

**Matter of L.K. v City of New York**

2017 NY Slip Op 31726(U)

August 14, 2017

Supreme Court, Kings County

Docket Number: 506499/2017

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 14th day of August 2017.

P R E S E N T:

Honorable Reginald A. Boddie  
Justice, Supreme Court

-----X  
In the Matter of the Claim of L.K., An Infant by Her  
Parents and Natural Guardians, SHERRI KILGORE and  
DAVID KILGORE, and SHERRI KILGORE Individually,  
and DAVID KILGORE, Individually.

Petitioners,

Index No. 506499/2017  
Cal. No. 25

-against-

THE CITY OF NEW YORK and NEW YORK CITY,  
DEPARTMENT OF CORRECTION and their agents,  
servants and employees,

DECISION AND ORDER

Respondents.  
-----X

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Petition & Annexed Affirmation/Affidavits	1-2
Affirmation in Opposition	3
Reply	4

Upon the foregoing cited papers, and after oral argument, the decision and order on petitioner's petition for leave to serve a late notice of claim and deem the notice of claim served on March 31, 2017, timely nunc pro tunc is as follows:

Petitioners, residents of Pennsylvania, seek to recover for personal injuries allegedly sustained as a result of a May 30, 2016 home invasion by Layquan Johnson, who was erroneously released from the custody of New York City Department of Corrections on May 3, 2016.

A timely notice of claim is a condition precedent to suit (General Municipal Law § 50-e

[a]). “Under General Municipal Law § 50-e (5), a court considering a petition for leave to serve a late notice of claim upon a public corporation must consider various factors, of which the ‘most important, based on its placement in the statute and its relation to other relevant factors’ (*Matter of Katsiouras v City of New York*, 106 AD3d 916, 917 [2d Dept 2013], quoting *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147 [2008]), is whether the public corporation acquired actual [knowledge] of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter” (*Katsiouras*, 106 AD3d at 917, quoting *Matter of Jackson v Newburgh Enlarged City School Dist.*, 85 AD3d 1031, 1031 [2011]). Additionally, the Court must consider whether there is a reasonable excuse for the delay and whether defendant is substantially prejudiced in its ability to maintain a defense (General Municipal Law § 50-e [5]; *Katsiouras* at 917).

Petitioners argue their cause of action arose on May 3, 2016, when Mr. Johnson was erroneously released from custody. Petitioners further argue the City had actual knowledge of the essential facts that constitute their claim because the City became aware of the Mr. Johnson’s escape within days, there was widespread media coverage of the escape, and a statewide manhunt was undertaken to apprehend Mr. Johnson. The City argues it did not have actual knowledge of the May 30, 2016 home invasion that occurred in Pennsylvania and the specific injuries allegedly suffered by the petitioners within 90 days of the date on which the claims arose. The Court agrees.

Assuming the cause of action arose on May 3, 2016, with the erroneous release of Mr. Johnson, the papers fail to proffer any evidence that the City had actual knowledge of the May 30 home invasion or the injuries allegedly suffered by each petitioner. Contrary to petitioners’ contention, the fact that the City investigated Mr. Johnson’s erroneous release, does not establish

that they acquired any knowledge of the alleged causal relationship between that error and the harm that Mr. Johnson subsequently inflicted on petitioners (*see Facey v City of New York*, 150 AD3d 826, 827 [2d Dept 2017]). The Court notes, petitioners raise for the first time in their reply that the City became aware of the home invasion and victimization of petitioners on June 13, 2016, when Mr. Johnson was arrested in Pennsylvania and returned to the City's custody. However, the petition fails to substantiate this argument with any documentation or other proof.

Moreover, even assuming the City became aware of the home invasion on June 13, "knowledge of the facts underlying an occurrence does not constitute knowledge of the claim" (*Matter of Lenoir v New York City Hous. Auth.*, 240 AD2d 497, 498 [2d Dept 1997] quoting *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *affd* 78 NY2d 958 [1991]). Here, the petition establishes that the City investigated the circumstances surrounding the erroneous release, not the subsequent criminal acts committed by Mr. Johnson or the claims which petitioners now raise. Accordingly, the Court is constrained from concluding the City had actual knowledge of the essential facts constituting petitioners' claim within 90 days of either May 3 or May 30, 2016. For the same reason, petitioners' argument that the City was not prejudiced by the delay fails.

Petitioners allege the emotional and psychological trauma they were suffering caused their delay in seeking counsel in this matter. Excuses for failing to timely serve a notice of claim based on injuries, medical condition, or incapacity require more than conclusory allegations by petitioners or petitioners' counsel (*See Matter of Papayannakos v Levittown Mem. Special Educ. Ctr.*, 38 AD3d 902 [2d Dept 2007], citing *see Matter of Aliberti v City of Yonkers*, 302 AD2d 456 [2003]; *Robertson v New York City Hous. Auth.*, 237 AD2d 501 [1997]; *Matter of Caruso v County of Westchester*, 220 AD2d 746 [1995]). Here, petitioners proffer the affirmation of Dr.

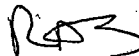
Jeanette Wasserstein, a neuropsychologist, to establish that petitioners were suffering emotional and psychological trauma that rendered them unable to comprehend that legal action needed to be taken within 90 days.

This affirmation is facially insufficient. Dr. Wasserstein holds a doctoral degree in psychology (Ph.D.). Unlike attorneys, physicians, osteopaths and dentists, psychologists are not authorized to submit affirmations under CPLR 2106 (*Vailes v Sukhraj*, 2011 NY Slip Op 33378[U] [Sup Ct, Nassau Co 2011] citing *Doumanis v Conzo*, 265 AD2d 296 [2nd Dept 1999]; *Casas v Montero*, 48 AD3d 728 [2nd Dept 2008]). Moreover, the affirmation fails to establish whether Dr. Wasserstein interviewed or evaluated petitioners or reviewed their medical records. Rather, it merely states that Dr. Wasserstein relied on "information." Therefore, this affirmation is insufficient to establish the petitioners' condition and petitioners fail to substantiate the excuse for their delay.

Although the lack of a reasonable excuse is not necessarily fatal to the granting of leave to serve a late notice of claim, where, as here, there is also a lack of actual notice, it is an improvident exercise of the Court's discretion to grant the petition (62A NY Jur 2d, Government Tort Liability § 440, citing *Hunt v City of New Rochelle*, 223 AD2d 643 [2d Dept 1996]; *Matter of Martin*, 100 AD2d 879 [2d Dept 1984]). Accordingly, the petition is denied.

Dated: August 14, 2017

E N T E R:



Hon. Reginald A. Boddie  
Justice, Supreme Court

**HON. REGINALD A. BOODIE**  
**J.S.C.**