

**Matter of Armansa v City of New York**

2011 NY Slip Op 31415(U)

May 20, 2011

Sup Ct, NY County

Docket Number: 102510/11

Judge: Alexander W. Hunter Jr

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: ALEXANDER W. HUNTER JR.

PART 33

Index Number : 102510/2011

**ARMANSA, ANTONIO**

VS.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 001

EXTEND TIME

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-7

8

**FILED**

MAY 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

*See memo and/or decision and order annexed hereto.*

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 26, 2011

  
\_\_\_\_\_  
ALEXANDER W. HUNTER JR. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33**

-----X

In the Matter of the Application of Antonio Armansa,

Index No.: 102510/11

Petitioner,

for an order pursuant to General Municipal Law §50-e(5)  
Extending the time to serve a Notice of Claim,

-against-

The City of New York,

Respondent,

-----X

**HON. ALEXANDER W. HUNTER, JR.**

**FILED**

**MAY 26 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

The motion by petitioner for an order pursuant to General Municipal Law §50-e(5), extending the time to serve two notices of claim, one relating to an injury sustained on or about May 24, 2010, while petitioner was confined in Riker's Island and a second relating to a claim of false imprisonment and deprivation of constitutional rights, resulting from wrongful acts by employees of the City of New York, is granted as to the first notice of claim and is denied as to the second one.

Petitioner submits two proposed notices of claim with the instant motion and seeks to have them deemed timely served as to all claims set forth therein. There are two claims being made against respondent. One claim is for personal injuries sustained by the petitioner on or about May 24, 2010, when he slipped and fell due to a collection of water in the lunchroom in Building C73 on Riker's Island. The second claim is for wrongful arrest, wrongful imprisonment, negligence and deprivation of constitutional rights arising from the incarceration of petitioner as a pretrial detainee from on or about March 1, 2010 through December 6, 2010. In that claim, petitioner asserts that the prosecution represented to the court that it was prepared to proceed to trial on the charges pending against him when, in fact, the prosecution was not prepared to proceed and as a result, he remained incarcerated until December 6, 2010 when he was released.

With respect to the personal injury claim, petitioner asserts that the accident occurred on respondent's premises, Riker's Island, it happened in the presence of employees of the City of New York, it was reported to the City of New York and the petitioner received medical examination and treatment from the City of New York. Petitioner annexes to his motion, excerpts from a certified copy of the New York City Department of Health and Mental Hygiene, documenting petitioner's injury and treatment. He also annexes an "Injury to Inmate Report" dated May 24, 2010 documenting petitioner's fall and his complains of injuries to his right shoulder, right wrist and lower back. Progress notes from the New York City Department of Health and Mental Hygiene, correctional health services are annexed as well.

Petitioner claims that respondent acquired actual knowledge of the essential facts constituting the claim within the time specified in General Municipal Law §50-e(5). Therefore, this court should permit the filing of a late notice of claim with respect to the personal injury

action.

With respect to the wrongful confinement claim, petitioner asserts that he was picked up involuntarily by police on a warrant. He was arraigned on a charge of sale of a controlled substance, a class B felony. On or about March 1, 2010, the court inquired of the prosecution whether the District Attorney was in a position to bring the case to trial and on or about March 29, 2010, the District Attorney reported that it was prepared to proceed to trial. However, the District Attorney was not in a position to proceed to trial on the charges against petitioner as the property clerk of the New York City Police Department did not have the evidence necessary to proceed to trial, including the alleged drugs and the laboratory tests on the alleged controlled substance.

Petitioner claims that the fact that the District Attorney was not in a position to proceed to trial was known or should have been known. Petitioner asserts that respondent was negligent and acted with reckless indifference in failing to have knowledge of the state of its evidence, in failing to properly and adequately collect and communicate information regarding the evidence to the District Attorney and to the court in a timely fashion. Petitioner also asserts, with regard to the wrongful confinement claim, which sounds in negligence, false arrest, false imprisonment and deprivation of constitutional right, that respondent was fully aware of all of the pertinent facts regarding said claims. A copy of the proposed notice of claim with respect to the wrongful confinement claim is annexed to the moving papers.

Petitioner further asserts that the notice of claim is timely as to all of the claims that sound in false arrest and false imprisonment as same accrued on or about December 6, 2010 when petitioner was released from incarceration, and the notice of claim has been served within 90 days of December 6, 2010. Nevertheless, petitioner makes the instant application with respect to the wrongful confinement claim, "in order to insure that Mr. Armansa has available to him all of the remedies to which he is entitled for all of his claims." (Dembia Aff., para. 13). Petitioner claims that until he was released from incarceration, he was hampered in his ability to find counsel to protect his interests in this matter. Therefore, the proposed notice of claim should be permitted with respect to the wrongful confinement claim.

Respondent opposes the motion and asserts that petitioner's late notice of claim with regard to his incarceration and prosecution should be denied as he offers no excuse and does not address notice to respondent or prejudice. Respondent contends that the bench warrant makes the arrest and incarceration of petitioner proper as petitioner concedes that the bench warrant was issued for him and there is no question of misidentification. Thus, there is no cause of action against the New York City Police Department or to respondent stemming from that arrest.

Moreover, respondent asserts that even though petitioner contends that the notice of claim in the malicious prosecution is timely since the charges against petitioner were dismissed on December 6, 2010 and the notice of claim annexed to the moving papers is dated February 22, 2011, petitioner has not indicated the method of service. In addition, petitioner argues that to obtain recovery for malicious prosecution, a petitioner must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause and that the proceeding was brought out of actual malice. However, termination was not favorable as petitioner's own misconduct frustrated the prosecution's ability to proceed with the case and the destruction of evidence in the intervening decade where petitioner was absent should not be rewarded with a windfall in civil court.

Respondent further argues that petitioner failed to establish that the City had actual notice and was not prejudiced by his delay in filing a late notice of claim. Moreover, petitioner offers no excuse for his delay in filing as the petitioner pleads that the notice is timely.

With respect to the personal injury action, respondent contends that the claim accrued on May 24, 2010 but petitioner failed to serve a notice of claim until, at the earliest, February 22, 2011. Petitioner failed to demonstrate that respondent acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. Respondent asserts that there was no basis to anticipate a civil suit. The fact that petitioner may have slipped gives no notice of a civil claim pending. Additionally, knowledge of the occurrence of the accident and injury, without more, does not constitute actual knowledge of the essential facts constituting the claim, irrespective of the seriousness of the injury.

Respondent further argues that attempts to impute notice to the City on the basis of reports generated by its own employees, have been denied by appellate courts. The fact that City employees were present at the time petitioner slipped and fell does not mean that notice of a civil lawsuit is imputed to the City.

Finally, respondent contends that it is petitioner's burden to affirmatively demonstrate that the City was not substantially prejudiced by the failure to timely file a notice of claim. However, petitioner makes no argument that the City was not prejudiced. In addition, even though it is not the City's burden to prove that it will be substantially prejudiced by petitioner's late notice of claim, the City will be prejudiced if petitioner is permitted to serve a late notice of claim. The City's ability to investigate has been prejudiced by the passage of time. Moreover, petitioner failed to offer a reasonable excuse for failing to serve a timely notice of claim. Accordingly, the motion should be denied.

In reply, petitioner contends that there is no prejudice to respondent if this court permits the filing of a late notice of claim as there was actual notice to the City of the personal injury claim. The accident occurred in the presence of City employees and petitioner was taken to a medical facility operated by the City of New York. Moreover, case law has established that the mere passage of time is not alone a sufficient basis to deny leave to file a late notice of claim. In addition, petitioner contends that the notice of claim with respect to the wrongful confinement claim is timely as the affidavit of service shows that it was served on respondent on March 1, 2011, which was within the statutory 90 day period.

General Municipal Law §50-e requires that a notice of claim be served within ninety days after the claim arises. General Municipal Law §50-e(5) addresses the requirements for filing a late notice of claim. Both the statute and case law have enumerated various factors for a court to consider when determining whether or not a party may file a late notice of claim. In pertinent part, the statute states that a court may, in its discretion, extend the time to serve a notice of claim. Also, "the extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider...whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim..., within the 90 day prescribed period or a reasonable time thereafter. Moreover, "Other relevant factors include the reason for the delay and whether the delay substantially prejudiced the public corporation's ability to defend on the merits." **Gerzel v. City of New York, 117 A.D.2d 549 (1<sup>st</sup> Dept. 1986).**

In the case at bar, petitioner has sufficiently demonstrated that respondent acquired actual knowledge of the essential facts constituting the claim with respect to the personal injury action. The accident occurred in a City facility, in the presence of City employees and petitioner was taken to a medical facility operated by the City of New York. Moreover, an "Injury to Inmate Report" was generated right after the incident documenting the circumstances of petitioner's injuries. In Miranda v. The New York City Transit Authority, 262 A.D.2d 199 (1<sup>st</sup> Dept. 1999), the court held that an accident report prepared by a supervisor immediately after an accident, was sufficient to provide the defendant with timely actual knowledge of the facts constituting the claim.

In addition, even though respondent asserts that it is prejudiced in its investigation due to the passage of time, it is well established by the mere passage of time alone is not a sufficient basis to deny leave to file a late notice of claim. Holmes by Holloway v. City of New York, 189 A.D.2d 676 (1<sup>st</sup> Dept. 1993). Accordingly, respondent's claim that it is prejudiced by the passage of time, is an insufficient basis to deny petitioner's motion.

Finally, even though respondent takes issue with the fact that petitioner has failed to provide a reasonable excuse for failing to serve a timely notice of claim, such a failure is not determinative. In Chattergoon v. New York City Housing Authority, 197 A.D.2d 397 (1<sup>st</sup> Dept. 1993), the court ruled that, "In determining whether to permit the filing of a late notice of claim, 'the presence or absence of any one factor is not determinative'...and the absence of a reasonable excuse for the delay is not fatal." Id. In fact, courts have ruled that all relevant factors are to be considered such as actual knowledge of the claim and prejudice. See, Harris v. City of New York, 297 A.D.2d 473 (1<sup>st</sup> Dept. 2002); Gerzel v. City of New York (supra); Rechenberger v. Nassau County Medical Ctr., 112 A.D.2d 150 (2<sup>nd</sup> Dept. 1985). Therefore, petitioner's failure to offer a reasonable excuse does not constitute an automatic denial of his motion to file a late notice of claim.

Accordingly, it is hereby

ORDERED, that petitioner's motion to file a late notice of claim with respect to the personal injury claim is granted and the proposed notice of claim annexed to the moving papers as Exhibit 2, is deemed timely served.

With respect to the wrongful confinement claim, petitioner asserts that the claim arose on December 6, 2011 and it served the notice of claim on the respondent on March 1, 2011. Since said notice of claim is within the 90 day statutory time period, there is no reason for this court to grant respondent's motion with respect to that claim and the motion with respect to that claim is hereby denied. The arguments made by respondent in its opposition papers with respect to the wrongful confinement claim would be more suitable in a future motion to dismiss that claim or a motion for summary judgment.

This constitutes the decision and order of the court.

**FILED**

Dated: May 20, 2011

MAY 26 2011



NEW YORK  
COUNTY CLERK'S OFFICE

J.S.C.