

Macinness v New York City Police Dept.

2010 NY Slip Op 33424(U)

December 10, 2010

Supreme Court, New York County

Docket Number: 114234/10

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

JAMES MACINNESS
- v -
NYC POLICE DEPT

INDEX NO. 114234/10
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 resolved pursuant to
the annexed decision,

FILED

DEC 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/10/10

CYNTHIA S. KERN J.S.C.
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 52

-----X
JAMES MACINNESS,

Petitioner,

Index No. 114234/10

-against-

DECISION/ORDER

THE NEW YORK CITY POLICE DEPARTMENT and
THE CITY OF NEW YORK,

FILED

Respondents.
-----X

DEC 14 2010

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>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u>3</u>

Petitioner commenced the instant action to recover damages for personal injuries he allegedly sustained when he was dragged by a moving vehicle while performing a routine traffic stop in his capacity as a New York City police officer on July 20, 2010. Petitioner now seeks leave to serve a late Notice of Claim for the alleged injuries sustained as a result of this incident and for negligent assignment of work beyond known physical capacities. For the reasons set forth below, petitioner's motion is granted.

The relevant facts are as follows. On March 18, 2009 petitioner was injured when the patrol car he was driving was rear-ended while he was working as a police officer for the New

York City Police Department (“NYPD”). As a result of this accident, petitioner was placed on “light duty” for restricted capacity. On May 26, 2010, after being examined by an independent medical examiner hired by the NYPD, petitioner was directed to and returned to full work duty without restrictions. On July 20, 2010, petitioner allegedly sustained injuries when he was dragged some 20 feet by the driver of a car attempting to flee from petitioner when petitioner pulled him over for a routine motor vehicle stop. The driver of that car was subsequently arrested and prosecuted by the Queens County District Attorney’s Office. Petitioner did not serve a timely notice of claim against respondents the City of New York and the NYPD. On or about October 26, 2010, petitioner served respondents with an Order to Show Cause seeking leave to serve a late Notice of Claim, together with a proposed Notice of Claim for negligent assignment to work beyond known physical capacities commencing May 26, 2010 and for personal injuries resulting from the July 20, 2010 incident. As of October 26, 2010, the statutory period for filing a Notice of Claim for the personal injury claims had expired approximately one week earlier and the statutory period for filing a Notice of Claim for the negligent assignment of work claim had expired two months earlier.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* Gen. Municipal Law §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to G.M.L. §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the delay prejudiced the municipality’s defense and whether the municipality acquired “actual knowledge of the essential facts constituting the claim” within ninety days after the claim arose or within a reasonable time thereafter. *See* Gen.

Mun. Law §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993).

It is petitioner's burden to prove each of these elements, including lack of prejudice to the respondents. 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 respondents 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. Although petitioner has not provided a reasonable excuse for his failure to serve a timely Notice of Claim, as discussed above, the lack of a reasonable excuse is not by itself fatal to an application for leave to file a late Notice of Claim. Moreover, respondents acquired actual knowledge of the facts forming the basis of the claim within the statutory period or shortly thereafter as petitioner brought his petition approximately one week after the expiration of the statutory period for the personal injury claim and two months after the statutory period for the negligent assignment claim, which are both reasonable times thereafter. See GML §50-(e)(5); see also *March v Wappinger*, 29 A.D.3d 998 (2nd Dept 2006) (delay of 11 months was held to be a reasonable time after expiration of 90 day period).

Finally, respondents have not been prejudiced by the delay in filing the Notice of Claim for the personal injury claim as it had only been a one-week delay. With regard to the negligent assignment claim, although it had been approximately two months since the expiration of the

