

<b>Syken v City of New York</b>
2017 NY Slip Op 32176(U)
October 12, 2017
Supreme Court, New York County
Docket Number: 160099/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
ARTHUR J. SYKEN,

Index No. 160099/2016

Petitioner,

Motion seq. no. 001

-against-

**DECISION AND ORDER**

CITY OF NEW YORK,

Respondent.

-----X  
BARBARA JAFFE, J.:

**For petitioner:**

Barry D. Haberman, Esq.  
254 South Main St. #404  
New City, NY 10956  
845-638-4294

**For respondent:**

Hafeez Adeniyi Taiwo, ACC  
Zachary W. Carter  
New York City Corporation Counsel  
100 Church St. 6<sup>th</sup> fl.  
New York, NY 10007  
212-356-4368

By notice of petition and petition dated December 2, 2016, petitioner moves pursuant to General Municipal Law (GML) § 50-e(5) for an order permitting him to file a late notice of claim.

In support of his petition, petitioner alleges that on December 4, 2015, he was arrested in Queens on a complaint of a neighbor of his. Upon his release from custody, he was found not guilty of the crime charged, and orders of protection were issued against him in favor of the complainant. Although he expressed a wish that day to file a complaint against the complainant for wrongfully and frivolously causing his incarceration, respondent refused to permit him to do so. (NYSCEF 1)

Petitioner now seeks redress for what he describes as “extremely severe civil rights and due process violations” committed by respondent in depriving him of his right to file a complaint, and damages for his arrest and incarceration. He explains his failure to serve a timely

notice of claim as resulting from the time it took him to be cleared of the charges against him and to investigate a means of seeking relief, and asserts that respondent is not prejudiced by the delay given its actual notice of the relevant facts. (*Id.*).

In the notice of claim annexed, petitioner sets forth the nature of his claim as “deprivation of Civil Rights and right to Due Process,” and the place at which he was accused of the crime as New York, New York, and the 111<sup>th</sup> Precinct in Bayside, Queens, where he was also falsely arrested and incarcerated. He claims a loss of compensation during his wrongful incarceration, and damage to his reputation and health, and an emotional impairment of his well-being. (NYSCEF.4).

In opposition, respondent observes that the petition is bereft of details such as the names of the officers who arrested petitioner, the date on which he was released from confinement, where and with whom he attempted to file a complaint, the date on which the charges against him were dismissed, and the dates on which the orders of protection issued. It, moreover, complains that the paperwork reflecting the arrest is not provided, nor was authorization provided to unseal petitioner’s record. It also claims that the petition is brought in the wrong venue, and that it should otherwise be dismissed as the notice of claim is too vague, and petitioner fails to demonstrate that it has actual notice of his claim and is not prejudiced, and does not provide a reasonable excuse for his delay. (NYSCEF 8).

Respondent denies actual knowledge of petitioner’s claim absent sufficient details set forth in the petition to enable it to investigate, and asserts that his arrest alone does not afford it knowledge of the essential facts underlying his causes of action against it. While petitioner alleges that his delay in seeking leave is attributable to the period of time he was incarcerated and

the time it took for him to investigate how to pursue his claims, respondent observes that petitioner does not specify the date of his release from custody, the date his case was dismissed, or how long he was incarcerated, and that in any event, the claims of false arrest and false imprisonment are palpably without merit as the arrest is concededly supported by probable cause emanating from the complaint of an identified citizen, namely, the complainant. (*Id.*).

In reply, petitioner asserts that his petition is factually sufficient as it contains his and his attorney's names and addresses, the nature of his claims, the time, place, and manner in which his claims arose, and the items of damage or injuries incurred, and that there is no requirement that he authorize the unsealing of his record. Rather, he maintains, the statute should be liberally construed to effect the Legislature's desire to resolve claims against a municipality on the merits. He also argues that respondent has not abided by the venue provisions of the Civil Practice Laws and Rules, and that in any event, dismissal for wrongful venue at this stage of the proceeding is not an appropriate remedy. (NYSCEF 11).

In support of his contention that respondent has actual knowledge of his claims, petitioner offers a copy of the desk appearance ticket dated December 4, 2015, a letter from a state senator to the Police Commissioner inquiring into petitioner's claim that he was deprived of the right to file a complaint against his neighbor, and the responsive letter from the Police Commissioner to the state senator advising that a review of the pertinent police records reflects that petitioner had filed complaints against his neighbor based on an incident occurring on August 2, 2015, and another on December 4, 2015. The Commissioner furnished a complaint number for each complaint. (NYSCEF 11, 12).

Petitioner here describes the Commissioner's letter as "purport[ing]" to address the facts underlying his claims, but he does not address the representation contained therein that he had filed a complaint against his neighbor relating to the December incident. Instead, petitioner relies on the letter solely in support of his assertion that respondent has actual knowledge of his claim by virtue of the Commissioner's "investigation." (NYSCEF 11).

Pursuant to GML § 50-e(1)(a) and 50-I, a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the date on which the claim arose. Pursuant to GML § 50-e, the court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (*Matter of Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947 [2d Dept 2009]; *Powell v City of New York*, 32 AD3d 227 [1<sup>st</sup> Dept 2006]; *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1<sup>st</sup> Dept 1993]). Whether the respondent "acquired knowledge of essential facts constituting a claim within the 90-day statutory period or shortly thereafter" should be given substantial weight when exercising discretion. (*Justiniano*, 191 AD2d at 252). The failure to offer a reasonable excuse for the delay is not fatal to the application. (*Id.*).

Here, respondent acquired actual knowledge of the facts constituting the claims not only because they are based on the conduct of respondent's police officers, but because the Commissioner's letter reflects that an investigation had been undertaken into petitioner's claim

that he was denied a chance to file his own complaint. And, having arrested petitioner, the officers presumably conducted an investigation into the basis for the arrest. Respondent thus possesses relevant records and its employees had or have pertinent information, permitting respondent to further investigate and defend against petitioner's claims. (*See Bakioglu v Tornabene*, 117 AD3d 658 [2d Dept 2014] [defendants had actual knowledge of claim as NYPD responded to scene of motor vehicle accident, conducted immediate investigation, and possessed records from investigation]).

Not only did respondent acquire actual knowledge, but it has not shown that it is prejudiced by petitioner's one-year delay in serving its notice of claim, absent evidence that any necessary witnesses are no longer available or that it is unable to obtain information from its own investigation. (*See eg Hosking v City of New York*, 139 AD3d 629 [1<sup>st</sup> Dept 2016] [no prejudice shown absent demonstration that necessary witnesses were unavailable or that defendants could not obtain information from investigation conducted by City]; *see also Thomas v City of New York*, 118 AD3d 537 [1<sup>st</sup> Dept 2014] [short delay of 30 days in filing notice of claim did not prejudice respondents' ability to investigate and defend claim as delay was unlikely to have affected witnesses' memories]). Given respondent's actual knowledge and the lack of prejudice to it, petitioner's delay is not fatal to the application. (*Alladice v City of New York*, 111 AD3d 477, 478 [1<sup>st</sup> Dept 2013]; *Matter of Brennan v Metropolitan Transp. Auth.*, 110 AD3d 437 [1<sup>st</sup> Dept 2013]; *Gonzalez v City of New York*, 92 AD3d 619 [1<sup>st</sup> Dept 2012]; *Matter of Schifano v City of New York*, 6 AD3d 259, 260-61 [1<sup>st</sup> Dept 2004], *lv denied* 4 NY3d 703 [2005]).

Moreover, although petitioner's explanation of his delay in filing the instant application has little probative value absent the duration of his incarceration and the steps needed to

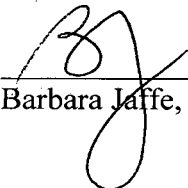
investigate avenues of relief, and regardless of who bears the burden of proof as to prejudice, there is apparently no prejudice, and petitioner's failure to explain the delay satisfactorily is insufficient to preclude the filing of late notice.

However, petitioner fails to attach the complaint referenced by the Commissioner, explain his failure to do so, or otherwise address the Commissioner's representation that a complaint had been filed. He also offered the letter only in reply to respondent's opposition. Notwithstanding respondent's failure to either seek leave to address petitioner's reply papers or address them at oral argument, as the existence of a complaint may be dispositive of petitioner's application, it is held in abeyance for 30 days pending respondent's production of the complaint, and plaintiff's explanation for failing to address the substance of the Commissioner's letter.

Accordingly, it is hereby

ORDERED, that the petition for leave to file a late notice of claim is held in abeyance for 30 days from the filing of this order with notice of entry.

ENTER:

  
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Barbara Jaffe, JSC

DATED:       October 12, 2017  
              New York, New York