

Gonzales v City of New York

2011 NY Slip Op 31100(U)

April 28, 2011

Supreme Court, New York County

Docket Number: 109154/10

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN
J.S.C.

PRESENT.

PART 52

Index Number : 109154/2010

GONAZLEZ, VERONICA LEE ANNA

vs
CITY OF NEW YORK

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. 109154/10

MOTION DATE _____

MOTION SEQ. NO. 02

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

APR 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/29/11 02

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
VERONICA LEE ANNA GONZALES,

Petitioner,

Index No. 109154/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Respondent.

-----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> |
| Answering Affidavits..... | <u>2</u> |
| Cross-Motion and Affidavits Annexed..... | _____ |
| Answering Affidavits to Cross-Motion..... | _____ |
| Replying Affidavits..... | _____ |
| Exhibits..... | <u>3</u> |

Petitioner commenced the instant action to recover damages for false arrest and imprisonment, harassment, theft of property, slander and defamation of character, assault, battery, malicious prosecution and violations of her civil rights stemming from an arrest that took place on February 2, 2009. In a decision dated October 28, 2010, this court denied petitioner's motion for leave to file a late Notice of Claim. Petitioner now moves for leave to reargue the portion of this court's decision that denied her leave to file a late Notice of Claim with respect to her claim for malicious prosecution. For the reasons set forth below, petitioner's motion to reargue is granted and, upon reargument, petitioner's motion for leave to file a late Notice of

Claim with regard to her claim for malicious prosecution is granted.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). Petitioner here argues that this court erred by finding that (i) she did not have a reasonable excuse for failing to file a Notice of Claim within 90 days of the date her cause of action accrued, (ii) the City did not acquire actual knowledge of petitioner's claim within the statutory period or shortly thereafter, and (iii) petitioner failed to show that the City was not prejudiced by the delay.

The relevant facts are as follows. Petitioner was arrested on February 2, 2009 and released from jail approximately one week later. The charges against her were dismissed on August 5, 2009. Petitioner filed a Notice of Claim on December 1, 2009 and was notified that her claim was disallowed on January 14, 2010 because it was not filed within the 90 day statutory period. Petitioner then sought leave from this court to serve a late Notice of Claim on July 12, 2010.

In its decision dated October 28, 2010, this court held that because petitioner failed to provide a reasonable excuse for her delay, the City did not acquire actual knowledge of the claim within the statutory period or shortly thereafter and that petitioner failed to show that the City was not prejudiced by her delay, petitioner's motion for leave to file a late Notice of Claim for her claim for malicious prosecution must be denied. This court now reconsiders that portion of petitioner's motion.

Prospective petitioners 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 petitioner'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).

In the instant action, this court still finds that petitioner has failed to meet the first factor, the existence of a reasonable excuse. Although she asserts that she did not know of the deadline for filing a Notice of Claim and that she was "affirmatively misguided," this argument is without merit. Ignorance of the law and, in particular, of the 90-day deadline for filing a Notice of Claim, does not constitute a reasonable excuse. *See Gaudio v. City of New York*, 235 A.D.2d 228 (1st Dept 1997). However, it is well-settled that 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).

This court, however, reverses its finding that the City did not acquire actual knowledge of petitioner's claim for malicious prosecution. 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 petitioner’s malicious prosecution 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. The officers involved in petitioner’s arrest had immediate knowledge of the essential facts of her claim and their knowledge would be documented in their memo books as well as police and Criminal Court records. Therefore, pursuant to the First Department holdings in *Schiffman* and *In re Ansong*, the officers’ involvement provided the City with notice of the essential facts of petitioner’s claim. Furthermore, the City was not prejudiced by the delay since it had actual knowledge of the essential facts and any records pertaining to petitioner’s arrest and malicious prosecution are presumably still in existence. *In re Ansong v City of New York*, 308 A.D.2d 333, 334 (1st Dept 2003).

