

Hernandez v City of New York

2011 NY Slip Op 31705(U)

June 23, 2011

Supreme Court, New York County

Docket Number: 105925/11

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
Justice

PART 52

HERNANDEZ, FRANCISCO

INDEX NO. 105925/11

MOTION DATE _____

- v -
CITY OF New York

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

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 27 2011

is decided in accordance with the annexed decision
NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/23/11

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
FRANCISCO HERNANDEZ,

Petitioner,

Index No. 105925/11

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

FILED

Respondent.

JUN 27 2011

-----x
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the papers
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

Petitioner brought the instant petition to serve a late Notice of Claim against the City of New York (the "City") for his action to recover damages for false arrest and imprisonment, assault and battery stemming from an arrest that took place on May 26, 2010. For the reasons set forth below, his petition is granted.

The relevant facts are as follows. On May 26, 2010, at approximately 4:20 p.m., petitioner alleges that members of the New York City Police Department ("NYPD") approached him when he was in front of his residence at 30 Post Avenue, New York, New York. Petitioner alleges that the officers assaulted and battered him, causing him serious personal injuries and then arrested him. The officers then brought petitioner to the 34th Precinct and thereafter, under

police custody, to Columbia Presbyterian Hospital. Petitioner alleges that he was then taken to Central Booking in New York County and held in jail without justification or cause. On May 4, 2011, all criminal charges against petitioner were dismissed.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety 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 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 A.D.2d 322 (1st 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 (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 ninety day statutory period or shortly thereafter. *See Justiniano v. New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993).

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 he believed he could not file a claim against the City while the criminal charges were pending against him and did not know about the 90-day deadline for filing a Notice of Claim. This is not a reasonable excuse, however, as ignorance 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, 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 (1st 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 (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 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 was no prejudice to the City since “police and criminal records pertaining to plaintiff’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 the claim within the statutory time frame or shortly thereafter based upon the fact 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 his claim and this knowledge would be documented in their memo books as well as police and

