

Matter of Brown v City of New York

2010 NY Slip Op 33469(U)

December 17, 2010

Supreme Court, New York County

Docket Number: 113864/10

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

LUSTIER BROWN
- v -
CITY OF NY

INDEX NO. 113864/10
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

DEC 20 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/17/10 CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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
LUSHIEL BROWN,

Petitioner,

Index No. 113864/10

-against-

DECISION/ORDER

CITY OF NEW YORK and NEW YORK CITY
POLICE DEPARTMENT,

FILED

Respondents.

FILED 20 2010

-----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 her action to recover damages for false arrest and imprisonment, malicious prosecution, abuse of process, assault, battery, and negligent hiring and supervision stemming from an arrest that took place on April 12, 2010. For the reasons set forth below, her motion is granted.

The relevant facts are as follows. Petitioner was arrested on April 12, 2001 on charges of resisting arrest and obstruction of governmental administration. She was released from jail the next day and the charges against her were dismissed on July 15, 2010. Petitioner petitioned the

Court for leave to serve a late Notice of Claim on October 14, 2010, three months after the statutory time period to file a Notice of Claim expired on the claims accruing on the days of her arrest and release but only one day after the time period expired for her claim for malicious prosecution.

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.

Ignorance of the statutory filing requirement is not a reasonable excuse for failing to serve a timely Notice of Claim. *See Turkenitz v. City of New York*, 213 A.D.2d 266 (1st Dept 1995); *see also Gaudio v. City of New York*, 235 A.D.2d 228 (1st Dept 1997). However, the lack of a reasonable excuse is not by itself fatal to an application for leave to file a late Notice of Claim. *See Ansong v. City of New York*, 308 A.D.2d 333 (1st Dept 2003); *see also Porcaro v. City of New York*, 20 A.D.3d 357 (1st Dept 2005).

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 and it is the actions of the police in arresting petitioner which form the basis of petitioner’s claim.

