

Matter of Miller v City of New York

2012 NY Slip Op 30549(U)

March 8, 2012

Supreme Court, New York County

Docket Number: 110445/11

Judge: Barbara Jaffe

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

PRESENT: Jaffe
Justice

PART 5

Index Number : 110445/2011
MILLER, LESTER
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOT OF CLAIM

INDEX NO. 110445/11
MOTION DATE 11/29/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 79

CAL # 79

n this motion to/for leave to serve late notice of claim

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1
2
3

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):

FILED

MAR 07 2012

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION ORDER

Dated: 3/2/12

Barbara Jaffe
BARBARA JAFFE J.S.C.
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 5

-----X

In the Matter of the Claim of:
LESTER MILLER,

Petitioner,

Index No. 110445/11

Argued: 11/29/11
Motion Seq. No.: 001
Motion Cal. No.: 79

For Leave to Serve a Late Notice of Claim,

DECISION & ORDER

-against-

FILED

THE CITY OF NEW YORK,

MAR 07 2012

Respondent.

NEW YORK
COUNTY CLERK'S OFFICE

-----X

BARBARA JAFFE, JSC:

For petitioner:
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By notice of motion, petitioner moves pursuant to General Municipal Law (GML)

§ 50-c(5) for an order granting him leave to serve a late notice of claim. Respondent opposes.

I. BACKGROUND

On July 6, 2010, petitioner was riding his motorcycle and was stopped at the intersection of Vernon Boulevard and 31st Street in Queens when New York City Police Officer Curtis Grimes pulled him over. (Affidavit of Lester Miller, dated Aug. 22, 2011 [Miller Affid.]). After determining that there was an outstanding bench warrant for petitioner, noticing that some sort of knife was pinned to the outside of his pants pocket, and finding the safety shield on his helmet insufficient, Grimes arrested petitioner and transported him to Queens County jail. (*Id.*). Shortly

thereafter, petitioner was charged with criminal possession of a weapon in the fourth degree (Penal Law § 265.01) and a violation of Vehicle and Traffic Law § 381(7). (*Id.*)

In an affidavit dated July 7, 2011 and attached to the Criminal Court complaint, Grimes states, in pertinent part, that he believed petitioner had a gravity knife in his possession on the date of his arrest. (*Id.*) At petitioner's arraignment on July 8, 2011, the bench warrant was vacated, and petitioner was released on his own recognizance. (*Id.*)

Over the four months following his release, petitioner appeared in court four times, requesting that the District Attorney's Office produce the knife, which he asserted was a box cutter. (*Id.*) At the fourth appearance, the charges against petitioner were dismissed upon discovery that the knife was not a gravity knife. (*Id.*)

Petitioner served respondent with a notice of claim describing the nature of his claim as a "[v]iolation [of] civil rights based on racial profiling, wrongful arrest, wrongful imprisonment, [and] malicious prosecution." He set forth a detailed narrative of his arrest, incarceration, prosecution, and alleged that the charges were dismissed "approximately four months" after his release. (*Id.*) A copy of Grimes's affidavit and photographs of the knife and helmet are annexed thereto. (*Id.*)

Sometime before October 7, 2011, petitioner served respondent with the instant motion, annexing thereto his affidavit, a copy of his notice of claim, photographs of the knife and motorcycle helmet, and Grimes's affidavit. (*Id.*) On October 7, 2011, respondent served petitioner with its opposition papers (Affirmation of Suzanne K. Colt, ACC, in Opposition, dated Oct. 11, 2011 [Colt Opp. Aff.]), and on October 20, 2011, petitioner served it with his reply, annexing thereto a return receipt dated January 18, 2011 purportedly evidencing service of

petitioner's notice of claim, a letter from the New York City Comptroller's Office dated February 2, 2011 acknowledging receipt of same, and a certificate of disposition reflecting that the charges against him were dismissed on November 17, 2010 (Affirmation of Wanda Sanchez Day, Esq., in Reply, dated Oct. 11, 2011 [Day Reply Aff.]).

II. CONTENTIONS

Petitioner asserts that Grimes's and the District Attorney's actual knowledge of the facts underlying his claim may be imputed to respondent, that it obtained same upon receipt of his notice of claim, and that it will not be prejudiced by his late filing as a result. (*Id.*). He claims that his delay is excused by the District Attorney's failure to produce the knife. (*Id.*).

In opposition, respondent contends that petitioner's application is facially deficient insofar as he fails to provide the date on which the charges were dismissed and offers only Grimes's affidavit as documentation of the criminal proceedings against him. (Colt Opp. Aff.). It denies having obtained actual knowledge of the facts underlying petitioner's claim until receipt of the instant motion and claims that the passage of time has prejudiced its ability to meaningfully investigate his claim. (*Id.*). And it maintains that the District Attorney's refusal to produce the knife does not excuse petitioner's subsequent delay in filing the instant motion. (*Id.*).

In reply, petitioner claims that the notice of claim he previously served was timely as to his malicious prosecution claim, relying on the return receipt, the February 2 letter, and the certificate of disposition, and he maintains that Grimes's knowledge of his claim may be imputed to respondent, that respondent's participation in his prosecution demonstrates that it will not be prejudiced by his delayed filing, and that his counsel needed the evidence in the District Attorney's possession in order to file a notice of claim. (Day Reply Aff.). And, he contends that,

pursuant to GML § 50-e(6), his failure to specify in his notice of claim the date the charges against him were dismissed should be disregarded, as respondent has actual knowledge of his claim and thus will not be prejudiced by this defect. (*Id.*).

III. ANALYSIS

A. Timeliness of previously-served notice of claim as to malicious prosecution claim

Pursuant to GML §§ 50-e(1)(a) and 50-i, in order to commence a tort action against a municipality, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. A claim for malicious prosecution accrues when a criminal proceeding is terminated in a petitioner's favor. (*Nunez v City of New York*, 307 AD2d 218 [1st Dept 2003]).

Here, as petitioner provides the January 18 return receipt, the February 2 letter, and the certificate of disposition for the first time with his reply, I decline to consider them. (*See Matter of Keyes v City of New York*, 89 AD3d 1086 [2d Dept 2011] [on a motion for leave to serve late notice of claim, court declined to consider evidence of excuse for late filing improperly submitted for first time on reply]). Thus, as he indicates only that he filed his notice of claim "soon" after the charges against him were dismissed, whether his notice of claim was timely with respect to his malicious prosecution claim cannot be determined.

B. Leave to serve late notice of claim

The court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable

excuse for the delay. (GML § 50-c[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *aff'd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

1. Actual knowledge

A claimant bears the burden of demonstrating a municipality's actual knowledge of the essential facts underlying his claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). A municipality has such knowledge when it has knowledge of the facts underlying the theory on which liability is predicated (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the municipality (*Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1027 [2d Dept 2010]), not merely general knowledge that a wrong has been committed (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009]; *Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York*, 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]).

Actual knowledge may be imputed to a municipality where its employees engaged in the conduct giving rise to a claim. (*Gibbs v City of New York*, 22 AD3d 717, 719-20 [2d Dept 2005];

Picciano v Nassau County Civil Serv. Comm'n, 290 AD2d 164, 174 [2d Dept 2001]; *Ayala v City of New York*, 189 AD2d 632, 633 [1st Dept 1993]).

Here, as petitioner's claims arise from Grimes's conduct in arresting and detaining him and the District Attorney in charging and prosecuting him, actual knowledge of the facts underlying his claim may be imputed to respondent. (*See Nunez*, 307 AD2d 218 [actual knowledge of false arrest and malicious prosecution claims imputed to City, as NYPD possessed all essential facts]; *Grullon v City of New York*, 222 AD2d 257 [1st Dept 1995] [where NYPD and District Attorney's Office investigated crimes allegedly committed by petitioner, actual knowledge of facts underlying false arrest and false imprisonment claims imputed to City]; *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dept 1993] [where police officers in municipality's employ made arrest and initiated investigation, actual knowledge of false arrest and malicious prosecution claims imputed to municipality]).

And, although a late notice of claim served without leave may provide a municipality with actual knowledge (*see, eg, Bertone Commissioning v City of New York*, 27 AD3d 222 [1st Dept 2006] [notice of claim served without leave less than two months after expiration of 90-day period provided agency with actual knowledge]), absent any proof of the date on which he served respondent with his notice of claim (*see supra*, III.A.), whether respondent obtained actual knowledge through same cannot be determined.

2. Prejudice

As petitioner has established that City obtained actual knowledge of the facts underlying his claims, he has also demonstrated the absence of prejudice. (*See Ansong v City of New York*, 308 AD2d 333 [1st Dept 2003] [no prejudice where police department acquired actual knowledge

through its employees' involvement and continued to investigate underlying crime, and police and court records presumably still in existence]; *Nunez*, 307 AD2d 318 [same]). Respondent's conclusory assertion of prejudice is insufficient to rebut this showing. (See *Schwindt v County of Essex*, 60 AD3d 1248, 1250 [3d Dept 2009] [where petitioner demonstrated actual knowledge of part of municipality and lack of prejudice on this basis, municipality's conclusory assertion of prejudice based upon "mere passage of time" is "unpersuasive"]; *Gibbs*, 22 AD3d at 719-20 [where City employees performed acts complained of, and petitioner able to show actual knowledge of claim on this basis, petitioner also able to show lack of prejudice, as City provided only conclusory assertions of prejudice made solely by its attorney]).

3. Reasonable excuse

As petitioner has established both actual knowledge and the absence of prejudice, and as "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Ansong*, 308 AD2d 333), respondent's delay in producing the knife need not be considered.

C. Error/omission of date in notice of claim

Pursuant to GML § 50-e(2), a notice of claim must include, *inter alia*, "the time, place, and manner in which the claim arose." However, pursuant to GML § 50-e(6):

At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

Here, as respondent's employees participated in petitioner's prosecution, there

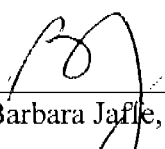
presumably exist records from which respondent may determine the exact date on which the charges against petitioner were dismissed. (See *supra*, *Ansong*, 308 AD2d 333). And, in any event, petitioner's narrative and Grimes's affidavit provide sufficient detail to permit respondent to investigate his claim. (See *Brown v City of New York*, 95 NY2d 389, 393 [2000] ["The test of the sufficiency of a [n]otice of [c]laim is merely whether it includes information sufficient to enable the city to investigate"]). Therefore, absent any indication of bad faith on petitioner's part, his failure to include same in his notice of claim does not prejudice respondent's defense and may be disregarded.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for leave to serve a late notice of claim is granted, and the annexed notice of claim is deemed served upon service of notice of entry of this order.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: March 2, 2012
New York, New York
MAR 02 2012

FILED
MAR 07 2012
NEW YORK
COUNTY CLERK'S OFFICE