

**Brown v City of New York**

2011 NY Slip Op 33298(U)

June 21, 2011

Supreme Court, Queens County

Docket Number: 25345/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X

Jonathan Brown,

Index  
Number: 25345/09

Plaintiff,

- against -

Motion  
Date: 6/14/11

The City of New York, The New York City  
Police Department, The Department Corrections  
for the City of New York, and Their Individual  
Employees Whose Identities Have Not Yet Been  
Determined,

Motion  
Cal. Number: 6

Defendants.

Motion Seq. No.: 1

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The following papers numbered 1 to 9 read on this motion by defendants (collectively the City) for summary judgment; and cross-motion by plaintiff for leave to serve a late notice of claim and to file an amended complaint.

|  | <u>Papers<br/>Numbered</u> |
|--|----------------------------|
| Notice of Motion-Affirmation-Exhibits.....       | 1-4                        |
| notice of Cross-Motion-Affirmation-Exhibits..... | 5-7                        |
| Affirmation in Opposition.....                   | 8-9                        |

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the City for summary judgment dismissing the complaint upon the ground that plaintiff failed to serve a timely notice of claim pursuant to General Municipal law §50-e is granted.

Cross-motion by plaintiff for leave to serve a late notice of claim and to file an amended complaint is denied.

Plaintiff, an inmate at Riker's Island Correctional Facility, sustained injuries as a result of being assaulted by other inmates at the prison on October 3, 2008. Plaintiff filed a notice of claim on February 24, 2009 and thereafter commenced the underlying action

on September 21, 2009. The notice of claim merely alleges, in general, personal injury and negligence arising out of plaintiff's assault by other inmates and the refusal of his requests for medical attention. In his complaint, plaintiff asserts causes of action for negligence on the part of the City in failing to investigate properly and to prevent plaintiff's assault and in failing to provide prompt medical attention. Plaintiff also asserts a cause of action for violation of his Constitutional rights under the First, Fourth, Thirteenth and Fourteenth Amendments pursuant to 42 U.S.C. §1983.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Since plaintiff's cause of action accrued on October 3, 2008, the deadline for serving a notice of claim was January 2, 2009. Therefore, plaintiff's service of a notice of claim on February 24, 2009, without leave of court, was untimely and a nullity.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Plaintiff has failed to offer a reasonable excuse for his delay in seeking leave to serve a late notice of claim. Counsel for plaintiff states in his affirmation in support of the cross-motion that he believed that it would be better to wait until the several criminal cases pending against plaintiff were resolved before filing a notice of claim. The Court considers such tactical miscalculation on the part of counsel as law office failure, which does not constitute a reasonable excuse for not serving a timely notice of claim (see Belenky v. Nassau Community College, 4 AD 3d

422 [2<sup>nd</sup> Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2<sup>nd</sup> Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2<sup>nd</sup> Dept 2000]). Counsel also represents that there was a further delay in getting plaintiff to sign the notice of claim because he was released from custody after a plea bargain on January 27, 2009 into an in-patient drug rehabilitation program where he spent nine months. However, counsel fails to explain how plaintiff's participation in a drug treatment program prevented him from signing a notice of claim, and plaintiff, in his affidavit in support of the cross-motion fails to address this purported excuse.

Counsel also fails to explain why he failed to commence a special proceeding for leave to serve a late notice of claim but improperly served a late notice of claim without leave of court and thereafter commenced an action based upon the invalid notice of claim. He also fails to provide an adequate explanation for his additional delay in seeking leave to serve a late notice of claim until May 17, 2011 when he filed his cross-motion only in response to the City's motion to dismiss.

Plaintiff's counsel's excuse that an application for leave to file a late notice of claim was not hitherto made because the City did not to move to dismiss the complaint for plaintiff's failure to serve a timely notice of claim is without merit. Plaintiff was required to move for leave to serve a late notice of claim at the outset, and not improperly serve a late notice of claim knowingly, without leave of court, improperly commence an action and thereafter move for leave to serve a late notice of claim in response to the City's motion for summary judgment. Counsel's further contention that the City failed to raise "the affirmative defense of plaintiff filing a late notice of claim" is without merit. The defense of failing to serve a timely notice of claim is not one that must be raised as an affirmative defense (see Ceely v New York City Health & Hosps. Corp., 162 AD 2d 492 [2<sup>nd</sup> Dept 1990]).

Finally, counsel's contention that the City should be barred from raising the defense of late notice of claim upon the basis of equitable estoppel is without merit. Nothing is proffered by counsel to show that plaintiff was misled or improperly induced into refraining from filing a timely notice of claim. Indeed, counsel admits that the delay in filing a notice of claim was a tactical judgment and decision on his part. Moreover, the City was not required to apprise counsel that it was rejecting the notice of claim for untimeliness. The notice of claim, knowingly served late without leave of court, was a nullity. Counsel is charged with that knowledge and may not be heard to argue that he was somehow lulled into not seeking leave to file a late notice of claim because of the City's failure to move for dismissal until now.

Therefore, plaintiff has failed to proffer a cognizable excuse for his failure to serve a timely notice of claim.

Plaintiff has also failed to demonstrate that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter by virtue of the incident reports, the injury to inmate report and the hospital records annexed to the cross-moving papers.

"What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2<sup>nd</sup> Dept 1996]).

The aforementioned documents do not apprise the City of any causal nexus between the injuries inflicted upon plaintiff from an inmate assault and any negligence on the part of the City (see e.g. Beretey v. New York City Health & Hospitals Corp., 56 AD 3d 591 [2<sup>nd</sup> Dept 2008]; Doyle v. Elwood Union Free School Dist., 39 AD 3d 544 [2<sup>nd</sup> Dept 2007]; Henriques v. City of New York, 22 AD 3d 847 [2<sup>nd</sup> Dept 2005]). Therefore, plaintiff has failed to establish that the City acquired timely actual knowledge of the essential facts constituting the claim, which are those facts supporting plaintiff's theories of liability.

The only other argument raised by counsel is that the City would suffer no prejudice by a late notice of claim. In the first instance, plaintiff has failed to meet his affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138, [2<sup>nd</sup> Dept 2008]). However, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant petition where plaintiff has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see National Grange Mutual Ins. Co. v. Town of Eastchester, 48 AD 3d 467, supra; Hebbard v. Carpenter, 37 AD 3d 538 [2<sup>nd</sup> dept 2007]; Carpenter v. City of New York, 30 AD 3d 594 [2<sup>nd</sup> Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2<sup>nd</sup> Dept 2006]).

With respect to plaintiff's §1983 claims, in order to sustain a cause of action under §1983, plaintiff must specifically plead and prove an official policy or custom that causes him to be deprived of a constitutional right (see Jackson v. Police Dept. Of City of New York, 192 AD 2d 641 [2<sup>nd</sup> Dept 1993]). Plaintiff failed

to articulate what governmental policy or custom deprived him of his constitutional rights. In his complaint, plaintiff alleges that the individual defendants "conspired with others, reached a mutual understanding and acted to undertake a course of conduct that violated Jonathan Brown's civil rights including, but not limited to, covering up the real facts and circumstances surrounding his unlawful and negligent treatment while in custody" and that the City "intentionally, knowingly, recklessly, or with deliberate indifference failed to expeditiously and vigorously investigate and interrogate suspect and witness corrections officers, thus enabling said officers to concoct a cover-up." These conclusory allegations, made by plaintiff's counsel "upon information and belief" concerning this one incident, fail to articulate any official policy or custom of the City. In his proposed amended complaint, plaintiff alleges that the corrections officers on duty at the time plaintiff was assaulted did not intervene but allowed the assault to occur and "created the conditions in which the inmate assault on plaintiff could take place." He also alleges that the corrections officer on duty refused him prompt medical treatment. He alleges that such actions constituted a policy or custom of the Department of Corrections to condone the practices of corrections officers in allowing or ignoring inmate on inmate violence at Rikers Island. However, plaintiff has failed to demonstrate that the actions of the corrections officers complained of, even if true, constituted an official policy or custom of the Department of Corrections so as to support a §1983 cause of action.

Accordingly, the motion is granted, the cross-motion is denied and the complaint is dismissed.

Dated: June 21, 2011

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KEVIN J. KERRIGAN, J.S.C.