

Matter of Stuart

2011 NY Slip Op 30739(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 114800/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
Justice J.S.C.

PART 5

STUART, WAYNE

INDEX NO. 114800/10

MOTION DATE _____

THE CITY OF N.Y.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for _____

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

PAPERS NUMBERED	
_____	<u>1, 2</u>
_____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/25/11
MAR 25 2011

BARBARA JAFFE 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 5

-----x

In the Matter of the Application of WAYNE STUART,

Index No. 114800/10

Petitioner,

Motion Date: 2/15/11

Motion Seq. No.: 001

for Permission to File a Late Notice of Claim upon

DECISION AND JUDGMENT

THE CITY OF NEW YORK,

Respondent.

UNFILED JUDGMENT

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-----x
BARBARA JAFFE, JSC:

For petitioner:
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For respondent:
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Michael A. Cardozo
Corporation Counsel
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By order to show cause dated December 3, 2010, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order permitting him to serve and file a notice of claim upon respondent. Respondent opposes the motion.

On May 26, 2009, petitioner was arrested and indicted for criminal sale of a controlled substance in the third degree and related charges, and on May 29, 2009, he was released on bail. On May 26, 2010, a jury acquitted petitioner of all charges. Petitioner explains his delay as resulting from his retaining counsel on July 1, 2010 and counsel's investigation of his claims. In his proposed notice of claim, petitioner asserts claims for false arrest and imprisonment, unlawful search and seizure, assault and battery, malicious prosecution, abuse of process, intentional and negligent infliction of emotional distress, negligence, negligent hiring, screening, retention,

supervision, and training, and violations of petitioner's state and federal constitutional rights. (Affirmation of Michael P. Rooney, Esq., dated Nov. 12, 2010; Second Affirmation of Michael P. Rooney, Esq., dated Dec. 1, 2010).

Petitioner argues that City acquired actual knowledge of his claims or that such knowledge may be imputed to City through the actions of City employees in arresting and imprisoning, investigating, and prosecuting him. At oral argument, petitioner conceded that his false arrest, assault and battery, and excessive force claims are time-barred. (*Id.*).

City alleges that petitioner delayed three months beyond the 90-day deadline in seeking leave to assert his abuse of process and malicious prosecution claims, and that he failed to offer a reasonable excuse for the delay or establish that City has not been prejudiced by the delay. (Affirmation of Jessica Wisniewski, ACC, dated Feb. 10, 2011).

Pursuant to General Municipal Law (GML) § 50-a, in order to commence a negligence action against a municipality, a claimant must serve a notice of claim upon the municipality within 90 days of the date on which the claim arose. Pursuant to GML § 50-e, the court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (*Perez ex rel. Torres v New York City Health and Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011]). The presence or absence of any factor is not dispositive. (*Id.*).

As City employees were allegedly involved in the investigation of petitioner which

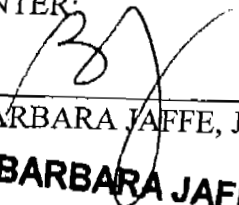
resulted in his criminal prosecution, knowledge of petitioner's claims may be imputed to City. (See *Nunez v City of New York*, 307 AD2d 218 [1st Dept 2003] [as Police Department possessed all essential facts, actual knowledge imputed to City]; *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dept 1993] [knowledge of malicious prosecution claim could be imputed to municipality through officers who initiated prosecution]; *Goodall v City of New York*, 179 AD2d 481 [1st Dept 1992] [knowledge imputed to City as police investigated incident to prepare for criminal prosecution]; *Tatum v City of New York*, 161 AD2d 580 [2d Dept 1990], *lv denied* 76 NY2d 709 [police arrest report and District Attorney's investigation may be considered actual or constructive knowledge to City]).

And in light of City's actual knowledge of petitioner's claims, there is no resulting prejudice. (*Nunez*, 307 AD2d at 220 [Police Department's investigation of alleged crime committed by petitioner and continued involvement in case until petitioner's release precludes substantial prejudice]; *Ansong v City of New York*, 308 AD2d 333 [1st Dept 2003] [respondent's claim of prejudice meritless as police and criminal court records pertaining to petitioner's arrest and prosecution presumably still exist]). Finally, to the extent that petitioner has not set forth a reasonable excuse for his delay, its absence is not fatal under these circumstances. (*Ansong*, 308 AD2d at 334 [lack of reasonable excuse insufficient to deny late notice of claim especially as respondent had actual knowledge of claims and no prejudice resulted from delay]).

Accordingly, it is hereby

ORDERED and ADJUDGED, that petitioner's application for leave to serve a late notice of claim is granted on condition that, within 20 days of the date of this order, petitioner serve his notice of claim upon respondent, after removing any reference to petitioner's claims sounding in

false arrest, assault and battery, and excessive force.

ENTER:


BARBARA JAFFE, J.S.C.
BARBARA JAFFE
J.S.C.

Dated: March 25, 2011
New York, New York

BARBARA JAFFE
J.S.C.

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