

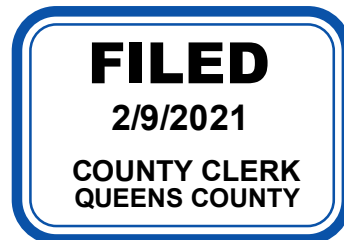
Barnes v City of New York
2021 NY Slip Op 31991(U)
February 8, 2021
Supreme Court, Queens County
Docket Number: 701045/20
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



-----X
George Barnes,

Index
Number: 701045/20

Plaintiff,

- against -

Motion
Date: 8/17/20

The City of New York, NYPD Officer Douglas
John, NYPD Officers "John" Farley, "John"
Saval and "John" Franco, et al,

Motion Seq. No.: 1

Defendants.

-----X

The following papers numbered E5-E15 and E18-E19 read on this motion by plaintiff for leave to serve a late notice of claim, nunc pro tunc.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... E5-14
Affirmation in Opposition..... E15
Reply-Exhibits..... E18-19

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff, pursuant to General Municipal Law §50-e(5), for leave to serve a late notice of claim against defendants limited to plaintiff's state law claims alleging assault and battery and unlawful imprisonment nunc pro tunc is granted solely to the extent that plaintiff is given leave to serve the individually-named defendant NYPD officers an amended notice of claim naming them only and asserting claims against them under state law for assault and battery and unlawful imprisonment only within 30 days after entry of this order.

That branch of the motion for leave to serve a late notice of claim nunc pro tunc alleging these claims as against the City is moot.

As a preliminary matter, this Court notes that issue has not yet been joined by defendants, and the opposition submitted by the Office of the Corporation Counsel indicates that said office is counsel for the City but does not indicate that it is counsel for

the individual defendants. In addition, although the City's counsel contends in opposition that the motion should be denied, his opposition is limited to arguments as to why a late notice of claim should not be served upon the City, and does not address the individual defendants. Therefore, this Court deems the opposition as opposition by the City only. Consequently, the motion is deemed submitted without opposition by the individual defendants.

Plaintiff alleges that he was assaulted and battered on November 4, 2018 at the Northern Boulevard subway station in Queens County by the individual NYPD officers John, Farley, Saval and Franco and forcibly transported unconscious to Elmhurst Hospital Center where he was handcuffed to his hospital bed.

A notice of claim was served against the City and the individual officers on November 17, 2019 alleging causes of action for negligence, illegal stop, assault and battery, use of excessive force, false arrest, false imprisonment, intentional infliction of emotional distress and negligent hiring, supervision, retention and training of officers by the City. It also asserts a claim of Constitutional violations under both the New York Constitution and under the U.S. Constitution pursuant to 42 U.S.C. §1983.

Plaintiff thereafter served a summons and complaint on January 24, 2020, but only alleges in the complaint a first to third cause of action under state law against the individual defendants for assault and battery and false imprisonment and a cause of action for Constitutional violations under §1983, and a fourth and fifth cause of action against the City under state law for negligent hiring, training and retention of the defendant officers and a §1983 "Monell" claim.

Plaintiff's counsel now seeks leave to serve a late notice of claim nunc pro tunc only as to the state law claims for assault and battery and false imprisonment, stating the established law that the Constitutional claims are not subject to the notice of claim requirement. The basis for the motion is that the individual defendants acquired actual knowledge of the facts of the claim immediately upon their assault and imprisonment of plaintiff and that defendants would not suffer any prejudice by allowing a late notice of claim.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Since plaintiff's cause of action accrued on November 4, 2018, he had until February 4, 2019 to serve a notice of claim. The notice of claim, served on May 17, 2019, more than three months past the 90-day deadline,

therefore, was untimely.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002])).

In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5])).

Plaintiff, in his affidavit in support of the motion, offers no excuse whatsoever for his failure to serve a timely notice of claim. Moreover, no cognizable excuse is offered, either by plaintiff or his counsel, for the additional delay of over 8 months in making this motion seeking leave to serve a late notice of claim.

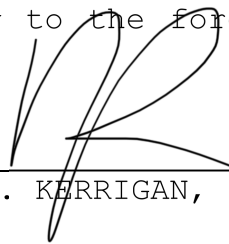
Counsel for petitioner merely argues that the individual defendants acquired actual knowledge of the facts underlying the claim immediately upon their assault and imprisonment of plaintiff. This Court agrees that the individual defendants had knowledge of the facts underlying plaintiff's claim of simple assault and battery and unlawful imprisonment (as opposed to a claim of false arrest and detention, which causes of action have not been alleged in the complaint) immediately upon their commission of such intentional tortious acts and, therefore, that service of a late notice of claim upon them should be granted. Indeed, they have not appeared to oppose the motion and the City has not offered any argument in opposition disputing the propriety of allowing plaintiff to serve the individual defendants with a late notice of claim alleging assault and battery and false imprisonment.

With respect to the City, however, the complaint does not assert state law causes of action against it for assault and battery or unlawful imprisonment. Although the untimely-filed notice of claim includes causes of action for assault and battery and false imprisonment against "defendants", which would include the City, this Court may not grant plaintiff's motion to allow this notice of claim to be asserted against the City nunc pro tunc where

the complaint does not contain such causes of action against the City and where plaintiff has not moved to amend the complaint to add such causes of action against the City. Consequently, this Court need not, and shall not, reach the issue of whether the City would be prejudiced by allowing a late notice of claim to assert these causes of action.

Accordingly, the motion is granted solely to the foregoing extent.

Dated: February 8, 2021



KEVIN J. KERRIGAN, J.S.C.

