

**Morales v City of New York**

2020 NY Slip Op 33695(U)

November 5, 2020

Supreme Court, New York County

Docket Number: 155018/2020

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART IAS MOTION 5
Justice
INDEX NO. 155018/2020
ERIK MORALES, Plaintiff, MOTION DATE 10/20/20
- v - MOTION SEQ. NO. 001
CITY OF NEW YORK, Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this petition for leave to file a late notice of claim (sequence 001): 4, 6, 11-15.

Petitioner Erik Morales moves, by order to show cause, for leave to file a late notice of claim, alleging false arrest, false imprisonment, illegal search and seizure, multiple assaults and batteries, malicious prosecution, and abuse of process stemming from Petitioner’s February 5, 2018 arrest by NYPD officers in the vicinity of Washington Bridge, between Washington Bridge and Henry Hudson Parkway, New York, New York. Respondent City of New York (the “City”) opposes. For the following reasons, after oral argument, the Petition is granted solely to the extent that Petitioner’s notice of claim, limited only to the malicious prosecution claim, is deemed timely filed and served nunc pro tunc.

NYPD officers arrested Petitioner on February 5, 2018 (Petition ¶ 7). After processing Petitioner and keeping him in custody for 36 hours, the NYPD released Petitioner on February 6, 2018 (id.). The charges against Petitioner were dismissed on June 17, 2019 and September 6, 2019 (Petition ¶ 3, citing NYSCEF 3). Petitioner did not file any notice of claim until the filing of this Petition, on July 6, 2020. Petitioner argues, in sum and substance, that he should be permitted to file a late notice of claim because the City’s agents, NYPD officers, by virtue of their participation in the subject events, acquired actual notice of the essential facts constituting the state law claims within 90 days of their accrual (Petition ¶ 4). Petitioner also argues that the

1 Though they are distinct legal claims, the Petition asserts the abuse of process and malicious prosecution claims together without specifying any distinction. At oral argument, Petitioner clarified—without citation to the record—that the “abuse of process” also related to the arrest. To the extent that this appears to fall within the framework of a malicious prosecution claim, it is analyzed accordingly (see Roberts v Pollack, 92 AD2d 440, 444 [1st Dept 1983] [elements of a malicious abuse of process claim are a regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act, a purpose to do harm without any justification, and advantage to the defendant or detriment to the plaintiff outside the legitimate ends of the process]; see Stubbolo v City of NY, 2008 NY Slip Op 31208[U], \*13-14 [Sup Ct, NY County 2008, Friedman, J.] [“While the complaint alleges abuse of process, it does not identify any process other than the arrests and institution of grand jury or criminal proceedings. The abuse of process claim is therefore duplicative of the false arrest and malicious prosecution claims.”]). To the extent that Petitioner fails to make specific allegations as to abuse of process, including any argument as to when that claim accrued, the Court is unable to make any determination.

City cannot demonstrate any specific prejudice stemming from the delay in filing, and that Petitioner has provided a reasonable excuse for the delay.

General Municipal Law (GML) § 50-e(5) provides that a court may extend the 90-day notice of claim filing deadline up to the expiration of the 1-year and 90-day statute of limitations for claims against the City (*Plaza v NY Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 467 [1st Dept 2012] [The failure to seek a court order excusing an untimely notice of claim within one year and 90 days after accrual of the claim requires dismissal of the action]; *Campbell v City of NY*, 4 NY3d 200, 203 [2005] [“[The Court of Appeals] has consistently treated the year-and-90-day provision contained in section 50-i as a statute of limitations.”]).

Here, all state personal injury claims other than the malicious prosecution claim began to accrue on February 5, the arrest date (illegal search and seizure and assault and battery), or February 6, 2018, the release date (false arrest/imprisonment) (*see Palmer v City of NY*, 226 AD2d 149, 149 [1st Dept 1996] [False arrest and false imprisonment claims accrue upon release from custody]; *McElveen v Police Dept. of NY*, 70 AD2d 858, 858 [1st Dept 1979] [“A cause of action for assault accrues on the date of the assault”]; *Val. Stream v Zulli*, 64 AD2d 609, 610 [2d Dept 1978] [“At the latest, the [abuse of process action] accrued on January 23, 1974, the date upon which defendants last appeared under compulsion of the abused process and the criminal complaints were withdrawn”]; *Stubbolo v City of NY*, 2008 NY Slip Op 31208[U], \*8 [Sup Ct, NY County 2008] [claims for illegal search and seizure “both accrued at the time the property was taken”]; *cf Nunez v City of NY*, 307 AD2d 218, 219 [1st Dept 2003] [malicious prosecution claim accrued when the proceeding was terminated in plaintiff’s favor by dismissal]). Thus, the statute of limitations on the aforementioned claims expired, at the latest, on May 7, 2019, a timeline which Petitioner does not dispute, and the Court cannot consider allowing them because this Petition was filed on July 6, 2020, over a year too late. The Court is left only to consider the malicious prosecution claim which, by the City’s own admission, was still within the year-and-ninety-day limitations period when the Petition was filed (*City Opp* ¶ 1 [“the Petition for malicious prosecution should be denied because it was filed 304 days after that claim accrued”] [emphasis added]).

GML § 50-e(5) provides, in relevant part, that in considering whether to permit late notice of claim, courts

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 specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including; ... and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits (*see also Melendez v City of NY*, 245 AD2d 564, 564 [2d Dept 1997] [reasons for permitting a late notice of claim include a petitioner’s infancy, minimal delay beyond the statutory 90-day period, a respondent’s possession of records containing the essential facts constituting the claim, and

the absence of actual prejudice to the respondent in the preparation of its defense]).

With respect to the City's acquisition of actual knowledge of malicious prosecution claims, actual knowledge of a malicious prosecution claim can also be imputed to the City where the NYPD possessed all essential facts (*Nunez v City of NY*, 307 AD2d 218, 220 [1st Dept 2003]; *Goodall v New York*, 179 AD2d 481 [1st Dept 1992] [reversing Supreme Court and permitting late notice of claim, including malicious prosecution claim, where the facts and circumstances surrounding the incident were investigated by the Civilian Complaint Review Board and the incident was investigated by the police in preparation for the criminal prosecution of the plaintiffs]). Similarly, a municipality's "investigation of the underlying crime for which the claimant was arrested and its continuing involvement until such time as he was released, reasonably precludes substantial prejudice arising from any impediments to an investigation of the civil claim" (*Nunez v City of NY*, 307 AD2d 218, 220 [1st Dept 2003]). As Petitioner points out in reply, the precedent cited by the City in opposition relies primarily on negligence cases (*City Opp* ¶¶ 16-17), which can be distinguished from the intentional torts alleged here.

Finally, with respect to the reason for the delay, as the City argues in opposition, "the petitioner's assertion that he knowingly delayed service of a timely notice of claim while the criminal charges were pending due to an unsubstantiated fear of reprisal, does not, under the circumstances of this case, constitute a reasonable excuse" (*Matter of Ruiz v City of NY*, 154 AD3d 945, 946-947 [2d Dept 2017] [affirming denial of petition for leave to file late notice of claim where petitioner failed to submit evidence establishing City's actual knowledge of facts constituting false arrest/imprisonment claim]). However, more persuasive is Petitioner's other argument: that Petitioner was stonewalled in his attempts to obtain documentation to verify his arrest, detention, and release from custody, including summary denial of his Freedom of Information Act requests (*Petition* ¶ 20; see *Matter of Townson v NY City Health & Hosps. Corp.*, 158 AD3d 401, 404 [1st Dept 2018] [holding that a delay in filing a notice of claim was reasonable where liability was necessarily predicated upon the medical records of petitioner's treatment, and that "an attorney and client should not be penalized for waiting for medical records to file a complete and accurate notice of claim."]).

In any event, "[t]he absence of an acceptable excuse for the delay is not necessarily fatal to a motion for leave to serve a late notice of claim" (*Justiniano v NY City Hous. Auth. Police*, 191 AD2d 252, 252 [1st Dept 1993] [affirming decision to permit late service of notice of claim]). "Rather, all relevant factors are to be considered, in particular, whether respondent acquired actual knowledge of the essential facts constituting the claim within the 90-day statutory period or shortly thereafter" (*id.* [holding that knowledge of claims for false imprisonment and malicious prosecution could be imputed to the municipality through the officers in its employ who made the arrest or initiated the prosecution]). Given the Court's holding above regarding actual knowledge and prejudice, Petitioner has satisfied the factors necessary to justify a late notice of claim, albeit limited to the malicious prosecution claim. It is therefore

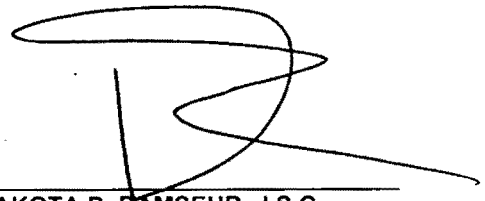
**ORDERED** and **ADJUDGED** that the Petition for leave to file a late notice of claim is **GRANTED solely to the extent that** the notice of claim attached to the Petition (*NYSCEF* 2) is

deemed timely filed and served as to Petitioner's state malicious prosecution claim only; 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; and it is further

**ORDERED** that Petitioner shall, within 30 days of this order, e-file and serve a copy of this order with notice of entry upon Respondent.

This constitutes the decision and order of the Court.



11/5/2020  
NEW YORK, NY

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: