SUPREME COURT
STATE OF NEW YORK COUNTY OF SARATOGA

In the Matter of the Claim of
DERRELL E. COPPAGE, JR.,

Plaintiff/ Claimant,

- against -

DECISION and ORDER
RJI # 45-1-2009-1391
Index #2009-1592

COUNTY OF SARATOGA,

Defendant.

APPEARANCES

Brennan & White, LLP
Attorneys for the Plaintiff
163 Haviland Road
Queensbury, New York 12804

Rehfuss, Liguori & Associates
Attorneys for the Defendant
40 British American Blvd
Latham, New York 12110-1421

STEPHEN A. FERRADINO, J

The plaintiff has requested an order of this court pursuant to General Municipal Law § 50-e(5) authorizing the plaintiff to serve a late notice of claim. The defendant has opposed the motion and cross-moved requesting an order pursuant to CPLR § 3211(7) dismissing the plaintiff's complaint for failure to state a cause of action.

The plaintiff alleges that on May 26, 2008 two Saratoga County Deputy Sheriffs improperly handcuffed him causing him to suffer personal injuries. The plaintiff served a notice of claim upon the defendant on August 27, 2009. The claim was received by the defendant three days beyond the required ninety-day period set forth in General

Municipal Law § 50-e. The late service was the result of a ministerial error by the plaintiff in failing to properly compute the ninety-day period.

The court has broad discretion in ruling upon an application for permission to file a late notice of claim pursuant to General Municipal Law § 50-e (5). *Matter of Jensen v City of Saratoga Springs*, 203 AD2d 863 [1994]; *Kressner v Town of Malta*, 169 AD2d 927 [1991]. In making its determination the court must consider whether the defendant acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, whether the plaintiff offers a reasonable excuse for the delay in filing the application and whether granting the application would substantially prejudice the defendant. See, General Municipal Law § 50-e. No one factor outweighs another. *Welch v Board of Educ. of Saratoga Central School Dist.*, 287 AD2d 761, 763 [2001].

The defendant received the notice of claim three days beyond the prescribed ninety-day time period for service. The plaintiff's counsel's excuse for his delay while honestly stated may not be universally accepted as a reasonable excuse. In examining the other factors the record establishes that the deputies are still employed by the department and there is no evidence that other witnesses to the events are unavailable. Official reports were filed documenting the arrest and the circumstances surrounding the arrest. The defendant has not provided any proof that when it received the claim it was unable to engage in a timely investigation or that its ability to investigate the claim was hampered by the plaintiff's three-day late notice. Furthermore, the defendant has not supplied any proof that it is prejudiced by the delay. Considering all factors and the circumstances of the case the plaintiff/claimant's failure to allege a reasonable excuse

for the minimal delay in service of the notice of claim is not fatal. See, *Krohn v Berne-Knox-Westerlo Cent. School Dist.*, 168 AD2d 826 [1990]. The motion for permission to serve a late notice of claim is granted.

On a motion to dismiss pursuant to CPLR § 3211 the challenged pleading must be afforded a liberal construction. *Leon v. Martinez,* 84 NY2d 83, 87 [1994]. The Court must accept the facts alleged in the plaintiff's complaint as true, and determine only whether the facts as alleged fit within any cognizable legal theory. *Id. citing Monroe v Monroe,* 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633,634. Whether or not the plaintiff is ultimately able to sustain the alleged causes of action he alleges is not at issue. Even if persuasive, when accompanying a motion to dismiss the Court must also ignore the affidavit submitted by the defendant. *Henbest & Morrisey, Inc.,* 259 AD2d 829,830 [1999]. Although issue is joined in the absence of any discovery, other than a mishandled 50-h hearing, the court will not consider converting this motion to dismiss to one for summary judgment. *Id.* Because none of the causes of action alleged in the complaint are facially deficient the motion to dismiss is denied. *Id.*

Alternatively the defendant contends that the plaintiff's complaint "must be dismissed for his refusal to comply with General Municipal Law § 50-h." More specifically, the defendant accuses the plaintiff of refusing to answer relevant questions during the §50-h hearing. A review of the transcript reveals that the plaintiff did not refuse to answer any questions. The plaintiff was cooperative and responded to the questions posed. Counsel had disagreements over the permissible scope of questioning. What ensued was a cat fight between the attorneys and a decision by defendant's counsel to "bust" the hearing. Defendant now requests a dismissal.

The hearing that a municipality is entitled to pursuant to General Municipal Law § 50-h is a vehicle for the municipality to further investigate the allegations of the claim and explore its merits. The hearing provides a form of pre-action "discovery." Its purpose is to provide the opportunity to evaluate the claim before an action is commenced and provide a platform for settlement negotiations or further litigation. *Alouette Fashions, Inc. v Consolidated Edison Co. of New York, Inc.*,119 A.D.2d 481, [1986] affirmed 69 N.Y.2d 787 [1987]. The municipality most often accomplishes this investigation by questioning of a witness under oath. However the examination performed under a General Municipal Law § 50-h hearing is not as broad and extensive a means of obtaining disclosure as provided for in the CPLR once an action is commenced.

There is no specific guidance by the appellate courts whether or not a General Municipal Law § 50-h hearing is subject to Part 221 Uniform Rules for the Conduct of Depositions. Professor Patrick Connors in his 2008 commentary CPLR § 3133 states;

> While the above caselaw is somewhat inconsistent, a strong argument can be made that the provisions in Part 221 should apply to an examination conducted under General Municipal Law section 50-h(1), "unless the parties otherwise stipulate." N.Y. Gen. Mun. Law 50-h(1). As Gonzalez, Claypool, Barnes and Weinberg demonstrate, if the testimony elicited at a 50-h hearing is ultimately offered at trial pursuant to General Municipal Law section 50-h(4), it must conform to the same standards governing the admission of deposition testimony in CPLR Article 31. If there are numerous violations of Part 221 at an examination conducted under General Municipal Law section 50-h(1), such as speaking objections or interruptions to confer with the deponent, a court might similarly refuse to admit testimony from the session. (Connors, 2008 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3113, 2010 Supp pamphlet at 18)

In this case there were attempts by plaintiff's counsel to have defendant abide by the Part 221 rules. This tactic did not work. The parties may have stipulated to abide by

those rules and then been able to conduct themselves accordingly. The court declines the defendant's suggestion that the court dismiss this case based upon what he deems is the plaintiff's lack of cooperation. Going forward the defendant may utilize the available discovery tools to flesh out his case. It is recommended that both counsel review the rules prior to conducting any depositions in the future. Unlike a trial where testimony is supervised a deposition relies upon the skill and integrity of the attorneys to abide by the simple rules governing this process. If the parties believe they need supervision for future depositions upon proper application the court may assign a referee at the parties expense to monitor this process.

Any relief not specifically granted is denied. This decision shall constitute the order of the Court. No costs are awarded to any party. The original decision and order shall be forwarded to the attorney for the plaintiff for filing and entry. The underlying papers will be filed by the court.

Dated: January 13, 2010
Malta, New York

STEPHEN A. FERRADINO, J.S.C.

Papers Received and Considered:

Notice of Motion Dated August 18, 2009

Affidavit of William J. White, Esq., sworn to August 18, 2009 with attached Exhibits A-D

Affidavit of Derrell E. Coppage, Jr., sworn to August 24, 2009

Notice of Cross-Motion dated October 7, 2009

Affidavit of Stephen J. Rehfuss, Esq., sworn to October 7, 2009 with attached Exhibits A-G

Memorandum of Law dated October 7, 2009

Affidavit of William J. White, Esq., sworn to October 30, 2009

Plaintiff's Memorandum of Law in Opposition to Defendant's Cross-Motion to Dismiss and In Reply to Defendant's Opposition to Motion for Leave to File a Late Notice of Claim dated October 30, 2009