SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

MUKUL BARUA,

Petitioner,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, NATHAN CAVADA, (Transit Div. Dist. 04- Shield # 20077), "JOHN & JANE DOES" (Unidentified police officers sued in their individual and official capacities), and PANJIN SHIM,

Respondents.

INDEX NO. 103922/12

MOTION SEQ. NO. 001

The following papers, numbered 1-5 were considered on this motion to serve a late notice of claim:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits ____	1, 2, 3, 4
Answering Affidavits — Exhibits ____	5
Replying Affidavits ____	____
Cross-Motion: [ ] Yes [X] No	____

Upon the foregoing papers, it is ordered that this motion is decided as set forth below.

Background

Petitioner seeks to commence an action against the City of New York (City) and the New York City Police Department (NYPD), as well as the other respondents, for false arrest and malicious prosecution. His claims are based upon his arrest on July 6, 2011, for forcible touching and sexual abuse. Petitioner was taken to a police precinct, photographed, and fingerprinted. Petitioner was given a desk appearance ticket and ordered to appear in court on August 9, 2011. On February 28, 2012, the charges against petitioner were dismissed, by Decision & Order of Honorable Diana M. Boyar.

Petitioner brought the instant application to serve a late notice of claim, by Notice of Petition and Verified Petition, on or about October 2, 2012.

Discussion

At the outset, this Court notes that petitioner seeks to serve a late notice of claim against the NYPD, an agency of the City. *See* New York City Administrative Code § 12-303(d); New York City Charter § 431. Pursuant to New York City Charter § 396, "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law." Thus, the petition is denied as against the NYPD.

Under General Municipal Law (GML) § 50-e(1)(a), service of a notice of claim must occur within 90 days after the claim arises. The accrual date for a claim of malicious prosecution accrues on the date that the criminal charges are dismissed, in this case on February 28, 2012. *See Grullon v City of New York*, 222 AD2d 257, 258 (1st Dep't 1995). Here, petitioner has failed to serve a notice of claim and, thus, it is untimely. Moreover, the accrual date for the claim of false arrest begins on the day that an inmate is released from prison. *See Nunez v City of New York*, 307 AD2d 218, 219 (1st Dep't 2003). Petitioner does not identify the date he was released from custody. Nevertheless, since petitioner was issued a desk appearance ticket, it was likely that he was released by the police on the day the incident occurred, July 6, 2011. Thus, petitioner's notice of claim is also untimely with respect to his claim of false arrest.

However, petitioner may seek leave to file a late notice of claim, as the applicable one year and 90 day Statute of Limitations has not run, with respect to either of petitioner's claims for false arrest or malicious prosecution. *See Pierson v City of New York*, 56 NY2d 950, 954 (1982); *Hall v City of New York*, 1 AD3d 254, 255-256 (1st Dep't 2003); *Davis v City of New York*, 250 AD2d 368, 369 (1st Dep't 1998). When deciding a motion to serve a late notice of claim, courts consider various factors, including: (1) whether petitioner has demonstrated a reasonable excuse for the failure to timely serve a

notice of claim; (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter – a factor that should be accorded great weight, (*see Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dep't 1993]); and (3) whether the delay substantially prejudiced the municipality respondents' ability to defend its case on the merits. *See* GML § 50-e(5); *Gelles v New York City Hous. Auth.*, 87 AD2d 757 (1st Dep't 1982); *Strauss v New York City Tr. Auth.*, 195 AD2d 322 (1st Dep't 1993); *Diallo v City of New York*, 224 AD2d 339 (1st Dep't 1996). No one single factor is determinative. *See Matter of Gerzel v City of New York*, 117 AD2d 549, 551 (1st Dep't 1986).

Here, while petitioner has failed to set forth an acceptable excuse for his failure to timely file a notice of claim, the "[a]bsence of an acceptable excuse for delay is not necessarily fatal to [a] petitioner's motion." *Diallo v City of New York*, 224 AD2d 339, 340 (1st Dep't 1996); *Chattergoon v New York City Hous. Auth.*, 197 AD2d 397 (1st Dep't 1993). Rather, courts have ruled that, when deciding a petitioner's motion to file a late notice of claim, all factors listed in GML § 50-e(5), whether the respondent acquired actual knowledge of the essential facts constituting the claim within the 90 day statutory period must be considered. *See Diallo*, 224 AD2d at 340. Upon considering the remaining factors, the Court grants petitioner's application to file a late notice of claim as ordered below.

The purpose of the notice of claim provision in GML § 50-e(5) "is to protect the municipality against unfounded claims and to assure it 'an adequate opportunity...to explore the merits of the claim while information is still readily available.' " *Camacho v City of New York*, 187 AD2d 262, 263 (1st Dep't 1992) (citing *Teresta v City of New York*, 304 NY 440, 443 [1952]). "However, it should not operate as a device to defeat the rights of persons with legitimate claims.... Indeed, '[the statute]...is remedial in nature, and so should be liberally construed.' " *Camacho*, 187 AD2d at 263 (citing *Matter of Santana v City of New York*, 183 AD2d 665, 665 [1st Dep't 1992]).

As in the instant case, "where the police department conducted an extensive investigation in which the District Attorney's Office joined, knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City." *Grullon v City of New York*, 222 AD2d 257 (1st Dep't 1995). Further, knowledge from police arrest records and District Attorney investigations resulting in the dismissal of the criminal action may be considered actual or constructive knowledge to the City. *See Tatum v City of New York*, 161 AD2d 580, 581 (2nd Dep't 1990), *appeal denied*, 76 NY2d 709 (1990). Where, "the claim is for false imprisonment and malicious prosecution, such knowledge may be imputed to the municipality through the officers in its employ who made the arrest or initiated the prosecution." *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252, 252-253 (1st Dep't 1993).

Here, an arrest was made, necessitating an investigation, with paperwork documenting the underlying incident, sufficient for the police to proceed and the District Attorney to prosecute. Thus, sufficient actual or constructive notice was provided to the City, to warrant an extension of the time to file a notice of claim. Moreover, since notice can be imputed to the City, the City has failed to demonstrate that it was substantially prejudiced by the delay. *See Nunez v City of New York,* 307 AD2d 218, 220 (1st Dep't 2003); *Grullon v City of New York*, 222 A.D.2d 257, 258 (1st Dep't 1995). In fact, other than claiming prejudice in a conclusory fashion, the City has not articulated how it was prejudiced or what investigatory measures it was prevented from undertaking because of the "late" notice.

Accordingly, it is

ORDERED AND ADJUDGED that petitioner's application to serve a late notice of claim, with respect to his claims for false arrest and malicious prosecution, is granted as to the City; and it is further

ORDERED AND ADJUDGED that petitioner's application to serve a late notice of claim, with respect to his claims for false arrest and malicious prosecution, is denied as to the NYPD; and it is

further

ORDERED that, within thirty days of entry, petitioner shall serve upon all parties a copy of this decision and judgment; with notice of entry, and it is further

ORDERED that the proposed notice of claim annexed to the petition as an exhibit shall be deemed timely served, upon service of a copy of this decision and judgment, with notice of entry, on respondents.

In granting this application, the Court does not pass on the relative merits of petitioner's claims. *See Weiss v City of New York*, 237 AD2d 212 (1st Dep't 1997).

This constitutes the decision/order of the Court.

Dated: 4/15/13

DORIS LING-COHAN, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if Appropriate: [ ] DO NOT POST

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