

Matter of Outlaw v City of New York

2013 NY Slip Op 30207(U)

January 24, 2013

Supreme Court, New York County

Docket Number: 103524/2012

Judge: Kathryn E. Freed

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

PRESENT: Jaffe HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Outlaw, James
- v -
City of New York

INDEX NO. 103524/12
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Leave amended w/claim

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

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):

DECIDED IN ACCORDANCE WITH
FILED DECISION / ORDER
JAN 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-24-13
[Signature]
HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

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
JAMES OUTLAW and CYNTHIA PRIDGEN,

DECISION/ORDER
Index No.: 103524/2012
Seq. No.: 001

Petitioners,

-against-

THE CITY OF NEW YORK

Respondent.

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

FILED

JAN 30 2013 X

HON. KATHRYN E. FREED:

**NEW YORK
COUNTY CLERK'S OFFICE**

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PARTS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....4-5.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioners move for an Order pursuant to the General Municipal Law 50-e, declaring *nunc pro tunc*, that the Amended Notice of Claim be deemed timely served or, in the alternative, permitting them leave to file a late Amended Notice of Claim upon respondent and requiring respondent to schedule both petitioners for a 50-H hearing, or otherwise waive said hearing. No opposition has been submitted by defendants.

[* 3]

After a review of the instant motion, all relevant statutes and caselaw, the Court grants the motion to the following extent:

Factual and procedural background:

This is an action to recover damages for personal injuries allegedly sustained by petitioners on May 28, 2011, as a result of being assaulted by police officers. Petitioners assert that "based upon the attitude and remarks of the police, it is maintained that these actions were precipitated by both racial profiling as racial prejudice in addition to constituting police brutality in perpetuating an unlawful violation of their Civil Rights without reasonable cause while acting under color of State Law."

Petitioners timely served their respective Notices of Claim upon respondent on August 24, 2011, within 90 days of the subject incident. However, petitioners' counsel contends that "despite a very detailed rendition of the location and details pertaining to the incident, the date of the incident was inadvertently omitted from each original Notice of Claim." Thereafter, in response to the service of said Notices of Claim, separate letters were received for each petitioner dated August 30, 2011, from the City of New York Comptroller's Office, acknowledging receipt of same.

Petitioners' counsel asserts that since that time, he had not received any correspondence concerning this matter until July 19, 2012, when a letter from the Civilian Complaint Review Board, setting forth its findings to petitioners' complaint, was received. Petitioners' counsel then reviewed the file and realized that before a summons and complaint was to be prepared, a 50-H hearing needed to be scheduled by the City. He contacted the City to discuss whether they wanted to conduct the hearing before petitioners proceeded with meeting an impending deadline to file a summons and complaint by August 25, 2012, a year and 90 days from the incident. In response to his inquiry, a

* 4]

“city representative” responded that the City’s computer file indicated that the claims had been disallowed, and that separate letters of disallowance of each of the claims had been sent out by the City Comptroller’s Office on August 30, 2011, the same date as the letters acknowledging receipt of the notice of claims

Petitioners’ counsel had a subsequent conversation with Lynell Canagata, Esq., an attorney with the Law Department, on August 9, 2012, wherein he requested that the City stipulate to the receipt of an amended Notice of Claim adding the correct date of the incident on behalf of both petitioners. Ms. Canagata informed him that she did not have the authority to enter into such a stipulation, thus compelling counsel to make the instant motion. Petitioners’ counsel asserts that he “is waiting” to serve a Summons and Verified Complaint in this matter, on or before August 25, 2012, since the one year and ninety day period for a number of the claims alleged would be reached on August 25, 2012. Now, petitioners argue that in consider of the aforementioned events, their amended Notices of Claim should be deemed timely served.

Conclusions of law:

In determining whether to permit service of a late notice of claim, the court must consider all relevant factors and circumstances, including whether (1) the public corporation (or its attorney or insurance carrier) acquired actual knowledge of the essential facts constituting the claim within 90 days of the incident or a reasonable time thereafter, (2) the claimant was an infant at the time the claim arose and, if so, whether there was a nexus between the claimant’s infancy and the delay in service of a notice of claim; (3) the claimant had a reasonable excuse for the delay, and (4) the public corporation was prejudiced by the delay in its ability to maintain its defense on the merits (*see* General Municipal Law §50-e [5]; Matter of Avalos v. City of N.Y. Bd. of Educ., 67 A.D.3d 675,

675-675 [2d Dept. 2009]; Matter of Formisano v. Eastchester Union Free School Dist., 59 A.D.3d 543, 544 [2d Dept. 2009]).

In the case at bar, respondent received timely notice of the claim within 90 days of the incident via the service of the Notices of Claim on August 24, 2011. Said Notices of Claim were sufficient in that they included information necessary to enable respondent to investigate the allegations contained therein (*see* Canelos v. City of New York, 37 A.D.3d 637 [2d Dept. 2007]). Based on the description contained therein, respondent is clearly able to locate the place, fix the time, and understand the nature of the incident (*Id.*; *see also* Brown v. City of New York, 95 N.Y.2d 389, 393 [2000], *lv dismissed* 96 N.Y.2d 936 [2001]; O'Brien v. City of Syracuse, 54 N.Y.2d 353, 358 [1981] Indeed, the proposed Notices of Claim merely correct a "mistake, omission, irregularity or defect," and do not impermissibly allege a new theory of liability (*see gen.* Barksdale v. New York City Tr. Auth., 294 A.D.2d 210 [1st Dept. 2002]).

Since petitioners are not alleging a new theory of liability, the instant motion is not governed by the standards for seeking to serve a late notice of claim (*see* Halperin v. City of New York, 127 A.D.3d 461, 462 [1st Dept. 1987]; Holmes-Thompson v. New York City Tr. Auth., 17 Misc.3d 1123(A), 851 N.Y.S.2d 69, 2007 Slip Op. 521304 (N.Y. Sup. 2007)). Moreover, the Court does not find that granting the instant motion would cause respondent any undue prejudice.

It is important to note that the Court acknowledges that the instant motion is dated August 13, 2012, well before the expiration of the statute of limitations on August 25, 2012. The Court also notes that it inherited Part 5 with its outstanding motions in January 2013, and wants to make clear that any attorney who submitted various notices, motions, etc., within the statutory time periods, will not be penalized by this unfortunate administrative delay.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that petitioners' motion is granted to the extent that the amended Notices of Claim are deemed timely served upon respondent and it is further

ORDERED that respondent is to schedule a 50-H hearing for both petitioners herein and it is further

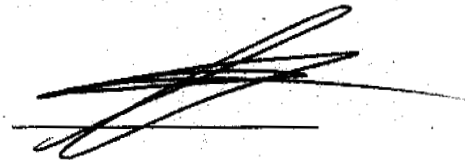
ORDERED that a copy of this order with notice of entry be served on the appropriate Court Clerk and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 24, 2013

ENTER:

JAN 24 2013



Hon. Kathryn E. Freed
J.S.C.

FILED HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
JAN 30 2013
NEW YORK
COUNTY CLERK'S OFFICE