

**Matter of Freyre v City of New York**

2011 NY Slip Op 32450(U)

September 9, 2011

Sup Ct, NY County

Docket Number: 107609/11

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

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In the Matter of the Claim of GEORGE FREYRE,

Petitioner,

Index No. 107609/11

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK and NEW YORK CITY  
POLICE DEPARTMENT,

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

**FILED**  
Numbered  
**SEP 13 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE  
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Notice of Motion and Affidavits Annexed.....  
Notice of Cross Motion and Answering Affidavits.....  
Affirmations in Opposition to the Cross-Motion.....  
Replying Affidavits.....  
Exhibits.....

Petitioner brought the instant motion to serve a late Notice of Claim for his action to recover damages for malicious prosecution, abuse of process, negligent hiring and supervision, false arrest and false imprisonment, civil rights violations, excessive force and assault and battery stemming from an arrest that took place on December 31, 2009. The motion is resolved as explained below.

The relevant facts are as follows. Petitioner was arrested on December 31, 2009 in the West 35<sup>th</sup> Street, New York, New York Police Precinct at approximately 6:00 p.m. At the time of the arrest, petitioner alleges respondents, their agents, servants and employees assaulted,

battered, falsely arrested, detained and confined petitioner without probable cause. The case against petitioner stemming from this arrest was terminated in petitioner's favor on December 9, 2010. On July 8, 2011, petitioner brought this motion for leave to serve a late Notice of Claim against respondents for damages stemming from the December 31, 2009 arrest.

Prospective plaintiffs must commence an action against a municipality within one year and ninety days of the date the cause of action accrues. *See* General Municipal Law §50-i. G.M.L. §50-i(1) provides that “[n]o action or special proceeding shall be prosecuted or maintained against a city...unless, (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.” It is well-settled that the Court may not grant a petitioner leave to serve a late Notice of Claim after the expiration of the statute of limitations for that claim. *See Hochberg v. City of New York*, 63 N.Y.2d 665, 665-666 (1984).

Petitioner's claims for abuse of process, negligent hiring and supervision, false arrest and false imprisonment, civil rights violations, excessive force, assault and battery are time-barred as these claims accrued more than one year and ninety days before he brought the present application. Petitioner's claims for assault and battery, excessive force, civil rights violations and abuse of process accrued on the date of his arrest on December 31, 2009. Thus, the last day for petitioner to timely serve his Notice of Claim for these causes of action was March 31, 2010. Furthermore, petitioner's claims for false arrest and imprisonment accrued on the day of his release. That date is not specified in petitioner's moving papers but the Court will assume that he was released on or about January 1, 2010, as reported in the article included in the City's opposition papers. Petitioner sought leave to file a late Notice of Claim over eighteen months

after his release, and thus, after the one year and ninety day statute of limitations expired. These claims are therefore time-barred and the court cannot consider petitioner's application for leave to file a late Notice of Claim with respect to these claims.

However, petitioner's claim for malicious prosecution is not time-barred as it accrued on the date the charges against him were dismissed in his favor, December 9, 2010. Therefore, because plaintiff filed the instant petition on July 8, 2011, within one year and ninety days of that date, the court will consider petitioner's application for leave to serve a late Notice of Claim with respect to his malicious prosecution claim.

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 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 (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 387 (1<sup>st</sup> Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 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 with respect to his claim for malicious prosecution is granted. Plaintiff fails to satisfy the first factor, the existence of a reasonable excuse. His only excuse is that he did not know of the deadline for filing a Notice of Claim. However, 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 (1<sup>st</sup> Dept 1997). However, the lack of a reasonable excuse alone is not fatal to a petition 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).

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 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

