

<b>Bolin v City of New York</b>
2022 NY Slip Op 34005(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 150468/2022
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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HUNTER BOLIN, NICHOLS ENTWISTLE, SONALI GUPTA, JOSUE MURALLES

Petitioners,

- v -

THE CITY OF NEW YORK,

Respondent.

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INDEX NO. 150468/2022

MOTION DATE 08/23/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion for LEAVE TO FILE LATE NOTICE OF CLAIM

Upon review of the foregoing documents, it is ordered that the petition for leave to serve a late notice of claim is granted.

On November 15, 2021, petitioner Josue Murrals filed a notice of claim alleging that on May 29, 2020, at 200 Willoughby Street in Brooklyn, New York, members of the New York City Police Department ("NYPD") detained him and, in the process of taking him to the 88th Precinct, carried him through a "gauntlet" of officers who hit him with batons and kicked him, and then, upon his arrival, slammed him to the floor at the station, causing further injuries (NYSCEF Doc. No. 2). Murrals's notice of claim asserts claims for assault and battery and excessive force.

On November 15, 2021, petitioners Hunter Bolin, Nichols Entwistle, and Sonali Gupta also filed notices of claim alleging that on June 4, 2020 in the Bronx, New York, NYPD officers encircled and "kettled" a group of protestors without giving them an opportunity to disperse (Id.). Bolin, Entwistle, and Gupta's notices of claim asserted claims for, inter alia: false imprisonment;

false arrest; assault; battery; trespass to chattels; conversion; malicious prosecution; intentional infliction of emotional distress; negligence; and various violations of the New York City Human Rights Law and the New York State Civil Rights Law.

On January 14, 2022, petitioners filed the instant petition, pursuant to General Municipal Law (“GML”) §50-(e), seeking an order deeming each of the petitioners’ notices of claim timely filed, nunc pro tunc. The City opposes the petition, on the grounds that petitioners: (1) failed to demonstrate that the City acquired actual knowledge of the essential facts underlying petitioners’ claims within ninety days of these events; and (2) failed to provide affidavits from petitioners attesting to the facts underlying their notices of claim.

### DISCUSSION

General Municipal Law §50-e(1)(a) provides that a party who intends to sue the City must file a notice of claim within ninety days from the date on which the claim arose. This requirement is intended “to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity to explore the merits of the claim while information is still readily available” (Porcaro v City of New York, 20 AD3d 357, 357 [1st Dept 2005] [internal citations and quotations omitted]). However, while “[s]ervice of a notice of claim is a condition precedent to [the] assertion of a tort claim against a municipal corporation” (Needleman v McFadden, 197 AD3d 1070 [1st Dept 2021] [internal citations omitted]), GML §50-e “is not intended to operate as a device to frustrate the rights of individuals with legitimate claims” (Porcaro v City of New York, 20 AD3d 357, 358 [1st Dept 2005] [internal citations and quotations omitted]). Accordingly, a plaintiff who misses this ninety-day deadline may still move for leave to serve a late notice of claim within one year and ninety days of the claim’s accrual (See GML §50-e[5]; CPLR §217-a). In this case, the instant petition was filed within the one year and ninety days from the alleged events of May 29,

2020 and June 4, 2020 (after accounting for the period tolled by Executive Order §202.8). Accordingly, the Court considers the petition on its merits.

GML §50-e(5) gives the Court “the discretion to determine whether to grant or deny leave to serve a late notice of claim within certain parameters” (Richardson v New York City Hous. Auth., 136 AD3d 484, 484-85 [1st Dept 2016] [internal citations omitted]). “[F]actors to be considered by the court include: whether the failure to identify the proper party was an excusable error, whether the public corporation received actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter, and whether the delay substantially prejudiced the public corporation's ability to defend the claim on the merits (Id. [internal citations and quotations omitted]). “[T]he presence or absence of any one factor is not determinative [and] [t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application” (Velazquez ex rel. Segarra v City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.), 69 AD3d 441, 442 [1st Dept 2010] [internal citations omitted]).

While petitioners do not offer an excuse for their delay in filing the instant petition, this omission is not dispositive where, as here, petitioners have established that the City had actual notice and will suffer no prejudice from the delay. Specifically, petitioners Hunter Bolin, Nichoals Entwistle, and Sonali Gupta have met their burden by establishing the City has actual notice of the essential facts underlying their false arrest and malicious prosecution claims where “members of the municipality’s police department [allegedly] participate[d] in the acts giving rise to the claim[s] and are [necessarily] in possession of records and documents relating to the incident” (Orozco v City of New York, 200 AD3d 559 [1st Dept 2021] [internal citations and quotations omitted]). Similarly, while petitioner Josue Murrales asserts a claim for excessive force and not false arrest, “Respondent’s claimed lack of actual knowledge is refuted by the fact that the officers who

allegedly assaulted petitioner or witnessed the incidents would, as respondent's employees, have had immediate knowledge of the events giving rise to this dispute” (Jaime v City of New York, 205 AD3d 544, 544 [1st Dept 2022] [internal citations omitted]; see also Erichson v City of Poughkeepsie Police Dept., 66 AD3d 820, 821 [2d Dept 2009]).

In light of the City’s actual knowledge, it has not been prejudiced by the petitioners’ delay (See Orozco v City of New York, 200 AD3d 559 [1st Dept 2021]). Contrary to the City’s contention, petitioners’ failure to include affidavits attesting to the facts underlying their notices of claim is not fatal to their petition<sup>1</sup> (See Orozco v City of New York, 200 AD3d 559 [1st Dept 2021]). While the City maintains that Matter of Figueroa v City of New York, 195 AD3d 467 (1st Dept 2021) mandates the inclusion of such affidavits, this argument is belied by Orozco, which was issued after Figueroa—and references it—yet affirmed the trial court’s grant of leave to file a late notice of claim for false arrest and malicious prosecution despite the fact that “[p]etitioner did not submit his own affidavit, or the affidavit of anyone else with personal knowledge...” (Orozco v City of New York, 200 AD3d 559, 564 [1st Dept 2021] [Moulton, J., dissenting]).

In light of the foregoing, it is

**ORDERED** and **ADJUDGED** that the petition is granted and petitioners’ notices of claim attached to the Petition (NYSCEF Doc. Nos. 2) and previously served on the City on November 15, 2021 are deemed timely filed nunc pro tunc; and it is further

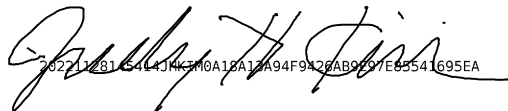
**ORDERED** that, in the event lawsuits arising from these notices of claim are filed, the petitioners shall commence an action and purchase a new index number; and it is further

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<sup>1</sup> The Court does not accept the cursory affidavits petitioners submit in reply in an effort to correct this purported defect (See Brown v City of New York, 174 AD3d 800, 802 [2d Dept 2019]; Matter of Bell v City of New York, 100 AD3d 990, 991 [2d Dept 2012]).

**ORDERED** that petitioners shall, within fifteen days, file and serve a copy of this decision and order with notice of entry upon all parties.

This constitutes the decision and order of the Court.



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11/28/2022

DATE

HON. JUDY H. KIM, 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