

Blatt v City of New York
2014 NY Slip Op 32736(U)
October 17, 2014
Supreme Court, New York County
Docket Number: 157363/2014
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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DAVID BLATT,

Petitioner,

- against -

DECISION/ORDER
Index No. 157363/2014
Seq. No. 001

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT and DET. SALVATORE
TUDISCO, SHIELD NO. 4994,

Respondents.

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HON. KATHRYN E. FREED:

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

PAPERS	NUMBERED
ORDER TO SHOW CAUSE AND AFFIRMATION ANNEXED.....	1,2(Exs. A-C)
AFFIRMATION IN OPPOSITION.....3.....
REPLYING AFFIRMATION.....
OTHER.....

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

Petitioner moves, by order to show cause, for an order permitting him to serve and file a late notice of claim upon respondents The City of New York (“the City”), New York City Police Department (“NYPD”), and Detective Salvatore Tudisco pursuant to General Municipal Law (“GML”) § 50-e (5). Respondents oppose the motion. After oral argument and a review of the papers presented and all relevant statutes and case law, the Court **denies** the petition.

Factual Background:

Petitioner David Blatt alleges that, on September 24, 2013, he was arrested and charged

with theft of services due to his alleged failure to pay a taxi fare. In a criminal information dated October 18, 2013, Det. Tudisco wrote that he was informed by a taxi driver that petitioner failed to pay his fare. Ex. A.¹ In the information, Det. Tudisco stated that the incident occurred on August 25, 2013 (Ex. A), rather than September 23, 2013, as alleged by petitioner. Ex. C.

On or about August 11, 2014, petitioner filed the instant order to show cause seeking leave to file a late notice of claim. In an affidavit submitted in support of his motion, petitioner alleges that “[o]n or about September 2013 [he] was arrested by Det. Salvator Tudisco² of the 7th Precinct Detective Squad.” In an affirmation in support of the motion, petitioner’s attorney claims that, after being arrested, petitioner was kept in an interview room for three hours before being released on a desk appearance ticket. Counsel further asserts that petitioner was required to appear in court at least six times and had to hire defense counsel at an expense of \$2,750 before finally having the charge dismissed against him on July 7, 2014 “for speedy trial.” Further, counsel urges that petitioner had a reasonable excuse for failing to file a timely notice of claim, which was that his criminal attorney told him that he did not need to make such a filing until the criminal proceeding against petitioner had terminated. In his own affidavit in support of the motion, petitioner also maintains that he did not file a timely notice of claim based on advice from his prior attorney. Ex. B.

In any event, argues counsel, the respondents would not be prejudiced if petitioner were able to file a late notice of claim because they “have [p]etitioner’s arrest records and any and

¹ Unless otherwise noted, all references are to the exhibits annexed to petitioner’s motion.

²The spelling “Salvatore” in the caption is evidently incorrect, as Det. Tudisco spelled his name “Salvator” in the criminal information.

other [sic] documents prepared concerning the investigation, arrest and prosecution of [p]etitioner.” Petitioner’s Affirmation in Support, at par. 15.

A proposed notice of claim names as respondents the City, the NYPD, and Detective Tudisco. Ex. C. Petitioner asserts in the notice of claim that he was arrested without probable cause on September 23, 2013 and was released approximately three hours later. Ex. C. The proposed notice of claim contains claims of abuse of process, false arrest, false imprisonment, intentional infliction of emotional distress, malicious prosecution, violations of his State and Federal Constitutional rights, and negligent hiring, training and supervision. Ex. C.

Positions of the Parties:

Petitioner argues that this Court should grant his request for leave to file a late notice of claim. He maintains that he had a reasonable excuse for failing to file a timely notice of claim, which is that his prior attorney told him that he did not need to file the same until the conclusion of his criminal case. He further maintains that respondents would not be prejudiced if he were permitted to file a late notice of claim since they are in possession of his arrest records and thus have actual notice of the facts giving rise to the claim.

Respondents argue that petitioner’s motion must be denied because his ignorance of the 90-day deadline for filing a notice of claim does not constitute a reasonable excuse for his failure to file the same in a timely fashion. Further, respondents maintain that, since the claim accrued on or about September 23, 2013, petitioner had until December 22, 2013 to file a notice of claim but did not bring the instant application until July 28, 2014, by which time its ability to investigate the claim was prejudiced because it did not have actual knowledge of the essential

facts constituting the claim.

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 alleged injury. *See* General Municipal Law (“GML”) § 50-e (1)(a); *Harper v City of New York*, 92 AD3d 505 (1st Dept 2012); *Jordan v City of New York*, 41 AD3d 658, 659 (2d Dept. 2007). The filing of a notice of claim is a condition precedent without which an action against a municipal entity is barred.

Despite the foregoing, GML § 50-e (5) confers upon a court the discretion to determine whether to permit the filing of a late notice of claim. In making this determination, the court must consider the factors set forth in the 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; and (3) whether the late filing has substantially prejudiced the entity’s ability to investigate and defend against the claim. *See* GML §50-e (5); *Williams v Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006), *Plaza v New York Health & Hosps. Corp.*, 97 A.D.3d 466 (1st Dept. 2012); *Bazile v City of New York*, 94 A.D.3d 929, 929-930 (2d Dept. 2012); *Acosta v City of New York*, 39 A.D.3d 629 (2d Dept. 2007); *Seif v City of New York*, 218 A.D.2d 595 (1st Dept. 1995); *Goldstein v Clarkstown Cent. School Dist.*, 208 A.D.2d 537 (2d Dept.1994), *lv denied* 85 N.Y.2d 810 (1995). The party seeking to file the late notice of claim has the burden of persuading the court that it is entitled to do so. *See Harris v City of New York*, 297 AD2d 473 (1st Dept 2002).

“The most important factor that a court must consider in deciding [a motion to file a late

notice of claim] is whether [the municipality] ‘acquired actual knowledge of the essential facts constituting the claim within the time specified’ (General Municipal Law § 50-e [5]; *Matter of Allende v City of New York*, 69 AD3d 931, 932 [2010]).” *Padilla v Dept. of Education of the City of New York*, 90 AD3d 458, 459 (1st Dept 2011). A municipality has such knowledge when it is apprised of the facts underlying the theory on which its liability is allegedly predicated. *See Matter of Grande v City of New York*, 48 AD3d 565, 566 (2d Dept 2008). The crucial facts are those which demonstrate a connection between the alleged incident and any wrongdoing on the part of the municipality. *See Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1027 (2d Dept 2010).

Here, petitioner has failed to establish that respondents had the requisite actual knowledge. In asserting that respondents had such knowledge, petitioner relies on the criminal information written by Det. Tudisco (Ex. A). However, the plain wording of the information establishes that Det. Tudisco did not have such actual knowledge. Specifically, Det. Tudisco states therein that he was “informed” by the taxi driver that petitioner did not pay his fare. Ex. A. Det. Tudisco does not state that he was present at the time petitioner failed to pay his fare. Ex. A. Nor does petitioner contend that Det. Tudisco or any other detective or police officer was present at that time. Since respondents were not directly involved in the events giving rise underlying claim, *i.e.*, petitioner’s failure to pay a taxi fare, they had no actual knowledge of the same. *Cf.*, *Schiffman v City of New York*, 19 AD3d 206 (1st Dept 2005); *Ansong v City of New York*, 308 AD2d 333 (1st Dept 2003).

As noted previously, petitioner concedes that the criminal charge against him was dismissed on “speedy trial” grounds and not on the merits. Thus, it appears as if the charge was

dismissed because an affidavit was not obtained from the complainant taxi driver. Given the absence of such an affidavit, the only known facts regarding the underlying claim are the conclusory statements in petitioner's affidavit that he was arrested by Det. Tudisco, was charged with theft of services, and "did not steal the services of anyone" (Ex. B). However, petitioner's affidavit neither establishes that respondents had actual knowledge of the essential facts giving rise to the claim nor connects the occurrence to any wrongdoing by respondents. *Matter of DeCicco v Port Authority of New York and New Jersey*, 277 AD2d 24 (1st Dept 2000).

Petitioner also fails to establish a reasonable excuse for filing a late notice of claim. Although petitioner asserts that his criminal attorney advised him that he did not need to file a notice of claim until the criminal charge against him was resolved, courts have consistently held that ignorance of the law is not a reasonable excuse. *See Astree v New York City Trans. Auth.*, 31 AD3d 589 (2d Dept 2006); *Landa v City of New York*, 252 A.D.2d 525 (2d Dept. 1998); *Alper v City of New York*, 228 A.D.2d 390 (1st Dept. 1996). Nor is law office failure a reasonable excuse for the failure to serve a timely notice of claim. *See Matter of Kittredge v New York City Hous. Auth.*, 275 AD2d 746 (2d Dept 2000).

Further, although petitioner asserts that "actual prejudice cannot be established" because respondents are in possession of "records delineating the facts and circumstances of [the] claim", (Plaintiff's Affirmation in Support, at par. 13), petitioner fails to enumerate any of the records to which he refers. To the extent petitioner refers to the criminal information, that document is, as noted above, insufficient to establish that respondents had actual knowledge of the facts giving rise to the claim within 90 days after the alleged incident.

Additionally, as noted above, petitioner alleges in his proposed notice of claim (Ex. C)

that the alleged incident occurred on September 23, 2013, whereas he states in his affidavit (Ex. B) that it occurred in September of 2013 and Det. Tudisco states in the information (Ex. A) that it occurred on August 25, 2013. However, petitioner does not in any way address the potential prejudice to respondents' investigation of the alleged incident which could result from these discrepant dates. Thus, petitioner has failed to satisfy his burden of establishing that respondents would not be prejudiced by the filing of a late notice of claim. *See Harris, supra* at 473.

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

ORDERED and ADJUDGED that the petition to file a late notice of claim is denied; and it is further,

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

DATED: October 17, 2014

ENTER:



Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT