Wooden v City of New York
2013 NY Slip Op 34093(U)
August 19, 2013
Supreme Court, Queens County
Docket Number: 10968/13
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Unique Wooden, an infantunder the age of 18 years, by his mother and natural guardian, Latasha Wooden,

Petitioner,

- against -

The City of New York, P.O. David Teta [Shield #30870], Sergeant Stanley Xenakis [Shield #2233], P.O. Michael Cohen, and John Doe #1-7, et.al.,

Respondents.

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Index Number: 10968/13

Motion Date: 8/7/13

Motion Cal. Number: 129

Motion Seq. No.: 1

The following papers numbered 1 to 11 read on this petition for leave to serve a late notice of claim.

	Papers Numbered
Order to Show Cause-Petition-Affidavit-Affirmation-Exhibit	1-5
Affirmation in Opposition-Exhibit	6-8
Reply-Exhibits	9-11

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioner for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), is denied.

Infant petitioner allegedly was falsely arrested on March 16, 2012 in proximity to 109-20 Rockaway Beach Boulevard in Queens County and was arraigned and released from custody on March 22, 2012. He also alleges that he was falsely arrested on January 16, 2013 at the intersection of Beach 82nd Street and Rockaway Beach Boulevard. He does not allege, and the record on this petition does not show, that he was detained beyond January 16, 2013.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim 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]). Infant petitioner's cause of action that accrued on March 22, 2012 required his mother, co-petitioner Latasha Wooden, to file a notice of claim no later than June 20, 2012, and his cause of action that accrued on January 16, 2013 required his mother to file a notice of claim no later than April 15, 2013. No notice of claim was filed. The instant order to show cause for leave to file a late notice of claim was served on June 17, 2013, almost one year after the expiration of the 90-day deadline for the March 16, 2012 cause of action, and two months after the expiration of the 90-day deadline for the January 16, 2013 cause of action.

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, foremost of which are 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 Scolo v. Central Islip Union Free School Dist., 40 AD 3d 1104 [2nd Dept 2007]; 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]).

The statute also directs the Court to consider all other relevant factors, including, inter alia, whether the claimant was an infant, which, although listed separately, is related to the inquiry as to whether claimant had a reasonable excuse (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]).

Petitioners have failed to offer a cognizable excuse for their failure to serve respondents within the statutory period, failed to demonstrate that petitioner's infancy was in any way related to the failure to serve a notice of claim, failed to demonstrate that respondents acquired actual knowledge of the facts underlying the claim within 90 days of the incident or a reasonable time thereafter and failed to show that a late notice of claim would not substantially prejudice respondents.

The only excuse proffered in the petition is by infant petitioner in his affidavit in support of the petition stating, "Because of my infancy, I was unable to seek timely legal advice." Such is not a cognizable excuse.

"[P]etitioner's infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse" (Vicari III v. Grand Avenue Middle School, 52 AD 3d 838, 839 [2nd Dept 2008]). Here, no relationship between petitioner's infancy and the failure to file a timely notice of claim has been demonstrated. Since plaintiff is an infant, his own affidavit averring that he could not seek timely legal advice because he is an infant is of no moment. Since he is an infant, responsibility for serving a notice of claim, or seeking legal counsel, on his behalf is upon his guardian, in this case, his mother, Latasha Wooden. No affidavit by Latasha Wooden is annexed to the petition proffering any reason for her failure to serve a timely notice of claim. No argument is made, and no evidence is shown, that she was hampered in any way by her son's infancy from timely filing a notice of claim. Moreover, no excuse is proffered for her failure to serve a notice of claim as to her individual cause of action.

Latasha Wooden annexes, for the first time in her reply, an affidavit averring that she was not able to serve a timely notice of claim on her son's behalf because she was preoccupied with taking care of her newborn infant that had serious medical issues that required her full attention. However, said allegation is unsupported by the affirmation of a physician (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2nd Dept 1994]).

Therefore, petitioners have failed to proffer an acceptable excuse for the delay in filing a notice of claim.

Although 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]), no such additional factors are present in this case.

Petitioners have also failed to demonstrate that respondents acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. The Appellate Division, Second Department has emphasized that in determining whether to grant leave to file a late notice of claim, the acquisition by the municipality of actual knowledge of the facts constituting the claim is a factor that must be given particular consideration (see Hebbard v. Carpenter, 37 AD

3d 538 [2nd Dept 2007]).

Counsel for petitioners contends that respondents acquired actual knowledge of the essential facts underlying infant petitioner's claim because two other individuals who were arrested along with plaintiff on both of the aforementioned dates have filed timely notices of claim.

"What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2nd Dept 1996]; Vicari III v. Grand Avenue Middle School, 2008 NY Slip Op 05938, supra). Counsel cites no authority, and this Court is unaware of any, for the proposition that a notice of claim filed by one individual may constitute actual knowledge of the facts underlying the claim of another individual.

Therefore, petitioner has failed to establish that respondents acquired actual knowledge of the essential facts constituting the claim, which are those facts supporting petitioner's theory of liability.

No other factor is proffered by petitioner's counsel that would militate in favor of granting leave to serve a late notice of claim. Counsel's only other argument is that petitioner is entitled to the benefit of the infancy toll pursuant to CPLR 208. However, said argument is nonsequitur. It is well-established that although infancy operates as a disability to toll the one year and 90-day statute of limitations for commencing an action against a municipality, pursuant to General Municipal Law §50-i (see Henry v. City of New York, 94 NY 2d 275 [1999]), it does not serve to toll the time within which a notice of claim must be served, pursuant to General Municipal Law §50-e (see Cotten v. County of Nassau, 307 AD 2d 965 [2nd Dept 2003]; Harris v. City of New York, 297 AD 2d 473 [1st Dept 2002]).

Finally, since petitioners' counsel's contention that respondents would not be prejudiced by a late filing of a notice of claim is based upon the unmeritorious argument that respondents acquired timely actual knowledge of the facts underlying petitioners' claim, petitioners have failed to meet their burden of establishing that respondents would not suffer prejudice if a late notice of claim were allowed (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138, supra).

In any event, it would be error for the Court to reach the statutory factor of prejudice where petitioners have failed to

demonstrate either that there was a reasonable excuse for their failure to timely file a notice of claim or that respondents acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

Accordingly the application is denied and the petition is dismissed. Respondents may enter judgment accordingly.

The Court notes that although the proposed notice of claim includes a claim for violation of Constitutional rights, such claims are not subject to the notice of claim requirement under General Municipal Law §50-e.

Dated: August 19, 2013

KEVIN J. KERRIGAN, J.S.C.

FILED

AUG 21 2013

COUNTY CLERK
QUEENS COUNTY