

<b>Berg v City of New York</b>
2022 NY Slip Op 30418(U)
February 8, 2022
Supreme Court, New York County
Docket Number: Index No. 160933/2021
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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GREGORY BERG

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 160933/2021

MOTION DATE 12/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8 were read on this motion to/for LEAVE TO FILE LATE NOTICE OF CLAIM.

Upon review of the foregoing documents, it is ordered that petitioner's motion to serve a late notice of claim is GRANTED.

Petitioner seeks to commence an action against Respondent the City of New York (the "City") for, inter alia, false arrest, false imprisonment, malicious prosecution, and assault and battery in connection with Petitioner's November 4, 2020 arrest by the New York Police Department. Petitioner filed a notice of claim on December 1, 2021 (the "Notice of Claim"). On December 6, 2021 he then filed the instant Petition, pursuant to General Municipal Law ("GML") §50-(e), for an order deeming the Notice of Claim as timely filed, nunc pro tunc or, alternatively, permitting him to file a late notice of claim. The City opposes the Petition.

DISCUSSION

GML §50-e (1) (a) requires that where, as here, a notice of claim is a precondition to the commencement of an action, such notice must be served "within ninety days after the claim arises" (Rivera v New York City Hous. Auth., 25 AD3d 450, 451 [1st Dept 2006]). The City contends, and Petitioner does not dispute, that Petitioner's deadline to file a notice of claim with respect to

the instant claim was February 2, 2021 but that he filed the Notice of Claim 302 days after this deadline had passed.

However, GML §50-e “is not intended to operate as a device to frustrate the rights of individuals with legitimate claims” and the Court may, in its discretion, excuse a delay in filing a notice of claim after considering “(i) the reasonableness of the excuse offered for the delay in filing the notice of claim; (ii) whether the municipality obtained actual knowledge of the essential facts constituting the claim within the 90-day as-of right filing period or within a reasonable time thereafter; and (iii) whether the municipality was prejudiced because the claimant did not file during the as-of-right period” (Orozco v City of New York, 200 AD3d 559-560 [1st Dept 2021] [internal citations omitted] citing General Municipal Law § 50-e[5]).

Here, the Court, in its discretion, excuses Petitioner’s delay in filing the notice of claim. Although Petitioner failed to assert a reasonable excuse<sup>1</sup>, that “alone, is not fatal to the application” (Velazquez v City of New York Health and Hasps. Corp. [Jacobi Med. Ctr.], citing Ansong v City of New York, 308 AD2d 333 [1st Dept 2003]). Petitioner met his burden to establish that the City had actual knowledge of the essential facts underlying his claim (See Washington v City of New York, 72 NY2d 881 [1988] [petitioner bears burden to establish respondent’s actual knowledge]) and that the City was not prejudiced by the delay (See Matter of Newcomb v Middle Country Cent. School Dist., 28 NY3d 455, 466 [2016] [initial burden to establish lack of substantial prejudice rests with petitioner]).

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<sup>1</sup> Petitioner’s proffered excuse for his delay in filing the notice of claim, i.e., office closures caused by COVID-19, is insufficient (See Chattergoon v New York City Hous. Auth., 161 AD2d 141 [1st Dept 1990], affd., Matter of, 78 NY2d 958 [1991]). While the Court acknowledges the chaos caused by COVID-19, the events at issue did not occur in the tumult of March and April 2020 or even during the extensive tolling period created by Executive Order 202.8, but rather, after that toll’s expiration (See Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8] et seq.).

In a false arrest and malicious prosecution action such as this one, the City has actual notice of the essential facts of the claim since “members of the municipality’s police department participate in the acts giving rise to the claim, and reports and complaints have been filed by the police,” (Orozco v City of New York, 200 AD3d 559 [1st Dept 2021] [internal citations and quotations omitted]; see also Ansong v City of New York, 308 AD2d 333, 333-34 [1st Dept 2003] [“Respondent’s claimed lack of actual knowledge is completely refuted by the fact that the officers who allegedly assaulted petitioner would, as respondent’s employees, have had immediate knowledge of the events giving rise to this dispute”]). The cases relied upon by the City in opposition involve a far more attenuated connection between petitioners’ claims and the records possessed by respondents (See e.g., Williams v. Nassau County Medical Center, 6 NY3d 531, 537 [2006] [defendant hospital’s possession of medical records of difficult delivery did not necessarily confer actual knowledge of facts constituting claim for medical malpractice based on child’s developmental disorder or epilepsy]; Blaze v New York City Dept. of Educ., 112 AD3d 428, 428 [1st Dept 2013] [defendant Board of Education’s records of negative evaluation of plaintiff, its former employee, did not provide defendant actual notice of plaintiff’s claim for emotional distress, economic losses, damage to her reputation, and pain and suffering stemming from this negative evaluation]; Chattergoon v New York City Hous. Auth. 161 AD2d 141 [1st Dept 1990] [housing police investigation of homicide of petitioner’s decedent did not give actual knowledge to New York City Housing Authority, since investigation was geared toward finding murderer and not preparing defense for negligence claim] aff’d 78 NY2d 958 [1991]).

In addition, Petitioner’s the delay in filing has not prejudiced Respondent. While Respondent argues it has been deprived of the opportunity to “identify witnesses and collect their testimony based on fresh memories,” this argument is unavailing in light of the City’s actual

knowledge of the facts constituting the claim and the fact that “records pertaining to petitioner’s arrest, as well as the favorable disposition of charges against him, are presumably still in existence” (Ansong v City of New York, 308 AD2d 333, 334 [1st Dept 2003]; see also Orozco v City of New York, 200 AD3d 559 [1st Dept 2021]). To the extent the City cites to several cases in which much shorter delays than the one at issue here have been held to be unduly prejudicial, this is of no moment. In each of the cases, unlike this one, the court had determined that the respondents had not received actual notice (See e.g., Bailey v City of New York Hous. Auth., 55 AD3d 443 [1st Dept 2008]; Rivera v New York City Hous. Auth., 25 AD3d 450 [1st Dept 2006]; Harris v City of New York, 297 A.D.2d 473 [1st Dept 2002]).

In light of the foregoing, it is

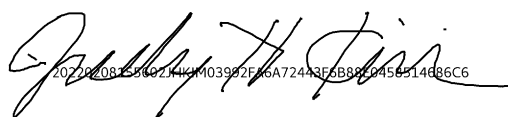
**ORDERED** that Petitioner’s motion to serve a late notice of claim is **GRANTED**; and it is further

**ORDERED** that Petitioner’s Notice of Claim attached to the Petition (NYSCEF Doc. No. 3) is deemed timely filed nunc pro tunc; and it is further

**ORDERED** that, in the event a lawsuit arising from this notice of claim is filed, the Petitioner shall commence an action and purchase a new index number; and it is further

**ORDERED** that Petitioner shall, within thirty (30) days, e-file and serve a copy of this decision and order with notice of entry upon all parties.

This constitutes the decision and order of the Court.



HON. JUDY H. KIM, J.S.C.

2/8/2022  
DATE

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