tomasso

INDEX NO. 112141/10

MOTION DATE 10/20/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

The City of New York et al.

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 attached decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

DEC 13 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/10/10

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
PETER TOMASSO,

Petitioner,

Index No. 112141/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT and POLICE OFFICER
"JOHN DOES" 1-2 (whose names being fictitious, as the
true names are unknown to plaintiff, the persons being
designated as police officers),

Respondents.
-----X

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

FILED

DEC 13 2010

**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.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
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, false imprisonment, malicious prosecution and violations of his civil rights stemming from an arrest that took place on February 15, 2010. For the reasons set forth below, his motion is granted.

The relevant facts are as follows. Petitioner was arrested on or about February 15, 2010 on charges of aggravated unlicensed operation of a vehicle in the third degree and unlicensed

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driving. The charges against him were dismissed on July 15, 2010. Petitioner filed a Notice of Claim on July 30, 2010, which was timely for his claim for malicious prosecution but after the expiration of the statutory period for his claims for false arrest and imprisonment. Petitioner then petitioned the Court for leave to serve a late Notice of Claim on his claims for false arrest and imprisonment on October 5, 2010, over seven months after their accrual. Petitioner now seeks leave to file a late Notice of Claim on his claims for false arrest, false imprisonment, and violations of his civil rights pursuant to 42 U.S.C. § 1983. For the reasons set forth below, his motion is granted with respect to his claims for false arrest and imprisonment. As to petitioner's claim for the alleged violation of his civil rights, compliance with the notice of claim requirement is not required for claims brought under § 1983. *Felder v. Casey*, 487 U.S. 131, 138 (1988).

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

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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*.

Moreover, the City acquired actual knowledge of the claim within the statutory time period. 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

