Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Carlos Castro,

Plaintiff,

- against -

The City of New York,

Defendants.

----------X

Index Number: 10552/12

Motion Date: 11/16/12

Motion Cal. Number: 17

Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion by plaintiff for leave to serve a late notice of claim and for leave to serve the summons and complaint; and cross-motion by defendant for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition to Cross-Motion.....	9-10
Reply.....	11-12

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by plaintiff for leave to file a late notice of claim, pursuant to General Municipal Law §50 (e) (5), and for leave to serve the summons and complaint after the time period prescribed under CPLR 306-b is granted. Cross-motion by the City for summary judgment dismissing the complaint for failure of plaintiff to serve a timely notice of claim pursuant to General Municipal Law §50-e is denied.

Plaintiff, an inmate at Riker's Island Detention Center, was being transported in a NYC Department of Corrections bus to the Queens County Criminal Court on March 3, 2011. Plaintiff alleges that he sustained injuries to his lumbar spine when the bus struck a pothole on the Grand Central Parkway, causing him to be thrown upward from his seat at the rear of the bus and land back down onto the hard plastic seat, causing him to sustain a compression

fracture of his lumbar spine.

Plaintiff did not file a notice of claim. Instead, on March 18, 2011, plaintiff filed a grievance with the Department of Corrections. He states in his handwritten "Grievant's Statement Form", "I am writing this grievance in regards to a complaint due to the improper transportation of Rikers Island Department of Correction. This incident occured (sic) while being transported by Rikers Island GMDC 73 building to Queens Supreme Court, for sentencing on March 3, 2011. I was in the back seat of the bus handcuffed to another inmate by my right hand. The bus driver was speeding on the Grand Central Parkway, traveling eastbound where there is a posted speed limit of 55mph. Due to the bus driver's wreckless (sic) driving, he struck a pothole in the road at a speed well over the posted speed limit. The force of the bus hitting this pothole knocked me out of my seat into the ceiling of the bus. When my rear end landed back into the seat, I felt a severe sharp pain in my lower back. I then screamed for the bus driver to stp (sic) the bus. He told me he cannot stop the bus on the highway, that he can only stop when he reached Queens Court. I asked the driver to stop once more saying that I desperately required medical attention, due to the excruciating pain in my lower back. His response was "I am not taking that as an excuse for missing sentencing your getting sentenced today no matter what!! (sic). I kindly request that proper action be taken in this serious matter. There has been nothing but a lack of concern on the part of Rikers Island, Department of Corrections, please send me a response ASAP so I can know what further action I should take to resolve this matter."

A condition precedent to commencement of a tort action against a municipality or public corporation, is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Therefore, plaintiff was required to serve a notice of claim no later than June 1, 2011.

On May 8, 2012, plaintiff, through his attorney, served upon the City a notice of motion for leave to serve a late notice of claim under Index No. 9848/12, setting the return date of the motion for May 29, 2012. In the interim, plaintiff's counsel filed an RJI and purchased the present Index No. 10552/12, and filed a summons and complaint on May 18, 2012 under this Index Number but never served the summons and complaint. At the calling of the calendar on May 29, 2012, the motion was adjourned to June 5, 2012. On June 5, 2012, the motion was again adjourned to July 3, 2012, and on July 3, 2012, it was once more adjourned to July 24, 2012

and marked "Final" for that date. At the calling of the calendar on July 24, 2012, the motion was marked fully submitted.

At no time did plaintiff's counsel apprise the Court that he had commenced an action under a separate Index Number, no reference was made by plaintiff's counsel in the prior motion to commencement of an action under a different Index Number and the summons and complaint was not annexed to the motion papers. Therefore, pursuant to the order of this Court issued on August 8, 2012, the motion was denied without prejudice upon the ground that there was no action pending at that time and, therefore, plaintiff was required to proceed by way of a special proceeding.

Plaintiff's counsel now moves again, properly, for leave to serve a late notice of claim under Index No. 10552/12. Since there was an action pending, the instant application was properly made by way of notice of motion. Plaintiff also moves for leave to serve the summons and complaint beyond the prescribed deadline for service pursuant to CPLR 306-b.

Pursuant to CPLR 306-b, service of the summons and complaint must be made within 120 days after filing. If service is not effected within the 120-day period, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown, or in the interest of justice, extend the time for service."

Plaintiff's counsel explains in his affirmation in support of the instant motion that he had filed the summons and complaint in order to commence the action prior to the imminent expiration of the statute of limitations, but held back on serving the summons and complaint pending the decision on his motion for leave to serve a late notice of claim, stating that "there seemed to be no purpose in serving it [the summons and complaint] until and unless his application for leave to file a late notice of claim was granted." This Court does not consider such excuse to constitute good cause. However, under the circumstances, it would be in the interest of justice to grant plaintiff leave to serve the summons and complaint, even at this late stage, since plaintiff has shown that the City acquired timely actual knowledge of the facts underlying his claim and that the City has not suffered any prejudice, thus warranting the granting of leave to serve a late notice of claim. The Court also takes into consideration the fact that if plaintiff were not allowed to serve the summons and complaint, and the action were consequently dismissed upon motion by the City, plaintiff would now be time-barred from commencing a new action and from seeking leave to serve a late notice of claim. Therefore, leave to serve the summons and complaint is warranted in the interest of justice.

As to that branch of the motion for leave to serve a late notice of claim, 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 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [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 (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Plaintiff has failed to articulate a reasonable excuse for the delay in serving a notice of claim or making the instant application for leave to serve a late notice of claim. However, the lack of a reasonable excuse for the delay is not, in and of itself, fatal to an application for leave to file a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]).

Plaintiff has demonstrated that the City acquired actual knowledge of the facts underlying the claim within 90 days after the claim accrued or a reasonable time thereafter. Contrary to the argument of the City's counsel that plaintiff did not give sufficient details of the claim in his grievance so as to apprise the City of the essential facts underlying the claim, plaintiff, in his grievance, as heretofore quoted, sets forth sufficient facts as to the date, location and manner in which his claim arose and the nature of his claim so as to have put the City on reasonable notice of plaintiff's claim and to have given the City an adequate opportunity to investigate. Moreover, plaintiff alleges that his injuries were caused by the negligent conduct of a City employee in whose care and custody plaintiff was placed. Actual knowledge of the facts underlying the claim is presumed where municipal employees are personally involved in the acts complained of (see Brownstein v Incorporated Village of Hempstead, 52 AD 3d 507 [2nd Dept 2008]).

Thus, plaintiff has adequately shown that the City acquired actual knowledge of the facts constituting the claim within a reasonable time after the expiration of the 90-day deadline for

filing a notice of claim. Since the City acquired actual knowledge of the facts constituting the claim within a reasonable time by virtue of the fact that its own employee was involved in the allegedly injury-causing event and was apprised of the facts underlying the claim through the timely-filed grievance, plaintiff has met his prima facie burden of demonstrating that the City would not suffer substantial prejudice (see Brownstein v Incorporated Village of Hempstead, supra; Vasquez v. City of Newburgh, 35 AD 3d 621 [2nd Dept 2006]). In opposition, the City has failed to show that it would be prejudiced by the granting of the instant relief.

Accordingly, the motion is granted and the cross-motion is denied. Plaintiff is given leave to serve the summons and complaint and the notice of claim, in the form annexed to the moving papers, within 20 days after entry of this order.

Dated: November 29, 2012

KEVIN J. KERRIGAN, J.S.C.