| **Matter of Cummings v City of New York** |
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| 2015 NY Slip Op 30267(U) |
| February 25, 2015 |
| Supreme Court, New York County |
| Docket Number: 161254/2014 |
| 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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In the Matter of the Application of
KWAME CUMMINGS, 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, and
POLICE OFFICER MARTA GONZALEZ,

Respondents.

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**DECISION/ORDER**
Index No. 161254/2014
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 |
|---|---|
| ORDER TO SHOW CAUSE, PETITION, AND AFF. ANNEXED........ | 1-3(Exs. A-C) |
| ANSWERING AFFIDAVIT........ | 4 (Exs. A-B) |
| REPLY AFFIDAVIT........ | 5 (Ex. A) |

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

Petitioner Kwame Cummings 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"), the New York City Police Department ("the NYPD") and Police Officer Marta Gonzalez on November 12, 2014 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, this Court **grants** petitioner's application to deem the notice of claim filed against respondents on November 12, 2014 timely filed *nunc pro tunc* as to petitioner's claims for false arrest and false imprisonment.

**Factual and Procedural Background:**

Petitioner alleges that, on July 19, 2014, he was arrested at Amsterdam Avenue and West 148th Street in Manhattan after the police accused him of causing a disturbance. Ex. B.[1] He was released on bail on July 25, 2014. *Id.* On September 3, 2014, the office of the New York County District Attorney dismissed the charges against him. *Id.*

On November 12, 2014, petitioner filed a notice of claim with the office of the City's Corporation Counsel, alleging that he sustained physical injuries and emotional distress due, inter alia, to his false arrest, false imprisonment, and malicious prosecution by the respondents. Ex. A. The notice of claim was accompanied by executed authorizations allowing each respondent to obtain his sealed criminal file pursuant to Criminal Procedure Law § 160.50(1)(d).

**Positions of the Parties:**

Petitioner argues that this Court should allow his late notice of claim to be deemed timely with respect to his claims for false arrest and false imprisonment[2] since doing so would not result

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[1] Unless otherwise noted, all references are to the exhibits annexed to petitioner's order to show cause.

[2] The notice of claim was timely with respect to the claim for malicious prosecution.

in any prejudice to respondents. Specifically, petitioner asserts that, since the arresting officers are still employed at the precinct where he was taken at the time of his arrest, the respondents are still able to conduct an investigation of the facts giving rise to his claim. He further asserts that the respondents would not be prejudiced since the notice of claim was filed only 20 days late, and all records in existence on October 23, 2014, the day on which the notice of claim was due, still exist and the arresting officers and all arrest and criminal records are available for the respondents' investigation. Indeed, argues petitioner, he has provided the respondents with authorizations allowing them to unseal records relating to his arrest, incarceration, and criminal proceedings against him.

Although released from prison on July 25, 2014, petitioner claims that he did not retain counsel until November 10, 2014, 18 days after the deadline for filing a notice of claim as to his claims for false arrest and false imprisonment, because his criminal case was still pending and he was "recovering from emotional distress from the incident and fears of pursuing any matters involving the police." Ex. B.

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 the fact that petitioner's criminal case was still pending and that he feared retaliation by the NYPD are not valid excuses for failing to file a timely notice of claim. They further assert that petitioner's motion must be denied because he failed to show that respondents would not be prejudiced if he were permitted to file a late notice of claim. They also assert that petitioner failed to demonstrate that the respondents had "actual knowledge of the essential facts constituting the claim" within 90 days after his release from prison. Respondents' Aff. In Opp., at par. 21. Although respondents concede that plaintiff provided

authorizations for the release of his sealed criminal records, they maintain that the authorizations are defective insofar as they are not so-ordered.

In reply, the petitioner reiterates his initial arguments and stresses that, despite their opposition to the application, the respondents scheduled a 50-h hearing of the petitioner for February 2, 2015.

**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 municipality 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 the 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), *affd* 21 NY3d 983 (2013). 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 must be liberally construed (*see Camacho v. City of New York*, 187 A.D.2d 262 [1st Dept. 1992]) and "should not operate to frustrate the rights of those with legitimate claims." *Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029, 1038 (1st Dept 2014) citing *Matter of Porcaro v City of New York*, 20 AD3d 357 (1st Dept 2005).

"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.

In this matter, the NYPD was directly involved in the incident, from the time of the petitioner's arrest on July 19, 2014 until his release on July 25, 2013. Having arrested petitioner and held him in custody for 6 days, it is all but certain that the NYPD generated documents relating to the arrest and the confinement including, *inter alia*, arrest reports, memo book entries, and UF-61 reports. It is also reasonable to assume that the respondents would have had access to such documents, thereby providing them with actual notice of the essential facts of petitioner's claim.

Since the City's police officers allegedly falsely arrested and imprisoned plaintiff, exercised excessive force against him, and he was criminally prosecuted for the arrest, knowledge of his claim may be imputed to the City. *See Erichson v City of Poughkeepsie Police Dept.*, 66 AD3d 820 (2d Dept 2009) (police department acquired actual knowledge of assault claim since employees of police department engaged in conduct alleged); *Ansong v City of New York*, 308 AD2d 333 (1st Dept 2003) (knowledge imputed to city where officers who arrested plaintiff had knowledge of events in question); *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 (1st Dept 1993) (knowledge of malicious prosecution claim imputed to city since city's officers initiated prosecution).

Additionally, since the petitioner executed authorizations releasing all of his sealed criminal records to the respondents, the latter have not been deprived of a "fair opportunity to investigate his claims." *Rushmore v Hempstead Police Dept.*, 211 AD2d 776, 777 (2d Dept 1995).[3] Indeed, as the

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[3] The fact that the authorizations are not so-ordered is a technicality which can easily be rectified by this Court following the issuance of this decision and order.

petitioner asserts, despite asserting that the late notice of claim has undermined their ability to investigate the petitioner's claim, the respondents scheduled a 50-h hearing of the petitioner for February 2, 2014. Ex. A to Reply Aff.[4] At a minimum, this suggests that the respondents had enough information in their possession to question the petitioner at an investigative hearing.

Moreover, while this Court agrees with respondents that fear of retaliation and a pending criminal matter are not a valid excuses for petitioner's 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 (*see Bertone Commissioning v City of New York*, 118 AD3d 537 (1st Dept 2014) and the absence of a reasonable excuse for the delay is not necessarily fatal. *Matter of Sosa v City of New York*, ___AD3d___, 2015 NY App Div LEXIS 658 (1st Dept January 27, 2015), citing *Rosario v New York City Health & Hosps. Corp.*, 119 AD3d 490 (1st Dept 2014); *Matter of Thomas v City of New York*, 118 AD3d 537, 537-538 (1st Dept 2014); *see also Matter of Dell'Italia v. Long Is. R.R. Corp.*, *supra* at 759.

Finally, this 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:

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[4] Counsel have advised this Court that the 50-h hearing did not proceed as scheduled due to a snowstorm and was rescheduled for March 31, 2014.

ORDERED AND ADJUDGED that the petitioner's motion to deem his notice of claim filed against respondents on November 12, 2014 timely filed *nunc pro tunc* is granted as to the petitioner's claims for false arrest and false imprisonment; and it is further,

ORDERED that the 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 petitioner shall appear for a 50-h hearing within 30 days of service of this order with notice of entry, if such hearing has not been conducted by that time; and it is further,

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

Dated: February 25, 2015

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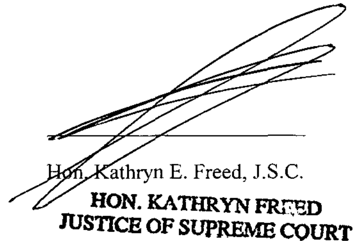

Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED**
**JUSTICE OF SUPREME COURT**