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SUPREME COURT
COUNTY OF SENECA STATE OF NEW YORK

DARIN PARSONS,

Plaintiff (Petitioner),

-against- DECISION AND ORDER

SENECA COUNTY SHERIFF'S DEPARTMENT, Index No. 45864

Defendant (Respondent).

Appearances: Richard P. Urda, Esq.
On Behalf of the Petitioner
Frank R. Fisher, Esq., County Attorney
On Behalf of the Respondent

Bender, J.

This matter involves an application in which the claimant seeks leave to file a late notice of claim pursuant to GML section 50-e against the Seneca County Sheriff's Department regarding a claim of "false arrest and/or false imprisonment", and malicious prosecution.

This matter was brought on by motion, filed on January 11, 2012, contemporaneously with the filing of a summons with notice bearing the above caption. The application herein should have been brought by way of a special proceeding. Regardless, it is appropriate under the law to treat it as such and to address the issue raised.

The asserted claim arises from a criminal action against the petitioner. The petitioner was arrested on October 13, 2010 upon a warrant issued October 12, 2010. Felony complaints alleging various felony sex crimes had been filed with the court following the alleged victim's statements to the Seneca County Sheriff's Department on October 11, 2010. The alleged victim apparently recanted her statement to the petitioner's attorney on October 13, 2010, and then related that recantation to a deputy of the Sheriff's Department. The deputy reduced the recantation to writing. (P Exh A). Presumably the arrest occurred subsequent to the written

recantation.

A preliminary hearing was held on October 23, 2010, and the matter was divested to the County Court. Bail was continued in the amount of $100,000.00 cash or $200,000.00 bond and was, pursuant to court records, reduced to $5,000.00 cash or $10,000.00 on October 27, 2010, upon the petitioner's application for a bail review in the County Court.

Counsel for the petitioner avers that he sought a copy of the written recantation from the lower court at the preliminary hearing, but was denied the same.

The petitioner was subsequently convicted on an unrelated charge, and on March 7, 2011, was sentenced to state prison in regard to it. The Court takes judicial notice that such was under Seneca County Indictment Number 10-060. The charges which resulted in petitioner's October 13, 2010, arrest were dismissed. Pursuant to court records and the sentencing minutes, the conviction under Indictment Number 10-060 was in satisfaction of the charges which lead to the claim herein.

On an unspecified date in October, 2011, the petitioner was informed by prison authorities that he was required to take certain programs because of the sex offense charges. He subsequently requested a copy of the October 13, 2010, recantation statement, which he received on or about October 25, 2011.

The proffered excuse for not filing a timely notice is that the petitioner only received the copy of the victim's written recantation on or about October 25, 2011, and because he only became aware in that month that, even though those charges were dismissed, they still had an effect on his prison programming. Subsequent production of the written recantation to prison authorities has apparently not affected the requirement that he engage in the required programming, however. [Petitioner's moving papers, aff't. of Richard P. Urda, para. 17]

A claim for false arrest or unlawful imprisonment accrues as of the date of a claimant's release from custody, and one for malicious prosecution accrues upon the dismissal of the charge or charges on the merits. Boose v. City of Rochester, 71 AD2d 59, [4th Dept, 1979] Notice to be timely must be provided within 90 days thereafter pursuant to GML section 50-e. If the claims are valid notice was thus required no later than June 5, 2011 for each of them.[1]

In determining whether to permit the service of a late notice of claim against a municipality, the courts generally consider three factors: 1) whether the petitioner has a reasonable excuse for a failure to serve a timely notice of claim; 2) whether the municipality acquired notice of the essential facts of the claim within 90 days after the claim arose or reasonable time thereafter, and 3) whether a delay would substantially prejudice the municipality. Padovano v. Massapequa Union Free School District, 31 AD3d , 563 (2nd Dept, 2006).

Addressing the factors in reverse order, the Court first notes that the County attorney properly asserts that the burden is upon the claimant to demonstrate there is no prejudice. Notwithstanding, the answering papers offer no suggestion of what prejudice might exist. As noted, the Sheriff's Department re-interviewed the alleged victim and obtained the written statement from her.

The second factor is also arguably addressed adequately, in that it is not denied that the Sheriff's Department had knowledge of the alleged victim's recantation prior to the claimant's arrest.

The Court does not however, find the petitioner has shown any reasonable excuse for the failure to serve a timely notice of claim.

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[1]Although it was not set forth in the papers, the petitioner was presumably held on the charges in question until the date of the dismissal of them.

The petitioner offers no reason why he needed the written recantation prior to filing a notice of claim. The moving papers make clear that the petitioner's attorney was aware of the recantation even before law enforcement officers, and that he knew of the written recantation if not the day it was made, at least by the time of the October 23, 2010, preliminary hearing. Further, even if delay could in some manner be held justifiable because the written statement was not in hand, no explanation was offered why it was not obtained sooner. Aside from the asserted request made for a copy of it from the lower court, no allegation is made of any subsequent attempt to obtain it prior to the October, 2011, request to the People, nor that it was not readily provided by them once the request was made. [2]

As for the argument that the petitioner was not aware of the prison programming requirements until October, 2011, a "proffered excuse for the delay, to the effect that the petitioners were not aware of the extent of the ..... injuries, [is] inadequate (citations omitted).", Scolo v. Central Islip Union Free School District, 40 AD3d 1104, 1106, (2nd Dept, 2007); see also Green v. City of Middletown, 5 AD3d 384, (2nd Dept, 2004). The prison programming was not in any event even impacted by the alleged "false imprisonment/ false arrest" and is thus irrelevant to it. As noted in the petitioner's supporting papers, the programming was not as a result of the petitioner being taken into custody, but rather was as a result of "the charges brought against him". [Aff't of Richard Urda, para. 17]. Those charges were filed prior to the recantation.

The Court further notes that probable cause to support the charges was obviously presented at the preliminary hearing since the matter was divested to the County Court. CPL section 180.70(1). The existence of probable cause for an arrest is a complete defense to claims

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[2]While this Court does not understand why the lower court would have refused to give the petitioner a copy of the written recantation upon his request, it is not the court's obligation to do so, the request should have been made to the prosecutor. Conspicuously absent is any indication that the defense did so. Further absent is any indication that the petitioner was precluded in any manner from cross examining the alleged victim regarding the recantation during the preliminary hearing, or that sufficient evidence was not presented to justify binding the matter over.

of false imprisonment, unlawful arrest, and malicious prosecution. Lawson v. City of New York, 83 AD3d 609, (1st Dept., 2011).

The Court finally notes that no valid cause of action for malicious prosecution ever accrued. Here the dismissal of the charges was the result of a plea bargain and occurred upon a plea to other charges "in satisfaction" of all that were pending. The charges were accordingly not dismissed on the merits, a prerequisite to an action for malicious prosecution. Butler v. Ratner, 210 AD2d 691, (3rd Dept., 1994).

The application is denied, without cost.

Dated: March 30, 2012

Hon. Dennis F. Bender, ASCJ