

**Matter of Khamraev v City of New York**

2023 NY Slip Op 31339(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 517627/2022

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 25 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of April 2023.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
In the Matter of the application of SUHROB KHAMRAEV,  
For Leave to file a Late Notice of Claim,

Petitioner,

**DECISION & ORDER**

Index: 517627/2022

Mot. Seq.: 002

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT and POLICE OFFICERS  
MEGHAN TAMAO (SHIELD #2815), JOHN  
VENTURA, GIOVANY DIEGUE, JALEESA  
ARRINGTON (SHIELD #8342), ALI HAMMUTOGLU  
(SHIELD #30112), RAFAEL ZALDIVAR (SHIELD #9441),

Respondents.

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 33 – 34, 35 – 43, 44, 45, 46

Petitioner seeks renewal and reargument of this court’s Decision and Order dated December 22, 2022 denying a motion for leave to serve a late notice of claim.

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision (internal quotation marks omitted).” *Maurisaca v. Bowery at Spring Partners, L.P.*, 168 A.D.3d 711 [2d Dept 2019].

“A motion for leave to renew ‘shall be based upon new facts not offered on the prior motion that would change the prior determination’ (CPLR 2221[e][2]) and ‘shall contain reasonable justification for the failure to present such facts on the prior motion’ (CPLR 2221[e][3]). ‘The requirement that a motion

for renewal be based on new facts is a flexible one' (internal citations omitted). The new or additional facts presented 'either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion' (internal citations omitted). In either circumstance, however, the party seeking renewal must present 'a reasonable excuse for the failure to present those facts on the prior motion' (internal citations omitted)." *Caronia v. Peluso*, 170 A.D.3d 649 [2d Dept 2019].

Petitioner's motion for renewal is Denied. The "new evidence" counsel attempts to use is a determination of the IAB dated August 31, 2022. While it came down after this court's decision, the findings of the IAB do not establish that the City had notice of the essential facts underlying the claim within 90 days of the occurrence or within a reasonable time thereafter. Indeed, these findings were reached much after the relevant period expired and therefore do not provide evidence of notice to the City as required by GML § 50-e.

Leave to reargue is Granted. Upon reargument, the decision is modified only to the extent that any and all references to federal 1983 claims are deleted from the decision. Notice of Claim requirements do not apply to federal civil rights claims and reference to these claims were inadvertently included in the denial of Petitioner's motion. Dismissal of a notice of claim application cannot preclude Petitioner's federal causes of action. *See Pendleton v. City of New York*, 44 A.D.3d 733, 738 [2d Dept 2007] (finding that denial of a late notice of claim petition "d[id] not affect the validity of the Civil Rights Act cause of action."). Therefore, this decision does not affect petitioner's right to proceed with his federal claims to the extent that the notice of claim requirements of General Municipal Law § 50-e do not apply to federal civil rights claims. The late notice of claim application is denied in all other respects as is discussed herein.

The claim in this case arose on February 24, 2021. The charges were dismissed on June 24, 2021. Counsel for petitioner states that a reason the application was made on June 22, 2022 is because they were investigating the claim. They state that FOIL records were finally furnished to the Petitioner's office on

June 1, 2022. The FOIL records revealed that a call was made to the police at 11:43am reporting that an elderly man was being assaulted by the property manager and the maintenance workers. Petitioner claims that the “FOIL records overwhelmingly show that each and every one of the above-captioned member of NYPD directly participated in the conspiracy to suppress key witness which proximately caused Petitioner to be deprived of his liberty.” Petitioner’s Aff. Supp. ¶ 55 (NYSCEF No. 34).

Petitioner argues that the court misapplied the law in relying on *Matter of Taylor v. County of Suffolk*, 90 A.D.3d 769, 770 [2011]; *Matter of Cuccia v. Metropolitan Transp. Auth.*, 150 A.D.3d 849, 850 [2017]; *Matter of Borrero v. New York City Hous. Auth.*, 134 A.D.3d 1104, 1105 [2015] as a basis for its Decision. Petitioner claims that the circumstances underlying these cases are distinguishable from the circumstance of this case. However, the petitioner is incorrect inasmuch as the court cited and relied on *Islam v. City of New York*, 164 A.D.3d 672 [2d Dept 2018] which internally references *Matter of Taylor v. County of Suffolk*, 90 A.D.3d 769, 770 [2011]; see *Matter of Cuccia v. Metropolitan Transp. Auth.*, 150 A.D.3d 849, 850 [2017]; *Matter of Borrero v. New York City Hous. Auth.*, 134 A.D.3d 1104, 1105 [2015]. The prior Decision clearly shows that it is based on *Islam*. Indeed, the court could have omitted the internal citations cited in *Islam* altogether. The Second Department in *Islam* stated: “ ‘[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 [2011]; see *Matter of Cuccia v. Metropolitan Transp. Auth.*, 150 A.D.3d 849, 850 [2017]; *Matter of Borrero v. New York City Hous. Auth.*, 134 A.D.3d 1104, 1105 [2015]).” *Islam*, 164 A.D.3d 672. The court relied and continues to rely on *Islam* as a basis for its decision finding that the reports, bodycam videos, etc. did not give notice to the City of the essential facts constituting the claim.

It is also well established that “the involvement of the City’s police officers in the alleged incident does not, without more, establish that the City had actual knowledge of the essential facts constituting the petitioner’s claims for, inter alia, false arrest and assault (*see Etienne v. City of New York*,

at 1401–1402; *Matter of Nunez v. Village of Rockville Ctr.*, 176 A.D.3d 1211, 1214 [2d Dept 2019]; *Matter of Fethallah v. New York City Police Dept.*, 150 A.D.3d 998, 1000 [2d Dept 2017]).” *Parker v. City of New York*, 206 A.D.3d 936, 938 [2d Dept 2022].

Also, “in order for a municipality to have actual knowledge of the essential facts constituting a 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]; see *Matter of Ramos v. Board of Educ. of the City of N.Y.*, 148 A.D.3d 909, 911 [2d Dept 2017]).” *Parker*, 206 A.D.3d at 938.

Thus, the creation of records alone, even where authored by the alleged wrongdoer, does not put the City on notice of a claim. When evaluating whether reports put the City on notice, the central inquiry is therefore the content of the reports, and not the author’s alleged involvement in the wrongdoing. *Taylor*, 90 A.D.3d at 770; see also *Islam*, 164 A.D.3d at 674.

As stated in the original decision, “[t]he factors to be considered by a court in determining whether to grant a petition for leave to serve a late notice of claim 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 his original application, petitioner failed to establish the City had actual notice of the claims within 90 days or a reasonable time thereafter. Indeed, this important factor to determine the underlying petition is not established in the papers in support of the motion.

Furthermore, no reasonable excuse was proffered for the delay. Petitioner’s counsel claims that his client was incapacitated and unable to remember any of the key details of the arrest. However, counsel

states that he was investigating the claims as early as July 2021. At that point, had a petition been filed, some of the claims interposed in the notice of claim would have been timely and the claim at issue herein (state law malicious prosecution) would have been, at most, a couple of months late. The timing of the petition is a factor to be considered in the court's determination of a late notice of claim motion. Additionally, Petitioner admits that it was law office failure to delay the filing of the notice of claim which could have been done as early as July 2021 when the FOIL and other requests were made, however, law office failure is not a valid excuse in reference to this application. *See Matter of Naar v. City of New York*, 161 A.D.3d 1081, 1083 – 1084 [2d Dept. 2018] (petitioner's delay in serving the notice of claim upon the City was the result of law office failure, which is not a sufficient excuse); *Matter of Morris v. City of New York*, 132 A.D.3d 997, 998 [2d Dept. 2015] (petitioner's delay in serving the notice of claim was the result of law office failure, which is not an acceptable excuse for the failure to comply with the provisions of General Municipal Law § 50-e); *Matter of Guminiak v. City of Mount Vernon Indus. Dev. Agency*, 68 A.D.3d 1111 [2d Dept. 2009] (petitioner's delay in serving the notice of claim was the result of law office failure, which is not an acceptable excuse for the failure to timely comply with the provisions of General Municipal Law § 50-e).

Petitioner has not established that the City would not be prejudiced. Petitioner bears the initial burden to show that a late notice of claim will not substantially prejudice the City. “[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 v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016]; *Matter of Ruiz v. City of New York*, 154 AD3d 945, 947 [2d Dept 2017]. In this instance, petitioner alleges the City had notice “as they were the sole custodians of any and all evidence.” Further, petitioner alleges the City has access to the videos and records they generated to investigate the essential facts of the claim. Petitioner argues that since the City received actual notice of the claims and has access to review and analyze the records, it has not been prejudiced. The court disagrees. As noted previously, the court finds petitioner failed to establish the City had actual notice of the claims within 90

days or a reasonable time thereafter. Since petitioner has made no showing that the City would not be prejudiced, the court finds petitioner did not meet his burden.

Lastly, the facts or merit (or lack of merit) of the claims is not a factor to be considered when determining whether to grant a notice of claim petition. Petitioner argues vehemently that the City through its employees is liable for the claims asserted in the notice of claim it filed on June 20, 2022. This however is not a summary judgment motion which is evidentiary in nature. As stated above, the court must consider the enumerated factors to determine whether to grant a motion for a late notice of claim to be deemed timely. The court has not overlooked or misapprehended the facts or the law or, for some reason, mistakenly arrived at its earlier decision.

Accordingly, all state claims are Denied as discussed above, and all federal claims remain viable to the extent that they are not within parameters of this decision.

This constitutes the decision and order of the court.

**ENTER.**



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**Hon. Consuelo Mallafre Melendez,  
J.S.C.**