

Hardy v City of New York
2016 NY Slip Op 30580(U)
April 1, 2016
Supreme Court, New York County
Docket Number: 162980/2015
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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ALONZO HARDY,

Petitioner,

Index No. 162980/2015

-against-

**Decision, Order, and
Judgment**

THE CITY OF NEW YORK and THE DEPARTMENT OF
HOMELESS SERVICES,

Respondents.

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JOAN B. LOBIS, J.S.C.:

This petition for leave to file late notice of claim seeks permission to file two claims. The first relates to an assault on petitioner at the Bedford-Atlantic Armory Men’s Shelter (Bedford Shelter), a Department of Homeless Services (DHS) facility, on June 20, 2015. The second relates to the alleged unauthorized disposal of petitioner’s property at the Delta Manor Men’s Shelter (Delta Shelter) on June 27, 2015. The notices of claim were due around September 20 and 25, respectively, and petitioner brought this application around three months later, on December 23, 2015. Respondents oppose the petition on several grounds. For the reasons below, the Court grants the petition.

Petitioner alleges that on June 20, 2015, members of the Bloods street gang attacked him while he resided at the Bedford Shelter. During the attack, petitioner’s jaw was broken and as a result he underwent surgery. Petitioner claims that a few weeks before this incident he received threats from the gang members and asked the Bedford Shelter staff and its program director for protection and for a transfer to another shelter, but DHC and the City did not take reasonable steps

for his protection. The second claim is that on June 27, 2015, following petitioner's transfer to the Delta Shelter, the employees at Delta Shelter disposed of his belongings and provided neither notice nor justification for this.

According to the petition, a reasonable excuse for petitioner's delay exists. Petitioner has a sixth grade education and suffers from schizoaffective disorder and generalized anxiety disorder, and he alleges that these impediments and the physical and mental trauma resulting from the incidents in question "made it impossible for [him] to file formal notices of claim" within the statutory time frame. Petition ¶ 8. He states that respondents had actual notice in a timely fashion. He gave written notice of each claim to shelter directors within thirty days of the incidents. With respect to the June 20 attack, a DHS security officer arrested the attacker within days of the assault and DHS, the New York Police Department, and the Kings County District Attorney's Office all conducted investigations. Petitioner filed an itemized request for compensation for the items he lost due to the June 27 incident, and DHS received, considered, and rejected the claim within thirty days of June 27. He annexes an affidavit of merit, copies of his June 24 grievance form concerning the June 20 attack, copies of the letter he gave to the Delta Shelter director – which he seeks to have this Court deem to be a notice of claim. He also provides formal notices of claim, which he served separately on DHS and the City on December 23, 2015 when he filed this proceeding. He requests that the December 23 notices of claim be deemed timely filed, obviating the need for further service.

In opposition, respondents argue that the notices of claims which petitioner provides are untimely under the ninety-day limitations period. They contend that in support of his

argument for permission to serve late notices of claim nunc pro tunc petitioner does not show a reasonable excuse for his untimeliness, actual notice, or lack of prejudice as required by the statute. His purported excuse is unreasonable, they state, because lack of education is not a valid excuse, and because despite his alleged disabilities he filed grievances with DHS within days of each incident. They state the knowledge by a police officer or police department does not impute knowledge to a municipality. They deny that petitioner's written complaints to DHS and DHS's ensuing investigation does not provide notice to the City. They argue that petitioner has not satisfied his burden of showing respondents will not be prejudiced by the delay in notice, and assert that the delay of six months will "likely" deny them the opportunity to conduct an adequate investigation.

In reply to the argument that petitioner has the burden to show lack of prejudice, petitioner cites to Thomas v. City of New York, 118 A.D.3d 537 (1st Dep't 2014) and Sosa v. City of New York, 124 A.D.3d 515 (1st Dep't 2015). These cases, he alleges, show that the notice here is acceptable, and thus he has satisfied his initial burden on this issue. Moreover, he states, this shifted the burden to respondents to show prejudice, and their conclusory and speculative statements concerning prejudice do not refute his concrete evidence to the contrary. His affidavit, he indicates, strengthens his argument because it shows that several of respondents' employees had actual knowledge of the problems and the potential bases for liability. He reiterates that his disabilities constitute a reasonable excuse for the delay, but that regardless of whether he is correct the Court has broad discretion to grant this petition. He points out that that respondents provide no evidence in opposition to his affidavit. He suggests that his written notice of these incidents are analogous to the timely service of a defective notice of claim.

General Municipal Law § 50-e(1)(a) provides that a party who intends to sue the City must file a notice of claim within ninety days of the occurrence in question. If the claimant does not file the notice of claim within this time frame, General Municipal Law § 50-e(5) provides that a claimant has an additional year within which to commence a proceeding for leave to file a late notice of claim. The reviewing court has wide discretion in reviewing the application. Richardson v. New York City Hous. Auth., 136 A.D.3d 484, 484 (1st Dep't 2016). Relevant factors are whether a reasonable excuse exists for the delay, whether the municipality had actual notice of the claim within the ninety-day period, and whether the municipality would suffer substantial prejudice due to the delay. Kellel B. v. New York City Health & Hosp. Corp., 122 A.D.3d 495, 496 (1st Dep't 2014). "The presence or absence of any one factor is not determinative . . . and the absence of a reasonable excuse is not fatal." Dubowy v. City of New York, 305 A.D.2d 320, 321 (1st Dep't 2003)(citations omitted). Finally, the purpose of the notice of claim requirement is "to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity to explore the merits of the claim while information is still readily available," Porcaro v. City of New York, 20 A.D.3d 357, 357 (1st Dep't 2005), and is not "a device to frustrate the rights of individuals with legitimate claims." Id. at 358.

In light of this standard, the Court grants the petition. The three-month delay in seeking permission to serve late notice of claim is relatively short, given that petitioner had an additional nine months to bring the application. Moreover, the delay is relevant but not dispositive, particularly where, as here, the respondents have notice of the underlying facts and does not show substantial prejudice. See Richardson v. New York City Hous. Auth., 136 A.D.3d 484, -- (1st

Dep't 2016)(avail at 24 N.Y.S.3d 308, 310). The Court notes that during this delay, he filed his complaints with the shelters based on the incidents and sought legal counsel. In light of the above, the Court does not address the adequacy of the excuse for petitioner's delay.

Respondents' argument that notice of a potential claim to a municipal agency is not equivalent to notice to the municipality itself lacks merit. "A report of an investigation by the municipal agency charged with tortious conduct may constitute proof that the municipality and its agency did in fact have actual notice of the facts constituting the claim." Johnson v. City of New York, 302 A.D.2d 463, 464 (2nd Dep't 2003); see Thomas v. City of New York, 118 A.D.3d 537, 538 (1st Dep't 2014)(police report sufficient to provide notice). Indeed, the fact that municipal employees who work for a particular agency witnessed the dispute has been held to constitute notice in some cases. See, e.g., Renelique v. New York City Hous. Auth., 72 A.D.3d 595, 596 (1st Dep't 2010).

Moreover, petitioner has established that he provided timely notice to respondents. As stated, the grievance form about the assault and the claim he filed regarding his disposed property provided critical data, including the date and time of the occurrence, the facility in question for each incident, and the other information the Court has described above. On its face, his grievance form alerts respondents to the fact that he may well seek a legal remedy, as it states that Delta shelter disposed of thousands of dollars' worth of his property without his consent and that he expected reimbursement. Though respondents are correct that petitioner must show that there is no prejudice, petitioner met this initial burden by showing "the City acquired timely knowledge of the essential facts of the claim." Jordan v. City of New York, 41 A.D.3d 658, 660

(2nd Dep't 2007). Respondents have not rebutted petitioner's argument through their conclusory and hypothetical assertions, which include no showing that any actual prejudice exists. Respondent's argument that the criminal investigation has no import overlooks the fact that the reports would contain the names and testimony of those who were interviewed, along with other potentially useful information, and this lessens any potential prejudice due to the brief additional passage of time. The Court has evaluated the additional arguments of the parties and reviewed the cases on which they rely, and they do not alter the decision here. Therefore, it is

ADJUDGED that the petition for leave to serve late notices of claim is granted;
and it is further

ORDERED that the attached notices of claim shall be deemed served nunc pro
tunc; and it is further

ORDERED that petitioner shall commence an action and purchase a new index
number in the event a lawsuit arising from this notice of claim is filed.

Dated: *Apr. 1*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.