SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

In the Matter of the Application of JAVIER SILVA,
For Leave to Serve and File a Notice of Claim,
nunc pro tunc, pursuant to Section 50(e) of the
General Municipal Law,

Petitioner,

-against-

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

Respondents.

----------X

DECISION/ORDER
Index No. 159076/2013
Seq. No. 001

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

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	1-3(Exs. A-C)
ANSWERING AFFIDAVITS.....	.....4.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
OTHER.....	.....

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

Petitioner Javier Silva moves, by Order To Show Cause, for an Order deeming the notice of claim which he filed on respondents The City of New York ("the City") and the New York City Police Department ("the NYPD") on September 27, 2013 to be deemed filed timely *nunc pro tunc* pursuant to General Municipal Law ("GML") § 50(e) only as to his claims for false arrest and false

imprisonment. In the alternative, petitioner seeks leave to file a late notice of claim *nunc pro tunc* upon respondents with respect to those causes of action pursuant to that statute. Respondents oppose the application. Upon oral argument, a review of the papers presented, and the relevant statutes and case law, the Court **grants** petitioner's application to deem the notice of claim filed against respondents on September 27, 2013 timely filed *nunc pro tunc* as to petitioner's claims for false arrest and false imprisonment.

Factual and Procedural Background:

Petitioner alleges that, on April 24, 2013 at approximately 7 p.m., he was inside Café Nunez, located at 240 West 35th Street in Manhattan, when members of the NYPD handcuffed him, forced him into a police vehicle, and brought him to the Midtown South Precinct. He claims that he was never told why he was being arrested. At the precinct, he was placed in a holding cell and was fingerprinted and photographed. After several hours, he was taken to Central Booking, where he was charged with criminal trespass. He was released on April 25, 2013 after nearly two days in custody. After several court appearances, the charges against him were dismissed on July 31, 2013.

On September 27, 2013, petitioner filed a notice of claim against respondents alleging, inter alia, false arrest and false imprisonment. The notice of claim was accompanied by an authorization permitting respondents to obtain his sealed criminal file pursuant to Criminal Procedure Law § 160.50(1)(d). The instant order to show cause was returnable on November 19, 2013.

Positions of the Parties:

Petitioner asserts that the late filing of the Notice of Claim would not be prejudicial to respondents since the arresting officers are still employed at the precinct where he was taken at the

time of his arrest. He further asserts that, although the notice of claim was filed 65 days late, respondents will not be prejudiced since all records in existence on July 24, 2013, when the Notice of claim was due, still exist and that the arresting officers are still available for the respondents' investigation.

Although released from prison on April 25, 2013, petitioner claims that he did not retain counsel until September 26, 2013 because he was still recovering from emotional distress from the incident, feared pursuing a claim against the police, and the charges against him were not dismissed until July 31, 2013. Further, he asserts that he has meritorious false arrest and false imprisonment claims against the respondents because he committed no conduct warranting his detention.

Respondents argue that petitioner's motion must be denied because petitioner failed to provide a reasonable excuse for his failure to file a timely notice of claim within 90 days of his release from prison, as required by GML § 50(e). Specifically, they maintain that petitioner's fear of retaliation by the NYPD is not a valid excuse. They further assert that petitioner's motion must be denied because he failed to show that respondents were not prejudiced by his delay in filing the notice of claim and because he failed to show that respondents had "actual knowledge of the essential facts constituting the claim." In support of their argument that they would be prejudiced by the late filing of the notice of claim, respondents assert, inter alia, that "all documentation" of [the NYPD's] involvement [in petitioner's arrest] was sealed and became unavailable as soon as [p]etitioner received his favorable disposition."

Conclusions of Law:

It is well settled that in order to commence a tort action against a municipality, the claimant is required to serve a notice of claim within 90 days of the accrual of the alleged claim. *See* GML§

50-e(1)(a); *Jordan v. City of New York*, 41 A.D.3d 658, 659 (2d Dept. 2007). The filing of such notice is a condition precedent without which an action against a municipal entity is barred.

However, GML§ 50-e(5) confers upon a court discretion to determine whether to permit the filing a late notice of claim. In making this determination, the court must consider the factors set forth in said statute, which include: (1) an explanation for the delay in filing a timely notice of claim; (2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days or a reasonable time thereafter; (3) whether the late filing has substantially prejudiced the entity's ability to investigate and defend against the claim. *See* GML§50-e(5); *William v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006); *Plaza v. New York Health & Hosps.* Corp., Jacobi Medical Center, 97 A.D.3d 466 (1st Dept. 2012). While this Court has discretion in determining a motion seeking permission to file a late notice of claim, the statute is remedial in nature and is therefor to be liberally construed. *See Camacho v. City of New York*, 187 A.D.2d 262 (1st Dept. 1992).

"However, whether the public corporation acquired timely knowledge of the essential facts constituting the claim is seen as a 'factor which should be afforded great weight'" *Matter of Dell'Italia v. Long Is. R.R. Corp.*, 31 A.D.3d 758,759 (2d Dept. 2006), *quoting Matter of Morris v. County of Suffolk*, 88 A.D.2d 956, 956 (2d Dept. 1982), *affd* 58 N.Y.2d 767 (1982). Indeed, actual knowledge of the essential facts of the claim, not just knowledge of the occurrence, must have been acquired by respondents. *See Matter of Santopietro v. City of New York*, 50 A.D.3d 390 (1st Dept. 2008); *Chattergoon v. New York City Hous. Auth.*, 197 A.D.2d 397 (1st Dept. 1993); *affd* 78 N.Y.2d 958 (1993). "Proof that [a respondent] had actual knowledge is an important factor in determining whether the [respondent was] substantially prejudiced by such a delay." (*Williams v. Nassau County Med. Ctr., supra* at 539; *see also Jordan v. City of New York*, 41 A.D.3d 658 (2d Dept. 2007).

The Appellate Division, First Department has addressed the issue of what constitutes "actual knowledge" of the essential facts of a claim, as well as whether such actual knowledge possessed by the NYPD can be imputed to the City, and has rendered conflicting decisions. In *Evans v. New York City Hous. Auth.*, 176 A.D.2d 221 (1st Dept. 1991), *lv denied* 79 N.Y.2d 754 (1992), the IAS Court granted leave to serve a late notice of claim, holding that the existence of a police aided report indicated that the respondent New York City Housing Authority ("NYCHA") had actual knowledge of essential facts underlying the crime of rape. The Appellate Division, First Department, reversed, noting that nothing in the aided report connected the rape with a defective lock or lack of security which was the basis of that petitioner's notice of claim. In *Chattergoon v. New York City Hous. Auth.*, *supra*, a majority of the Appellate Division, First Department, held that a police investigation of the homicide of petitioner's decedent did not give actual knowledge to the respondent NYCHA because the police investigation was dedicated to locating the murderer and not toward defending any claim of negligence related to the respondent.

Matter of Schiffman v. City of New York, 19 A.D.3d 206 (1st Dept. 2005), involved the actions of the police in response to an alleged assault and ensuing civilian struggle. In that case, the Appellate Division held that the City acquired notice of the essential facts of the claim based on the fact that the NYPD was called to the scene and was directly involved in all aspects of the claims emanating from the death of that petitioner's decedent. In addition, held the Appellate Division, since such knowledge was documented in the individual officers' memo books and official NYPD reports, it was imputed to the City. *See also Johnson v. New York City Tr. Auth.*, 278 A.D.2d 83 (1st Dept. 2000); *Miranda v. New York City Tr. Auth.*, 262 A.D.2d 199 (1st Dept. 1999). The Appellate Division concluded that the respondent in that matter was not prejudiced by the delay in filing the notice of claim.

In *Matter of Ragland v New York City Hous. Auth.*, 201 A.D.2d 7 (2d Dept. 1994), the Appellate Division held that "actual knowledge has been found to exist when there are other factors in addition to the existence of an accident or aided report. A factor of considerable significance in this regard arises when it is the acts of the police which give rise to the very claim set forth in the proposed notice." *Id.*, at 9; *see also Tatum v. City of New York*, 161 A.D.2d 580 (2d Dept. 1990), *lv denied* 76 N.Y.2d 709 (1990) (false imprisonment and malicious prosecution); *McKenna v. City of New York, supra* (false arrest and imprisonment); *Montalto v. Town of Harrison*, 151 A.D.2d 652 (2d Dept. 1989) (false arrest and imprisonment and malicious prosecution); *Matter of Reisse v. County of Nassau*, 141 A.D.2d 649 (2d Dept. 1988) (false arrest and imprisonment, malicious prosecution, violation of civil rights). "Where, as here, members of the municipality's police department participate in the acts giving rise to the claim, and reports and complaints have been filed by the police, the municipality will be held to have actual notice of the essential facts of the claim. Since the reason for the early filing of a notice of claim is to permit the public corporation to conduct a prompt investigation into the facts and circumstances giving rise to the claim, the existence of reports in its own files concerning those facts and circumstances is the functional equivalent of an investigation." *Ragland v New York City Hous. Auth., supra* at 11.

Similarly, in this case, since the NYPD was directly involved in the incident, from the initial confrontation with the petitioner until his release on April 25, 2013, it is virtually certain that the NYPD completed documents relating to this event, in the form of *inter alia*, arrest reports, memo book entries, and UF-61 reports. Therefore, it is also reasonable to assume that the City would have access to the said documentation, thereby providing it with actual notice of the essential facts of petitioner's claim. Although respondents assert that "all documentation of [the NYPD's] involvement was sealed and became unavailable as soon as [p]etitioner received his favorable

disposition," this contention is disingenuous given that petitioner has annexed as part of Exhibit A to his moving papers a signed authorization allowing respondents' counsel access to his sealed criminal records. Thus, the respondents have not been deprived of a "fair opportunity to investigate his claims." *Rushmore v Hempstead Police Dept.*, 211 AD2d 776, 777 (2d Dept 1995).

Moreover, while the Court agrees with respondents that fear of retaliation is not a valid excuse for failure to serve a timely notice of claim, (*see Doukas v East Meadow Union Free Sch. Dist.*, 187 A.D.2d 552, 553 [2d Dept. 1992]), it is well settled that the presence or absence of any of the aforementioned three factors is not necessarily determinative, and the absence of a reasonable excuse for the delay is not necessarily fatal. *See Matter of Dell'Italia v. Long Is. R.R. Corp.*, *supra* at 759.

Finally, the Court notes that the instant application was brought well within the one year and ninety day period during which it is afforded broad discretion in deciding whether or not to allow the untimely filing of a notice of claim. *See* GML§ 50-e(5); *Pierson v City of New York*, 56 NY2d 950 (1982); *Nunez v City of New York*, 307 AD2d 218 (1st Dept 2003).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED AND ADJUDGED that petitioner's motion to deem his notice of claim filed against respondents on September 27, 2013 timely filed *nunc pro tunc* is granted as to petitioner's claims for false arrest and false imprisonment; and it is further,

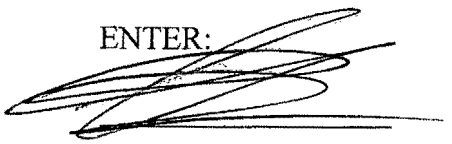
ORDERED that petitioner shall serve his notice of claim upon the City Comptroller accompanied by a copy of this decision/order; and it is further,

ORDERED that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from his notice of claim is filed; and it is further,

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

Dated: February 10, 2014

ENTER:



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