Dolinski v County of Nassau
2011 NY Slip Op 31971(U)
July 1, 2011
Sup Ct, Nassau County
Docket Number: 002817/11
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 18

MICKEY DOLINSKI,

Petitioner,

-against-

COUNTY OF NASSAU and VILLAGE OF MALVERNE,

Respondents.

Index No.: 002817/11
Motion Sequence...01
Motion Date... 05/03/11
XXX

Papers Submitted:
Order to Show Cause..................................x
Affirmation in Opposition............................x
Affirmation in Opposition............................x
Reply Affirmation.......................................x

Upon the foregoing papers, the Petitioner, MICKEY DOLINSKI's ("Dolinski"), Order to Show Cause, seeking an order pursuant to General Municipal Law § 50-e (5), granting the Petitioner leave to serve a late Notice of Claim, *nunc pro tunc*, against the Respondents, COUNTY OF NASSAU ("County") and VILLAGE OF MALVERNE ("Village"), is decided as hereinafter provided.

The claims for which the Petitioner seeks to file a late Notice of Claim arise out of an incident that occurred on July 7, 2010. As gleaned from the Affirmation in Support

and Affidavit of Merit by the Petitioner, on said date, the Petitioner claims that he was assaulted by his father after the Petitioner attempted to separate his father from his mother. As stated in the Affidavit of Merit, the Petitioner's father had his mother "pinned against the kitchen wall". (*See See* Affidavit of Merit, dated February 22, 2011, attached as Exhibit "1" to the Order to Show Cause, ¶ 2). According to the Petitioner, he was stabbed with a knife by his father when he attempted to separate his two parents. At approximately 3:00 a.m., while the Petitioner was hospitalized at Winthrop University Hospital for the stab wound to his chest, the Petitioner was allegedly arrested by law enforcement from the County and the Village on charges of Second Degree Assault. At Winthrop Hospital, the Petitioner provided statements to law enforcement regarding the incident that occurred earlier that night.

Later the same day, the Petitioner was arraigned on the Second Degree Assault charge and released on his own recognizance. On December 6, 2010, after appearing at four criminal court appearances, the criminal action was terminated in favor of the Petitioner. (*See* Certificate of Disposition Grand Jury Dismissal, dated December 20, 2010, attached to the Order to Show Cause as Exhibit "2").

On February 22, 2011, the Petitioner timely served a Notice of Claim for malicious prosecution upon the Respondents, County and Village. The ninety day time period in which to file a Notice of Claim for malicious prosecution begins to run on the date the criminal charges are dismissed in the Petitioner's favor. However, the Petitioner's time to file a Notice of Claim for false arrest and false imprisonment expired on October 5, 2010,

as the applicable time period for said claims begins to run on the date the Petitioner was released from custody. The instant application to file a late Notice of Claim was made on February 24, 2011, approximately four months after the ninety day time period expired for false arrest and false imprisonment.

In order to commence a tort action against a municipality, General Municipal Law § 50-e (1) (a) requires a claimant to serve a notice of claim within ninety (90) days of the alleged injury. *See Jordan v. City of New York*, 41 A.D.3d 658, 659 (2d Dept. 2007). Pursuant to General Municipal Law § 50-e (5), the court may, in its discretion, extend the time to serve a notice of claim. *Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006); *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138 (2d Dept. 2008); *Matter of Lodati v. City of New York*, 303 A.D.2d 406, 406-407 (2d Dept. 2003). The key factors in determining whether to allow service of a late notice of claim are whether (1) the movant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, (2) the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) the delay would substantially prejudice the municipality in its defense. *See* General Municipal Law § 50-e [5]; *Jordan v. City of New York, supra*, 41 A.D.3d at 659; *Matter of Lodati v. City of New York, supra*, 303 A.D.2d at 407. The presence or absence of any one of these factors is not necessarily determinative *Matter of Dell'Italia v. Long Is. R.R. Corp.*, 31 A.D.3d 758, 759 (2d Dept. 2006), and the absence of a reasonable excuse is not necessarily fatal. *Jordan v.*

City of New York, *supra*, 41 A.D.3d at 659; *Matter of March v. Town of Wappinger*, 29 A.D.3d 998, 999 (2d Dept. 2006).

"However, whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim is seen as 'a factor which should be accorded great weight' ". *Matter of Dell'Italia v. Long Is. R.R. Corp.*, 31 A.D.3d at 759, *supra*, quoting *Matter of Morris v. County of Suffolk*, 88 A.D.2d 956, 956 (2d Dept. 1982), *affd.* 58 N.Y.2d 767 (1982); *see also Matter of Battle v. City of New York*, 261 A.D.2d 614, 615 (2d Dept. 1999).

The Plaintiff contends, at the outset, that his application to file a late Notice of Claim is timely as it is being made within one year and ninety days of its accrual. The Plaintiff further contends that the Respondents received actual notice of the essential facts that constitute the claims of false arrest and false imprisonment as law enforcement from the County and the Village conducted an investigation and effectuated the Petitioner's arrest. (*See* Petitioner's Affirmation in Support, dated February 22, 2011, ¶¶ 7-8). Additionally, Petitioner posits that the Respondent, County, obtained and prepared a Statement of Admission and Supporting Deposition. The Petitioner claims that, due to the Respondents direct involvement in the investigation and subsequent arrest, actual knowledge is imputed to the municipalities.

With respect to the reasonable excuse factor, the Petitioner submitted an Affidavit wherein he states that he was misinformed by his criminal attorney regarding the

time in which to file a Notice of Claim for false arrest and false imprisonment. Specifically, as adduced from the Petitioner's Affidavit of Merit, his criminal attorney advised him that the ninety day time period in which to file a Notice of Claim for malicious prosecution, false arrest and false imprisonment runs from the date the criminal charges were dismissed in his favor. He further states that only after his retention of a civil attorney was he made aware that the time period in which to file a Notice of Claim against a municipality for false arrest and false imprisonment runs from the date of his release from custody, and, therefore, the time period expired on October 5, 2010. The Petitioner claims that even if the Court were to find the Petitioner's excuse unreasonable, "the absence of an acceptable excuse is not necessarily fatal" to the application. *Reisse v. County of Nassau*, 141 A.D.2d 649 (2d Dept. 1988).

Lastly, the Petitioner urges that the Respondents will not be substantially prejudiced given the Respondents actual knowledge of the circumstances giving rise to the claim and the brief four month delay.

The Village states in opposition to the Order to Show Cause that the Malverne Police Department did not in any way participate in the investigation prior to the arrest of the Petitioner. In support of its position, the Village submitted the Affidavit of John C. Aresta, the Chief of the Malverne Police Department. Chief Aresta states in his Affidavit that on the date of the incident, a Malverne police officer was dispatched to Winthrop Hospital. At the same time, a desk officer contacted the 5th Squad Detectives at the Nassau County Police

Department because the 5th Squad investigates most of the felonies that occur in Malverne. The criminal charge for which the Petitioner was initially a suspect and subsequently arrested on was Second Degree Assault, a felony. As stated in the Affidavit, an officer from the Malverne Police Department merely stood guard in front of the Petitioner's hospital room at Winthrop until the Petitioner was arrested by the 5th Squad Detectives. The Malverne Police Department did not interrogate the Petitioner, take any statements from him, investigate the facts, or subsequently arrest him. Based upon the Malverne Police Department's limited involvement, counsel for the Village argues that actual knowledge cannot be imputed to the municipality.

Moreover, Counsel for the Village posits that it would be substantially prejudiced if the Court were to permit the claim at this juncture as none of the relevant materials exist within the Village's control and witnesses' memories of the events may have faded.

The County also opposes the Petitioner's application stating, in relevant part, that: (i) ignorance of the law and law office failure are not reasonable excuses; (ii) the mere involvement of the Nassau County Police Department in the investigation and subsequent arrest of the Petitioner is insufficient to impute actual knowledge upon the County; and (iii) it will be substantially prejudiced if the Petitioner's application is granted. The crux of the County's opposition is that the method by which the Petitioner seeks to impute actual knowledge upon the County is similar to the line of cases that address issues of actual

knowledge arising from the completion of accident reports.

In Reply, the Petitioner primarily relies on *Ragland v. New York City Housing Authority*, 201 A.D.2d 7 (2d Dept. 1994), which stands for the proposition that where "members of the municipality's police department participate in the acts giving rise to the claim, and reports and complaints have been filed by the police, the municipality will be held to have actual notice of the essential facts of the claim". *Ragland*, 201 A.D.2d at 11. Further, Petitioner's counsel argues that several of the cases relied upon by the County involve circumstances where actual knowledge was not imputed to the municipality based merely upon a police officer's completion of an accident report.

In the instant matter, the Court finds that the Respondent, County, did acquire actual knowledge of the facts underlying the Petitioner's claims for false arrest and false imprisonment within ninety days of the incident. A member of the Nassau County Police Department, an employee of an agency of the municipality, was directly involved in the facts giving rise to the Petitioner's claims. To that end, it is alleged in the Petitioner's Affidavit of Merit, and supported by Chief Aresta of the Malverne Police Department, that an officer and/or detective of the Nassau County Police Department questioned the Petitioner and obtained a Supporting Deposition and a Statement of Admission from him. Moreover, the Nassau County Police Department subsequently arrested the Petitioner, charged him with Second Degree Assault based on those documents, and prosecuted the case against him until the charges were ultimately dismissed. While counsel for the County is correct in the assertion that completion of a police aided accident report, in and of itself, is insufficient to

impute actual knowledge to the municipality, actual knowledge has been found to exist when there are other factors present under the circumstances. *Caselli v. City of New York*, 105 A.D.2d 251 (2d Dept. 1984).

In *Ragland, supra*, a case most analogous to the matter *sub judice*, the petitioner filed an application to serve a late Notice of Claim for the claims of false arrest, false imprisonment and malicious prosecution. In that case, the police officer that effectuated the petitioner's arrest prepared and filed reports concerning all of the events involved in the arrest and prosecution of the petitioner. The Court found that it is "[a] factor of considerable significance when it is the acts of the police which give rise to the very claim set forth in the proposed notice". *Ragland*, 201 A.D.2d at 11. Likewise, in *Erichson v. City of Poughkeepsie Police Department*, 66 A.D.3d 820 (2d Dept. 2009), the Court determined that the municipality had actual knowledge of the facts underlying the plaintiff's claim, "as its own employees engaged in the conduct which gave rise to the claim". *Erichson*, 66 A.D.3d at 821.

The purpose of the statutory Notice of Claim requirement is to afford the public corporation "an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available". *Teresta v. City of New York*, 304 N.Y. 440, 443 (1952). In light of this standard, the Court finds that the Respondent, County, had the opportunity to investigate, and did in fact investigate, the circumstances underlying the Petitioner's claims within the statutory time period.

Since the County acquired actual knowledge of the essential facts of the Petitioner's claims, the Petitioner has met his initial burden of showing a lack of substantial prejudice to the municipality's ability to maintain a defense on the claims. *Williams ex rel. Fowler v. Nassau County Medical*, 6 N.Y.3d 531 (2006); *See also Matter of Felice v. Eastport/South Manor Central School District*, 50 A.D.3d 138 (2d Dept. 2008); *Jordan v. City of New York*, 41 A.D.3d 658 (2d Dept. 2007).

In this matter, however, the records from the underlying criminal matter were sealed pursuant to Criminal Procedure Law § 160.50. Surprisingly, the Respondent, County, does not raise the argument that it will be substantially prejudiced due to its inability to access to those records. Accordingly, the Court hereby conditions the granting the Petitioner's motion to file a late Notice of Claim on the Respondent, County, *nunc pro tunc*, on the Petitioner providing the County with the appropriate releases to enable it to unseal and obtain the records from the criminal file.

With respect to the reasonable excuse factor, the Petitioner argues that he did not file a Notice of Claim within the requisite time period as to the civil charges arising out of the false arrest and false imprisonment claims because he was advised by his criminal attorney that he had ninety days from the date of the dismissal of the charges to file a Notice of Claim for said claims. (*See* Petitioner's Affidavit, ¶ 8, dated February 22, 2011, attached to the Petitioner's Order to Show Cause as Exhibit "1"). Petitioner states that, only after he retained a civil attorney was he advised that the time in which to file a Notice of Claim for false arrest and false imprisonment is actually ninety days from the date of his release from

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custody. *Id.* at ¶ 8. Given the well settled law on this issue, the Petitioner's excuse, that he was ill advised by his criminal attorney regarding the accrual of the claims, is not reasonable. Courts have consistently held that not even ignorance of the law or, in limited circumstances, even imprisonment does not excuse the delay. *See Astree v. New York City Transit* Authority, 31 A.D.3d 589 (2d Dept. 2006); *see also Lavalliere v. Department of Corrections of City of New York*, 304 A.D.2d 370 (1st Dept. 2003).

However, where there is actual notice and an absence of substantial prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late Notice of Claim. *Brownstein v. Incorporated Village of Hempstead*, 52 A.D. 3d 507, 510 (2d Dept. 2008).

Accordingly, the Petitioner's Order to Show Cause to file a late Notice of Claim, *nunc pro tunc*, against the Respondent, County, is **GRANTED**, consistent with the terms of this order.

Contrary to the County, the Court finds that the Respondent, Village, did not acquire actual knowledge of the essential facts giving rise to the Petitioner's claims for false arrest and false imprisonment. It is evident from the record that the Village was not directly involved in the investigation preceding or subsequent to the arrest and prosecution of the Petitioner. The Supporting Deposition and Statement of Admission submitted in support of the Order to Show Cause are documents created by the County of Nassau. Actual knowledge will not be imputed to a municipality where the only involvement of a law enforcement official was to stand guard in front of the hospital room where the Petitioner was being

treated. The conduct of the Malverne Police Department cannot be found to give rise to the Petitioner's claims. Accordingly, since the Respondent, Village, did not obtain actual knowledge of the essential facts giving rise to the Petitioner's claims, the Petitioner's application to file a late Notice of Claim upon the Village, *nunc pro tunc*, is **DENIED**.

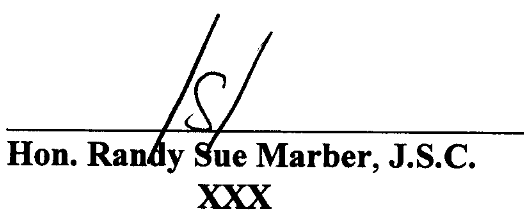
Accordingly, it is hereby

ORDERED, that the branch of the Petitioner's Order to Show Cause seeking to file a late Notice of Claim, *nunc pro tunc*, upon the Respondent, County, is **GRANTED**, conditioned upon the Petitioner providing the Respondent, County, with the appropriate releases to enable the County to unseal and obtain the records from the criminal file, *People v. Dolinski*, Case No. 02590N-2010; and it is further

ORDERED, that the branch of the Petitioner's Order to Show Cause seeking to file a late Notice of Claim, *nunc pro tunc*, upon the Respondent, Village, is **DENIED**.

This constitutes the decision and Order of the Court.

DATED: Mineola, New York
July 1, 2011



Hon. Randy Sue Marber, J.S.C.
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NASSAU COUNTY
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