

Fuster v New York City Dept. of Homeless Servs.

2026 NY Slip Op 30414(U)

February 3, 2026

Supreme Court, New York County

Docket Number: Index No. 155939/2022

Judge: Hasa A. Kingo

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. HASA A. KINGO PART 05

Justice

-----X

RICARDO FUSTER, DANNY TEJADA NUNEZ,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF HOMELESS
SERVICES, JOSEPH E. RAY, CITY OF NEW YORK,

Defendant.

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INDEX NO. 155939/2022

MOTION DATE 01/06/2026

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion for RENEWAL.

In this action arising from a May 5, 2022 motor-vehicle incident, plaintiff Ricardo Fuster (“plaintiff”) moves for leave to renew and/or reargue the court’s prior determination granting defendants’ oral motion to dismiss based on plaintiff’s alleged failure to timely serve a notice of claim. Defendants oppose the application in its entirety.

BACKGROUND AND PROCEDURAL HISTORY

This action was commenced against municipal defendants (including the New York City Department of Homeless Services and an individual City employee) arising from an incident alleged to have occurred on May 5, 2022.

The matter appeared on the court’s calendar in connection with settlement proceedings in the fall of 2025. Defendants requested proof that plaintiff had timely served a notice of claim; plaintiff did not produce a stamped notice of claim, an e-confirmation page, or an affidavit of service. Defendants advised that, absent proof, they would seek dismissal.

On November 17, 2025, the case was calendared for a settlement conference. Plaintiff’s counsel did not personally appear and instead sent *per diem* counsel. At that appearance, defendants made an oral application to dismiss based on plaintiff’s failure to satisfy the statutory notice-of-claim condition precedent. The motion was granted, and the action was dismissed.

Plaintiff now moves to renew and/or reargue. In support, counsel asserts that he retained a process server to personally serve a notice of claim on June 9, 2022, but that he has misplaced the affidavit of service and cannot now locate it. Counsel further asserts that the oral dismissal motion

was unexpected, was not made in writing, and was granted without a meaningful opportunity for opposition because only counsel (and not *per diem* counsel) supposedly knew the facts.

Defendants oppose, contending that plaintiff has not met the strict requirements of CPLR § 2221 for either renewal or reargument; that plaintiff has failed to provide any competent proof of timely service of a notice of claim; and that, in any event, to the extent plaintiff's request is functionally an effort to serve (or obtain leave to serve) a late notice of claim, the statute of limitations has long since expired, depriving the court of authority to grant such relief. Defendants rely, among other authorities, on *Brown v City of New York* (95 NY2d 389 [2000]) and *Pierson v City of New York* (56 NY2d 950 [1982]), and they submit that a search of the Comptroller's database revealed no notice of claim filed by plaintiff.

Plaintiff replies that he is not asking the court to extend time to file a late notice of claim; rather, he maintains that timely service was made and that the City must have misplaced the notice.

ARGUMENTS

Plaintiff argues that renewal should be granted because the “new facts” are that a process server personally served the notice of claim on June 9, 2022 and that counsel's inability to produce the affidavit of service is attributable to law office failure. Plaintiff also argues that reargument is warranted because the court should not have entertained an oral motion to dismiss at a settlement conference, and because plaintiff had no meaningful opportunity to oppose that oral application.

Defendants argue that plaintiff has not identified any matter of law or fact the court “overlooked or misapprehended” (CPLR § 2221[d]) and has not supplied new facts in admissible form that would change the result (CPLR § 2221[e]). Defendants emphasize that the timely service of a notice of claim is a statutory condition precedent to suit against the City, and that plaintiff's inability to produce any proof of service—more than three years after the incident—requires dismissal as a matter of law. Defendants further argue that the court is without power to entertain a request to serve a late notice of claim after the expiration of the applicable limitations period, relying on *Pierson* and related Appellate Division, First Department, authority.

DISCUSSION

A motion for reargument under CPLR § 2221(d) is addressed to the court's discretion and “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion,” and “shall not include any matters of fact not offered on the prior motion” (CPLR § 2221[d][2]). A motion for renewal must be “based upon new facts not offered on the prior motion that would change the prior determination,” and the movant must provide “reasonable justification for the failure to present such facts on the prior motion” (CPLR § 2221[e][2], [3]). Renewal is not a second chance to remedy evidentiary gaps that remain unfilled; the movant must present competent, material new proof that would change the outcome.

Measured against these standards, plaintiff has not demonstrated entitlement to either reargument or renewal.

General Municipal Law § 50-e requires that a notice of claim be served within 90 days after a claim arises, and compliance is a condition precedent to maintaining an action against a municipality (*Brown v City of New York*, 95 NY2d 389, 392 [2000]). The notice-of-claim requirement exists to afford the municipality a prompt opportunity to investigate while information remains readily available (*Heiman v City of New York*, 85 AD2d 25, 27 [1st Dept 1982]).

Here, plaintiff's own papers concede that he has no affidavit of service, no stamped notice of claim, and no e-confirmation page. Defendants, by contrast, submit proof that the Comptroller's database search revealed no notice of claim filed by plaintiff for the May 5, 2022 incident.

On this record, plaintiff offers only counsel's conclusory assertion that timely service occurred and speculation that the City "misplaced" the notice of claim. That is insufficient to establish compliance with the statutory condition precedent. Where a plaintiff cannot demonstrate timely service of a notice of claim, dismissal is warranted as a matter of law (*Brown*, 95 NY2d at 392).

I. Reargument is Denied

Plaintiff does not identify any controlling principle of law or material fact that the court overlooked or misapprehended when it dismissed the action for failure to show timely notice-of-claim service (CPLR § 2221[d]). Instead, plaintiff's motion seeks to present, after the fact, the factual narrative counsel contends could not be presented at the settlement conference. But reargument is not a vehicle to introduce facts not previously offered (CPLR § 2221[d][2]).

Plaintiff's additional contention that an oral motion to dismiss should not have been entertained does not warrant reargument. Notably, the record reflects that plaintiff was directed to provide proof of service by a date certain and was advised that failure to do so could result in an oral dismissal application. In any event, even accepting plaintiff's characterization that the oral application was procedurally unexpected, plaintiff must still demonstrate a meritorious opposition to dismissal grounded in proof of timely notice-of-claim service. Plaintiff has not done so.

Accordingly, reargument is denied.

II. Renewal is Denied

Plaintiff likewise fails to satisfy CPLR § 2221(e). The "new facts" asserted—i.e., that counsel retained a process server and believes personal service was made—are not supported by any new competent evidence, such as an affidavit from the process server, a business record from the process-server agency, a stamped notice of claim, an e-confirmation page, or any other proof that service was actually made. Instead, plaintiff's submission rests on counsel's inability to locate the affidavit of service and inability to identify the process-server agency years later.

Even crediting counsel's explanation as a form of law office failure, renewal still requires "new facts ... that would change the prior determination" (CPLR § 2221[e][2]). Plaintiff supplies no such facts in admissible form. Conclusory assertions cannot substitute for proof where a statutory condition precedent is at issue.

Plaintiff's reliance on cases addressing vacatur of defaults based on law office failure does not change the result. For example, *Goodwin v New York City Hous. Auth.*, 78 AD3d 550 (1st Dept 2010) concerned vacatur of a 22 NYCRR § 202.27 default for failure to appear and reaffirmed that law office failure may be a reasonable excuse where a litigant also shows a potentially meritorious claim.

Here, however, the impediment is not merely a conference default; it is plaintiff's inability to demonstrate satisfaction of the statutory condition precedent to suing the City. Put differently: even if plaintiff could establish an excusable failure to meaningfully oppose the oral application on November 17, 2025, he still must come forward now with competent proof that a timely notice of claim was served. He has not.

III. Late-Notice Relief

Although plaintiff insists he is not seeking an extension of time to file a late notice of claim, the practical effect of the motion—reinstatement of an action in which no timely notice of claim can be proven—would place the court in precisely the position the Court of Appeals has forbidden: granting late-notice relief after expiration of the limitations period.

It is well settled that an application for leave to serve a late notice of claim must be made within the time limit for commencing the action—generally one year and ninety days after accrual for tort claims against the City (*Pierson v City of New York*, 56 NY2d 950, 954–956 [1982]; see also *Davis v City of New York*, 250 AD2d 368, 369 [1st Dept 1998]; *Hall v City of New York*, 1 AD3d 254, 256 [1st Dept 2003]).

Once that limitations period expires, the court's discretion ends and relief is barred (*Pierson*, 56 NY2d at 955). Here, the incident is alleged to have occurred on May 5, 2022. Plaintiff did not seek, within the limitations period, leave to serve a late notice of claim; and he now cannot produce proof of timely service. On these facts, the court may not grant relief that would, in effect, revive an otherwise time-barred claim against the City.

IV. Conclusion

In short, plaintiff has not demonstrated entitlement to reargument (CPLR § 2221[d]) or renewal (CPLR § 2221[e]). The notice-of-claim requirement is a strict condition precedent, and plaintiff has not come forward with competent proof of timely service. To the extent plaintiff's motion would operate as late-notice relief, the court lacks authority to grant it after the expiration of the limitations period.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for leave to renew and/or reargue is denied in its entirety; and it is further

ORDERED that the action shall remain dismissed; and it is further

ORDERED that any requested relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

2/3/2026
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE