

Williams v Sheriff's Off. Suffolk County
2011 NY Slip Op 34301(U)
November 30, 2011
Supreme Court, Suffolk County
Docket Number: 11-19568
Judge: Jr., Paul J. Baisley
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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

DCM-J PART

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PATRICIA WILLIAMS,

By: Baisley, J.S.C.

Dated: November 30, 2011

Petitioner,

Index No. 11-19568

- against -

Mot. Seq. # 001 MotD;CASEDISP

Return Date: September 27, 2011

Adjourned: September 27, 2011

SHERIFF'S OFFICE SUFFOLK COUNTY and
OFFICER "JANE DOE", SHIELD #513, fictitious
name, intended to be the female officer,

Respondents.
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The application by petitioner for leave to serve a late notice of claim is granted to the extent that petitioner seeks to serve a notice of claim for abuse of process, and is otherwise denied.

The petitioner seeks leave to serve a late notice of claim on the respondent Sheriff's Office Suffolk County with respect to claims which arose from a purported incident which occurred on March 25, 2010, while the petitioner was attempting to visit a detainee at the Suffolk County Correctional Center in Riverhead, New York. By notice of claim, dated June 23, 2010, the petitioner alleged that the respondent is liable based on its negligence, carelessness and recklessness for the personal and psychological injuries that she sustained when she was assaulted by a sheriff at the correctional facility; arrested and charged with disorderly conduct in violation of Penal Law 240.20 (3) and failure to comply with the lawful order of a police officer in violation of Vehicle and Traffic Law 1102; and, thereafter, maliciously prosecuted for such crimes. By order dated December 1, 2010, the Town of Southampton Justice Court, granted the petitioner's motion to dismiss the criminal action against her in its entirety on the ground that the accusatory instrument did not meet the sufficiency requirements. A 50-h hearing was held, on December 10, 2010, for the purpose of questioning the petitioner with respect to her June 23, 2010 notice of claim.

On the instant application, the petitioner seeks leave to serve a late notice of claim on the respondent with respect to additional theories of liability. Specifically, the petitioner seeks to serve a notice of claim which includes claims for recovery for false arrest, false imprisonment, abuse of process,

civil violations of 42 USCA 1983, other violations of rights under United States and New York Constitutions, and negligent infliction of emotional distress. In light of the fact that the previous notice of claims contained a premature claim to recover for malicious prosecution, the petitioner also seeks leave to serve an untimely notice of claim with respect to this claim.

The General Municipal Law provides that a plaintiff must file a notice of claim within ninety days after the claim arises and commence the action within one year and ninety days from the date the cause of action accrues (*see Smith v City of New York*, 388 F Supp 2d 179, 184 [SDNY 2005]; *Nunez v City of New York*, 307 AD2d 218, 762 NYS2d 384 [1st Dept 2003]; *Pravda v County of Saratoga*, 255 AD2d 717, 680 NYS2d 705 [3d Dept 1998]). The statute provides that the court may extend the time to file a notice of claim, provided that such application is made within the applicable statute of limitations. The court may not entertain a request to extend the time in which to serve a notice of claim which is filed after the applicable statute of limitations has expired (*Pierson v City of New York*, 56 NY2d 950, 954, 453 NYS2d 615 [1982]; *Mahase v Manhattan & Bronx Surface Transit Operating Auth.*, 3 AD3d 410, 771 NYS2d 99 [1st Dept 2004]; *Hall v City of New York*, 1 AD3d 254, 768 NYS2d 2 [1st Dept 2003]; *Bardi v Warren County Sheriff's Dep't*, 260 AD2d 763, 687 NYS2d 775 [3d Dept 1999]).

Where an application is timely made, the determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (*see*, General Municipal Law § 50-e[5]; *Lodati v City of New York*, 303 AD2d 406, 755 NYS2d 853 [2003]; *Matter of Valestil v City of New York*, 295 AD2d 619, 744 NYS2d 701 [2002], *lv denied* 98 NY2d 615, 751 NYS2d 169 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, *inter alia*, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay in its defense (*see*, General Municipal Law § 50-e[5]; *Nairne v N.Y. City Health & Hosps. Corp.*, 303 AD2d 409, 755 NYS2d 855 [2003]; *Perre v Town of Poughkeepsie*, 300 AD2d 379, 752 NYS2d 68 [2002]; *Matter of Valestil v City of New York, supra*; *Brown v County of Westchester*, 293 AD2d 748, 741 NYS2d 281 [2002]). While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, leave should be denied where the proposed claim is patently without merit (*see Catherine G. v County of Essex*, 3 NY3d 175, 785 NYS2d 369 [2004]; *Matter of Day v Greenburgh Eleven Union Free School Dist.*, __ AD3d __, 2011 NY Slip Op 7421 [2d Dept, Oct. 18, 2011]; *Matter of Channel Mar. Sales, Inc. v City of New York*, 75 AD3d 600, 903 NYS2d 922 [2d Dept 2010]).

Here, the petitioner's claims for false arrest, false imprisonment, negligent infliction of emotional distress, and violation of the New York State constitution are all time-barred (*see Powell v City of New York*, 32 AD3d 227, 820 NYS2d 217 [1st Dept 2006]). The petitioner's claims for false arrest and false imprisonment both accrued on March 25, 2010, which is both the date of the petitioner's alleged arrest and of her release from actual custody (*see Smith v City of New York, supra*; *Bumbury v City of New York*, 62 AD3d 621, 880 NYS2d 44 [1st Dept 2009]; *Bennett v City of New York*, 204 AD2d 587 [2d Dept 1994]; *Sanchez v County of Westchester*, 146 AD2d 620, 536 NYS2d 529 [2d Dept 1989]). The instant application was not made until August 26, 2011, after the statute of limitations for such claims had expired. Accordingly, the Court will not entertain so much of the petitioner's application as seeks

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leave to serve a late notice of claim with respect to these claims (*see Pierson v City of New York, supra; Mahase v Manhattan & Bronx Surface Transit Operating Auth., supra; Hall v City of New York, supra; Bardi v Warren County Sheriff's Dep't, supra*). Likewise, the Court will not entertain so much of the petitioner's application as seeks leave to serve a late notice of claim with respect to the claims for negligent infliction of emotional distress and violation of the New York State constitution as these claims also accrued on March 25, 2010, the date the events giving rise to such claims occurred (*Dinerman v City of New York Admin. for Children's Servs.*, 50 AD3d 1087, 857 NYS2d 221 [2d Dept 2008]; *Avgush v Town of Yorktown*, 303 AD2d 340, 755 NYS2d 647 [2d Dept 2003]; *see also Murray v City of New York*, 283 AD2d 560, 725 NYS2d 73 [2d Dept 2001]; *cf. Dixon v City of New York*, 76 AD3d 1043, 908 NYS2d 433 [2d Dept 2010]) and the instant application was not made until after the statute of limitations for such claims had expired.

The Court is not similarly barred from considering the petitioner's application for leave to serve a late notice of claim with respect to claims for malicious prosecution and abuse of process. The statute of limitations for these claims began to run upon termination of the underlying criminal action on December 1, 2010 (*see 10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.*, 81 AD3d 1366, 916 NYS2d 705 [4th Dept 2011]; *Bumbury v City of New York*, 62 AD3d 621, 880 NYS2d 44 [1st Dept 2009]; *Benyo v Sikorjak*, 50 AD3d 1074, 858 NYS2d 215 [2d Dept 2008]; *Dobies v Brefka*, 263 AD2d 721, 694 NYS2d 499 [3d Dept 1999]) and, thus, had not expired at the time of this application.

Upon consideration, the petitioner's application for leave to file a late notice of claim for malicious prosecution is denied on the ground that such claim is patently without merit (*see Catherine G. v County of Essex, supra; Matter of Day v Greenburgh Eleven Union Free School Dist., supra; Matter of Channel Mar. Sales, Inc. v City of New York, supra*). In order to establish a prima facie case of malicious prosecution, a plaintiff must demonstrate (1) the commencement of a criminal proceeding by defendant against him, (2) the termination of that proceeding in his favor, (3) the absence of probable cause for the proceeding, and (4) actual malice (*see Avgush v Town of Yorktown, supra; De Cicco v Madison County*, 300 AD2d 706, 750 NYS2d 371 [3d Dept 2002]). It is well settled that a dismissal based upon the legal insufficiency of a charging instrument, which occurred here, is not a termination in favor of plaintiff within the context of a malicious prosecution claim (*see Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 912 NYS2d 623 [2d Dept 2010]; *De Cicco v Madison County, supra*).

The petitioner's application for leave to file a late notice of claim for abuse of process is granted. Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of process in a perverted manner to obtain a collateral objective (*see Hudson Val. Mar., Inc. v Town of Cortlandt, supra; Lundgren v Margini*, 30 AD3d 476, 817 NYS2d 349 [2d Dept 2006]; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003]). Based on the evidence presented, which includes the previously filed notice of claim, the petitioner's 50-h hearing testimony, and a report prepared by the Sheriff's Office of Internal Affairs, dated August 11, 2010, with respect to the subject incident, the Court finds that the respondent acquired actual knowledge of the facts constituting this claim within ninety days from its accrual, or a reasonable time thereafter. In addition, the Court finds that the respondent, who did not oppose this motion, is not substantially prejudiced by the delay in its defense.

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The petitioner's application for leave to file a late notice of claim for civil violations in violation of 42 USCA 1983, and other violations of rights under the United States Constitution is denied as academic. A notice of claim is not a condition precedent to a cause of action, asserted pursuant to 42 USCA 1983, which seeks to recover damages premised on violations of federal civil or constitutional rights under color of state law (*see Rowe v Nycpd*, 85 AD3d 1001, 926 NYS2d 121 [2d Dept 2011]).

Submit judgment.



J.S.C.