

**Williams v City of New York**

2019 NY Slip Op 32049(U)

July 16, 2019

Supreme Court, New York County

Docket Number: 152267/2019

Judge: Julio Rodriguez III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM**

*Justice*

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TROY WILLIAMS

Petitioner,

- v -

THE CITY OF NEW YORK,

Respondent.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for LEAVE TO FILE.

This action arises from an incident that occurred on March 9, 2017, when petitioner was arrested and charged with criminal possession of a controlled substance in the third degree amongst other related charges. Petitioner now seeks leave to serve a late notice of claim. Respondent City of New York (“City”) opposes the petition.

Pursuant to General Municipal Law (“GML”) 50-i (1), service of a notice of claim is a condition precedent to filing a claim against “a city, county, town, village, fire district or school district.” Said notice of claim must be filed within ninety days after the claim arises (GML 50-i). However, upon application, the court, in its discretion, may extend the time to serve a notice of claim, provided that the extension does not exceed the statute of limitation applicable to actions against a public corporation (GML 50-e [5]).

Here, petitioner seeks an order “1) granting petitioner leave to serve a late notice of claim upon the City of New York pursuant to [GML] 50-e (5) claiming common law malicious prosecution, and 2) for such other and further relief as may be just and proper” (petition at ¶ 2). Although the petition appears to only seek leave to file the proposed notice of claim as to the malicious prosecution claim (petition at ¶ 2), petitioner’s proposed notice of claim lists several causes of action: “[m]alicious prosecution, failure to intervene, negligent hiring/training/ retention, intentional infliction of emotional distress, negligent infliction of emotional distress, violation of civil rights under 42 USC section 1983” (petition, exhibit A, proposed notice of claim at 2).

Petitioner alleges that he was arrested on March 9, 2017, and that the charges were dismissed on September 11, 2018.

Petitioner’s state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence (hiring, training, retention, and failure to intervene) accrued on the date of the arrest (*see Murray v City of New York*, 283 AD2d 560 [2d Dept 2001]), March 9, 2017, and thus the statute of limitations on those claims expired on June 7, 2018 (GML

50-i). The petition, filed on March 4, 2019, is therefore untimely as to those claims (GML 50-e [5] and 50-i). Accordingly, the petition must be denied as to those claims.

As to the claim for malicious prosecution, however, the accrual date is the date the charges were dismissed, September 11, 2018 (*Rochester v City of New York*, 168 AD3d 435 [1st Dept 2019] citing *Nunez v City of New York*, 307 AD2d 218, 219 [1st Dept 2003]). Consequently, this petition, filed on March 4, 2019, is timely as to the cause of action for malicious prosecution because it was filed within one year and 90 days of the accrual (GML 50-e [5] and 50-i).

A court considering a motion 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” is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days of the accrual of the claim or a reasonable time thereafter (*Andrews v Long Is. R.R.*, 110 AD3d 653, 653 [2d Dept 2013] citing *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147, [2d Dept 2008]; see GML 50-e [5]; *Towson v New York City Health and Hospital Corporation*, 158 AD3d 401 [1st Dept 2018]). The court shall also consider whether the claimant made an excusable error concerning the identity of the public corporation; whether the delay would substantially prejudice the public corporation in its defense; and whether the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim (*id.*). “A court’s decision to grant or deny a motion to serve a late notice of claim is ‘purely a discretionary one.’” (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 465 [2016] citing *Cohen v. Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 265 [1980]). Finally, “[n]one of these enumerated factors is controlling” (*Towson* at 401), and “the lack of excuse is not fatal” (*Rodriguez v City of New York*, 172 AD3d 556 [1st Dept 2019]).

Significantly, knowledge of a claim for malicious prosecution “may be imputed to the municipality through the officers in its employ who made the arrest or initiated the prosecution” (*Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dept 1993]) because “the Police Department had all essential facts in its possession” (*Nunez v City of New York*, 307 AD2d 218 [1st Dept 2003] [false arrest/imprisonment and malicious prosecution claim]).

On prejudice, “[t]he burden on the issue of substantial prejudice potentially associated with a late notice of claim rests in the first instance with the petitioner. This showing ‘need not be extensive, but...must present some evidence or plausible argument that supports a finding of no substantial prejudice’. Once a petitioner has made this initial showing, ‘the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed’” (*Towson* at 404 [1st Dept 2018] quoting *Newcomb* at 466-467 [2016] [leave granted upon plaintiff’s showing of reasonable excuse and no prejudice despite defendant’s lack of actual knowledge]).

Here, petitioner does not attempt to show a reasonable excuse for the delay. This, however, is not necessarily fatal (*Rodriguez* at 556). Petitioner instead relies on the other two factors for consideration—actual knowledge and prejudice.

Although respondent City cites to a host of cases for the proposition that a general municipal investigation does not support a finding that a municipality had actual knowledge of the

essential facts constituting a claim (*see e.g. Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990] [“police investigation into the murder of the petitioner’s decedent was geared toward finding the murderer and not toward preparation of a possible claim...on the basis of negligence”]), the cited cases are distinguishable insofar as they do not address the cause of action of malicious prosecution. In cases involving a claim for malicious prosecution, knowledge may be imputed to a respondent municipality (*Nunez v City of New York*, 307 AD2d 218 [1st Dept 2003]) “through the officers in its employ who made the arrest or initiated the prosecution” (*Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dept 1993]). Based on the foregoing, this court therefore finds that knowledge of the essential facts of the claim may similarly be imputed to respondent City here.

As to prejudice, under *Newcomb* (28 NY3d 455 [2016]), a burden shifting framework is utilized by which petitioner must “present some evidence or plausible argument that supports a finding of no substantial prejudice” (*id.* at 466). Here, petitioner’s essential argument is that respondent City’s knowledge of the essential facts at the time of the occurrence supports a finding of no substantial prejudice (petitioner’s aff. in reply at ¶5; *see Goodall v City of New York*, 179 AD2d 481 [1st Dept 1992]). This court finds petitioner’s position to be a plausible argument such that the burden then shifted to respondent City to “respond with a particularized evidentiary showing that [respondent City] will be substantially prejudiced if the late notice is allowed” (*id.* at 467). In opposition, respondent City merely argues that petitioner failed to meet their initial burden under *Newcomb* and makes no attempt at a particularized evidentiary showing of prejudice. Consequently, this court finds that respondent City will not be substantially prejudiced by permitting petitioner to serve a late notice of claim as to the cause of action for malicious prosecution.

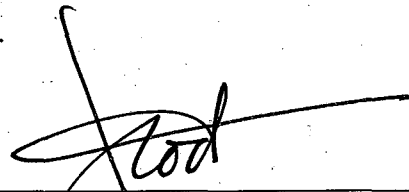
Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected.

Accordingly, it is ORDERED that petitioner’s motion seeking leave to file a late notice of claim is granted; and it is further

ORDERED that petitioner’s time to serve his proposed notice of claim, attached to the petition as exhibit A, upon respondent City of New York is extended until August 3, 2019; and it is further

ORDERED that petitioner shall appear for a hearing pursuant to General Municipal Law 50-h upon notice.

This constitutes the decision and order of the court.



HON. JULIO RODRIGUEZ III, JSC

July 16, 2019

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE