Matter of Bibbs v City of New York

2012 NY Slip Op 30403(U)

February 17, 2012

Sup Ct, NY County

Docket Number: 112037/11

Judge: Barbara Jaffe

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SCANNED ON 2/23/2012

[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5
Justice

BIBBS, LAURA

-v-

THE CITY OF NEW YORK, ET AL.

INDEX NO. 112037/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for leave to serve late notice of claim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

FEB 23 2012

COUNTY CLERK'S OFFICE NEW YORK

Dated: 2/17/12
FEB 17 2012

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

In the Matter of the Claim of:
LAURA BIBBS,

Petitioner,

For Leave to Serve a Late Notice of Claim, *Nunc Pro Tunc*,

-against-

THE CITY OF NEW YORK, POLICE OFFICERS "JOHN DOE" (First and last names being fictitious, plural and presently unknown), NEW YORK CITY POLICE DEPARTMENT,

Respondent.

----------x

Index No. 112037/11

Argued: 11/15/11

DECISION & ORDER

FILED
FEB 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

For petitioner:
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By order to show cause dated October 24, 2011, petitioner moves pursuant to General Municipal Law § 50-e(5) for an order deeming her notice of claim timely served, *nunc pro tunc*. Respondent City opposes.

I. BACKGROUND

On July 15, 2011, petitioner was arrested for criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) and incarcerated for 24 hours. (Affirmation of Spencer C. Gibbs, Esq., dated Oct. 21, 2011 [Gibbs Aff.], Exh. B).

Sometime thereafter, petitioner retained counsel who attempted to contact her within 90 days of the incident using telephone numbers she had given him, but was unsuccessful until October 18, 2011, when petitioner's friend provided him with an operable number. (*Id.*). A day later, 95 days after the incident, petitioner served respondents with a notice of claim, describing the nature of her claim as "[a]ssault, wrongful arrest and detention, and malicious prosecution . . . ." (*Id.*, Exh. A).

By affidavit dated October 21, 2011, petitioner states, *inter alia*, that she was arrested and detained on July 15, 2011, that multiple officers, the names of whom she does not know, were involved in her arrest, and that the charges against her are still pending. (*Id.*, Exh. B).

II. CONTENTIONS

Petitioner asserts that the arresting officers' actual knowledge of the facts underlying her claim may be imputed to respondents and that they will not be prejudiced by her late filing as a result. (*Id.*). She also claims that her counsel's inability to contact her constitutes a reasonable excuse for her delay and that, in any event, failure to provide a reasonable excuse is not fatal to her application. (*Id.*).

In opposition, City contends that petitioner offers no proof of her arrest and detention, and thus, that she has established neither actual knowledge nor the absence of prejudice, and it denies that her counsel's inability to contact her excuses her delay. (Affirmation of John Orcutt, ACC, in Opposition, dated Nov. 10, 2011). As the charges against petitioner are still pending, it also claims that she should be directed to remove her malicious prosecution claim from her notice of claim should her motion be granted. (*Id.*).

At oral argument, petitioner's malicious prosecution claim was dismissed on consent

without prejudice.

III. ANALYSIS

Pursuant to GML §§ 50-e(l)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. The court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality or agency acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality or agency in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

A. Actual knowledge

A claimant bears the burden of demonstrating the public entity's actual knowledge of the essential facts underlying her claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). A public entity has such knowledge when it has knowledge of the facts underlying the theory on which liability is predicated. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the entity. (*Matter of Werner v Nyack Union*

Free School Dist., 76 AD3d 1026, 1027 [2d Dept 2010]). The entity must have notice or knowledge of the specific claim and not merely general knowledge that a wrong has been committed. (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009]; *Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York*, 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]).

Actual knowledge may be imputed to a municipality where its employees engaged in the conduct giving rise to a claim. (*Gibbs v City of New York*, 22 AD3d 717, 719-20 [2d Dept 2005]; *Picciano v Nassau County Civil Serv. Comm'n*, 290 AD2d 164, 174 [2d Dept 2001]; *Ayala v City of New York*, 189 AD2d 632, 633 [1st Dept 1993]).

Here, petitioner's claims arise from the actions of New York City Police Department officers in arresting and detaining her. Absent evidence demonstrating that petitioner was not arrested or detained on July 15, 2011, petitioner's affidavit is sufficient to show that she was, and actual knowledge may be imputed to City on this basis. (*See Matter of Ansong v City of New York*, 308 AD2d 333 [1st Dept 2003] [actual knowledge of assault claim imputed to City where City police officers allegedly assaulted petitioner]; *Nunez v City of New York*, 307 AD2d 218 [1st Dept 2003] [actual knowledge of false arrest and malicious prosecution claims imputed to City, as Police Department possessed all essential facts]; *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 [1st Dept 1993] [where police officers in City's employ made arrest and initiated investigation, actual knowledge of false arrest and malicious prosecution claims imputed to City]).

Moreover, as petitioner served City with her notice of claim only five days after the expiration of the 90-day period, it obtained actual knowledge of the facts underlying her claim at that time, as well. (*See Erichson v City of Poughkeepsie Police Dept.*, 66 AD3d 820 [2d Dept 2009] [notice of claim served without leave six days after deadline provided agency with actual knowledge]; *see also Matter of Gershanow v Town of Clarkson*, 88 AD3d 879 [2d Dept 2011] [notice of claim served without leave one month after deadline provided agency with actual knowledge]; *Bertone Commissioning v City of New York*, 27 AD3d 222 [1st Dept 2006] [notice of claim served without leave less than two months after expiration of 90-day period provided agency with actual knowledge]; *Matter of Harrison v New York City Hous. Auth.*, 188 AD2d 367 [1st Dept 1992] [agency obtained actual knowledge from notice of claim received one month after expiration of 90-day period]).

B. Prejudice

As petitioner has established that City obtained actual knowledge of the facts underlying her claims, she has also demonstrated the absence of prejudice. (*See Ansong*, 308 AD2d 333 [no prejudice where Police Department acquired actual knowledge through its employees' involvement and continued to investigate underlying crime]; *Nunez*, 307 AD2d 318 [same]).

C. Reasonable excuse

As petitioner established both actual knowledge and the absence of prejudice, and as "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Ansong*, 308 AD2d 333), whether her late filing is excused by her counsel's inability to contact her within the 90-day period need not be determined.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for an order deeming her notice of claim timely served, *nunc pro tunc*, is granted.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE J.S.C.

FILED

FEB 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

DATED: February 17, 2012
New York, New York

FEB 17 2012