

Smith v City of New York
2022 NY Slip Op 30542(U)
February 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 521854/2020
Judge: Consuelo Mallafré Meléndez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 20

BRENNAN SMITH,

Index No. 521854/2020
DECISION AND ORDER

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendant.

CONSUELO MALLAFRE MELENDEZ, J.:

The court’s Decision and Order is based upon consideration of the following papers:

	CPLR 2219(a) Recitation	
Notice of Petition & Affidavits Annexed		1: NYSCEF #1,2
Opposition/Cross-Motion		2: NYSCEF #10
Reply/Opposition to Cross-Motion		3: NYSCEF #13
Exhibits		

Petitioner brought forth this action to recover damages for personal injuries allegedly sustained on August 11, 2019 based on claims of false arrest, false imprisonment, illegal search and excessive use of force by members of the New York City Police Department (hereinafter “NYPD”). On or about November 13, 2019, Petitioner’s criminal matter was resolved. The deadline for Petitioner to file a notice of claim on his false arrest, false imprisonment and excessive use of force claims expired on November 12, 2019. The deadline for Petitioner to file a notice of claim on his malicious prosecution claim expired on February 11, 2020. On January 28, 2020, eighty (80) days after the deadline to file a timely notice of claim expired for all of Petitioner’s claims, excluding malicious prosecution, Petitioner filed a Notice of Claim dated December 10, 2019. On November 5, 2020, 282 days after the Comptroller’s Office received

Petitioner's late notice of claim, Petitioner filed the instant Petition for an order granting leave to serve a late notice of claim.

The determination of an application for leave to serve a late notice of claim or deem a late notice of claim timely served *nunc pro tunc* is left to the sound discretion of the trial court (see *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 465 [2016]; *Matter of Wooden v. City of New York*, 136 A.D.3d 932 [2d Dept. 2016]). The factors to be considered by a court include whether: (1) the municipality acquired actual knowledge of the essential facts constituting the petitioner's claim within 90 days after the claim arose or a reasonable time thereafter; (2) the petitioner demonstrated a reasonable excuse for the failure to serve a timely notice of claim; and (3) the delay would not substantially prejudice the municipality in its defense on the merits (see General Municipal Law § 50–e[5]; *Matter of Mitchell v. City of New York*, 112 A.D.3d 940, 940 [2d Dept 2013]; *Beaton v City of New York*, 186 A.D.3d 1677, 1678 [2d Dept 2020]).

In its recent decision, *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, the Second Department stated that, “[o]n the issue of prejudice, the Court of Appeals has instructed that ‘a showing [of prejudice] need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice’” (*Matter of Newcomb*, 28 N.Y.3d 455 at 466 [internal citation omitted]). *Newcomb* does not change the long-standing law regarding the factors that courts are to consider in deciding whether to grant or deny leave to serve late notices of claim under General Municipal Law § 50–e(5). The import of *Newcomb* is limited to its clarification of the shifting burdens of proof when the substantial prejudice factor is addressed in the context of late notice of claim applications (*Id*; *Matter of Ruiz v. City of New York*, 154 A.D.3d 945, 947 [2d Dept 2017]).


In order for a municipality or public corporation to have actual knowledge of the essential facts constituting the claim, “[it] must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim” (*Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 148 [2d Dept 2008]). Where it is argued that records and documentation provided the municipality or public corporation with actual knowledge of the essential facts, the evidence submitted must establish such actual knowledge on the part of the municipality or public corporation (*Matter of Fethallah v. New York City Police Dept.*, 150 A.D.3d 998, 1000 [2d Dept 2017]; *Matter of Hamilton v. City of New York*, 145 A.D.3d 784, 785 [2d Dept 2016]; *Humsted v. New York City Health & Hosps. Corp.*, 142 A.D.3d 1139, 1140 [2d Dept 2016]; *Matter of Rivera v. City of New York*, 88 A.D.3d 1004, 1005 [2d Dept 2011]; *Matter of Blanco v. City of New York*, 78 A.D.3d 1048 [2d Dept 2010]; *Matter of Bush v. City of New York*, 76 A.D.3d 628 [2d Dept 2010]). “[F]or a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the [municipality or] public corporation” (*Matter of Taylor v. County of Suffolk*, 90 A.D.3d 769, 770, [2d Dept 2011]; see *Matter of Cuccia v. Metropolitan Transp. Auth.*, 150 A.D.3d 849, 850 [2d Dept 2017]; *Matter of Borrero v. New York City Hous. Auth.*, 134 A.D.3d 1104, 1105, [2d Dept 2015]; *Islam v City of New York*, 164 A.D.3d 672, 673-674 [2d Dept 2018]).

In this matter, on or about November 12, 2019 the 90-day requirement to file a timely notice of claim for all of Petitioner’s claims, excluding his malicious prosecution claim, expired. In his motion, Petitioner summarily claims that there is no prejudice to the City because it is in possession of records of the arrest records and has had access to them. However, the mere existence of, specifically, police reports and other records is insufficient alone to impute actual

knowledge (*Matter of Hamilton v. City of New York*, 145 AD3d 784 [2d Dept 2016]). Likewise, with regards the City’s actual knowledge, Petitioner claims in the most conclusory fashion that the City had actual notice of the essential facts of his claims on the date of his arrest solely because NYPD officers were involved in the arrest. In *Matter of Felice*, the Second Department held that mere knowledge of an accident’s occurrence does not satisfy the requirements of General Municipal Law § 50-e(5), rather, “the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim” (*Matter of Felice*, 50 A.D.3d 138 at 148). Lastly, Petitioner does not offer a reasonable excuse for the delay. Petitioner claims that the Notice of Claim was signed on December 10, 2019 but filed on January 18, 2020. While the court is aware that there was a suspension of non-essential filings from March 22, 2020 until May 25, 2020, Petitioner offers no excuse for the six months that elapsed between the lifting of the ban on non-essential filings and the filing of this motion.

Accordingly, Petitioner’s motion is Denied as to all claims except malicious prosecution.

Dated: February 17, 2022
Brooklyn, NY



Hon. Consuelo Mallafré Melendez
J. S. C.