

**Washington v City of New York**

2011 NY Slip Op 30976(U)

April 13, 2011

Supreme Court, New York County

Docket Number: 102246/11

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

KENNETH WASHINGTON  
- v -  
CITY OF NY

INDEX NO. 102246/V  
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 decided in accordance with the attached decision.

**FILED**

APR 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/13/11

CK  
CYNTHIA S. KERN 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  
KENNETH WASHINGTON,

Petitioner,

Index No. 102246/11

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK, NEW YORK CITY  
POLICE DEPARTMENT, THE NEW YORK CITY  
POLICE DEPARTMENT OF THE CITY OF NEW  
YORK, POLICE OFFICER FELIX VARGAS Shield  
number 25423, of the HOUSING BOROUGH  
MANHATTAN IMPACT RESPONSE TEAM  
POLICE OFFICER "JOHN" HALL, and PUBLIC  
SERVICE AREA 6 under the auspices of THE NEW  
YORK CITY POLICE DEPARTMENT OF THE  
CITY OF NEW YORK,

**FILED**

APR 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Respondents.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

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 his action to recover damages for false arrest and imprisonment stemming from an arrest by New York City Police Officers (the "City") that took place on June 13, 2010 in the County, City, and State of New York. For the reasons set forth below, the petition is granted.

The relevant facts are as follows. On June 13, 2010, petitioner alleges he was entering his

building carrying a cup that contained a non-alcoholic beverage when a police officer stopped him and began interrogating him without cause. Petitioner claims the police officer accused him of certain infractions that were false and meritless. Petitioner alleges that the police officer then called for back up and placed him under arrest, after which petitioner claims he was kept handcuffed for approximately seven hours. Petitioner was subsequently charged with Criminal Possession of Marijuana in the 5<sup>th</sup> Degree, Unlawful Possession of Marijuana, Consumption of Alcohol in a Public Place and Disorderly Conduct. Subsequently, all criminal charges against petitioner were dismissed on January 18, 2011.

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 plaintiff 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 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 A.D.2d 322 (1<sup>st</sup> 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 361 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dept 2010).

Considering all the above factors together, petitioner's motion to serve a late Notice of Claim is granted. Petitioner fails to satisfy the first factor, the existence of a reasonable excuse. Petitioner claims that while his criminal proceeding was pending, "pursuing a civil manner [sic] was the last thing on [his] mind." He also alleged that his criminal attorney informed him that if he pursued a civil proceeding, his criminal case might be jeopardized. However, this is not a reasonable excuse, as petitioner knew of the requirement to file a timely Notice of Claim and could have done so. 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 (1<sup>st</sup> Dept 2010).

Petitioner has, however, satisfied the next factor, that the City had actual knowledge of the facts constituting the underlying claim. 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 (1<sup>st</sup> Dept 2005); see also *In re Ansong v. City of New York*, 308 A.D.2d 333 (1<sup>st</sup> 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 fact that police were called to the scene and were directly involved in all aspects of the claims emanating from the death of plaintiff'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 plaintiff would, as respondent's employees, have had immediate knowledge of the events giving rise to this dispute." The Court also held that there

