

Damata v City of New York

2020 NY Slip Op 33364(U)

October 14, 2020

Supreme Court, New York County

Docket Number: 152153/2020

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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WELLINGTON DAMATA

Petitioner,

- v -

CITY OF NEW YORK,

Respondent.

INDEX NO. 152153/2020
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 10
were read on this motion to/for LEAVE TO FILE

Petitioner moves this court pursuant to General Municipal Law (GML) § 50-(e) seeking
leave to file a late notice of claim alleging false arrest, false imprisonment, illegal search and
seizure, assault and battery that occurred on February 27, 2019. Respondent, the City of New
York, opposes the instant petition.

Preliminarily, it should be noted that the instant petition was filed on February 27, 2020,
is a legal nullity as it was an unverified petition. However, even assuming that the later
verification of the petition on August 24, 2020, was timely pursuant to the Executive Orders that
tolled the statutes of limitations during the current pandemic, based on the reasons set forth
below the petition is denied.

Legal Standard

It is well settled law that granting a petition to file a late notice of claim is discretionary.
GML § 50-e (5), which pertains specifically to an application to file a late notice of claim, states
in pertinent part that, "Upon application, the court, in its discretion, may extend the time to serve
a notice of claim... [and] the court shall consider, in particular, whether the public corporation or

its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time period specified... or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including, ...whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.” The burden rests on petitioner to establish lack of prejudice. If petitioner satisfies its burden, the burden then shifts to the respondent to show that they are substantially prejudiced by the late service. (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016])

Additionally, it is well settled that courts consider “whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame.” (see *GML § 50-e [5]*). The presence or absence of any one factor is not determinative. (*Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], quoting *Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003].) Specifically, the failure to assert a reasonable excuse, alone, is not fatal to the application. (*Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, citing (*Ansong v City of NY*, 308 AD2d 333 [1st Dept 2003].)

In the context of GML § 50-e, "actual knowledge" means that the respondent acquired knowledge of the essential facts forming the basis of the claim, not simply knowledge of the occurrence of an accident. *Kim v City of New York*, 256 AD2d 83 [1st Dept 1998], app. Denied, 93 NY29 896 [1999]. Petitioner has the burden of establishing this element. *Washington v City of New York*, 72 NY2d 881 [1988].

Discussion

Petitioner was arrested on February 27, 2019, thus his assault and battery claims accrued on that date. Petitioner was released from custody on March 1, 2019, thus his false arrest/imprisonment claims began to accrue upon his release. Petitioner had until May 28, 2019 to file a timely notice of claim for his assault and battery claims and until May 30, 2019 to timely file a notice of claim for false arrest and imprisonment claims. Petitioner's criminal case was ultimately dismissed on May 23, 2019, thus petitioner had until August 21, 2019 to timely file a notice of claim for allegations of malicious prosecution. Petitioner moved on February 27, 2020, exactly one year from the date of the accrual of the assault and battery claims, 363 days after his detainment and release from custody and 280 days after his criminal case was dismissed. The Court does not deem that these time limits are within a reasonable time after the expiration of 90 day statute of limitations.

The petition does not provide a reasonable excuse for the delay; while this alone is not fatal, petitioner does not satisfy its burden with respect to the other factors. The petition does not establish that respondents had actual knowledge of the *claim* within 90 days or a reasonable time thereafter. The petition attempts to impute respondents with actual knowledge of the incident, based on the law enforcement involvement and subsequent prosecution; however, this is insufficient to establish that respondents had actual knowledge of petitioner's claim. See *Williams v Nassau Cty. Med. Ctr.*, 6 NY3d 531 [2006].

Moreover, petitioner does not establish that respondents will not be prejudiced by the delay. Petitioner's conclusory allegation that respondents cannot establish that prejudice exists, is inaccurate application of the standard and improper burden shifting. Accordingly, petitioner has not met its burden with respect to any of standards delineated in GML§ 50-e.

While the court appreciates petitioner’s argument that they intend to bring federal causes of action against the City of New York, this is not a dispositive issue with respect to the grant or denial of leave to file a late notice of claim. This court is unaware of any binding precedent or legislative exceptions, to the timely notice of claim requirement when a petitioner may commence an action to include parallel state and federal causes of action. Petitioner has not cited to any case law to support its position that the intention to include federal claims in an action alleviates any prejudice to satisfy its burden pursuant to GML§ 50-e.

Accordingly, it is hereby

ADJUDGED, that the petition to serve a late notice of claim is DENIED.

10/14/2020
DATE



LYLE E. FRANK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

HON. LYLE E. FRANK
J.S.C.