SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5
Justice

Emily Ines

- v -

City of NY

INDEX NO. 153017/13

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8-5-13
AUG 05 2013

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

EUDY JOSE TORRES,

Petitioner,

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICER JOHN DOE,

Respondents.

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DECISION/ORDER
Index No. 153017/2013
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	1-3
ANSWERING AFFIDAVITS	4
REPLYING AFFIDAVITS	
EXHIBITS	
OTHER	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner moves, via Order To Show Cause, for an Order permitting him to serve and file a late Notice of Claim *nunc pro tunc* upon respondents, pursuant to General Municipal Law§ 50-e. Respondents oppose.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** petitioner's O.S.C.

Factual and procedural background:

Petitioner alleges that on July 28, 2012 at approximately 9:00 pm, he was in the lobby of

1428 5th Avenue, a residential apartment building in New York County. He was there for the sole purpose of visiting his friend, Jonathan Barrow, when several police officers approached him and accused him of trespassing. Petitioner informed the officers that he was merely visiting his friend who resided in Apartment 411, however, they ignored him. Immediately after petitioner was stopped, Mr. Barrow came to the lobby and explained to the officers that petitioner was there to visit him and thus, had permission to be inside the building. Mr. Barrow also showed the officers his identification. Nevertheless, the officers handcuffed petitioner and placed him under arrest.

Petitioner was then transported to the local precinct where he was fingerprinted and photographed. His personal property was confiscated and he was placed in a cell. He remained in Central Booking until July 29, 2012 at 11:00 pm, when he was finally arraigned, and subsequently released on his own recognizance. He was required to return to court on two occasions, before his case was finally dismissed on November 8, 2012. Petitioner asserts that after the dismissal, "nobody informed [him] that [he] had a right to bring an action against the City and the NYPD. If he had known this about this right, [he], at the very least, would have spoken to an attorney regardless of the fact that he was concerned, scared and fearful of retaliation by the police." (See O.S.C. p.5¶ 11). Petitioner adamantly asserts that he has a meritorious cause of action in that he did nothing illegal or improper to warrant being arrested.

Positions of the parties:

Petitioner asserts that his request for leave to file a late notice of claim should be granted as leave is sought within one year and ninety days of accrual of his claim. He argues that his ignorance of the ability to bring a claim against the NYPD is a reasonable excuse for failing to serve the Notice of Claim within the statutorily mandated 90 days from the accrual of the subject incident. Petitioner also argues that respondents would not be prejudiced by the granting of his O.S.C., in that they

acquired actual notice of the essential facts of his claim within the statutory time period from filed reports of members of the NYPD who participated in the underlying acts giving rise to the instant claim.

Petitioner also argues that even if respondents did not have notice of the essential facts, they still obtained notice within a reasonable time thereafter. He asserts that his criminal case was dismissed on November 8, 2012. Thus, the 90 days for his claim of malicious prosecution began to run on that day. Since his proposed Notice of Claim was filed on November 28, 2012, it was timely with regard to this particular cause of action. Additionally, petitioner argues that his claim for false imprisonment began to run at the time he was released from detention, which was on or about July 29, 2012. He argues that despite the fact that his Notice of Claim filed on November 28, 2012 was one month late, this delay was nevertheless, "reasonable."

Respondents argue that despite the fact that petitioner alleges that he was arrested July 28. 2012 and "remained at Central Booking until July 29, 2012 at 11 pm," (*id.* at ¶ 6), and his case was dismissed on November 8, 2012 (*id.* at ¶ 6), he provides absolutely no physical proof of the alleged accrual dates of his claims. Nor, has he provided any documentation regarding the disposition of his case. Respondents also argue that while petitioner's Notice of Claim appears to have been marked "Received" by the City on or about November 28, 2012, he still waited approximately five months later to make the instant O.S.C. Respondents also emphasize that petitioner's attorney makes no effort to explain this added 140 day delay. Respondents also argue that while courts are afforded broad discretion in deciding whether to grant a late Notice of claim, said discretion ends with the expiration of the one year and ninety day statute of limitations period.

Respondents further argue that petitioner has failed to sufficiently comply with the criteria promulgated by GML§ 50-a . First, they argue that petitioner's professed ignorance of the law or

statutory limitations for filing a Notice of Claim is not recognized as constituting a reasonable excuse. Respondents also argue that despite petitioner's conclusory assertion that they will not be prejudiced by his delay, he neglects to prove that they actually possessed actual knowledge of the essential facts constituting his claims. Therefore, his claim of lack of prejudice is seriously undermined. Respondents additionally argue that they must have actual knowledge of the essential facts of the claim, and not merely knowledge of the occurrence, in order to conduct a sufficient investigation. Respondents also argue that the complaint against the NYPD necessitates dismissal because inasmuch as it is an agency of the City of New York, it is not amenable to suit.

Finally, respondents request that if the Court is inclined to grant the instant petition, that it directs petitioner to serve his notice of claim upon the City Comptroller along with the instant decision/order so as to facilitate the matter.

Conclusions of law:

It is well settled that in order to commence a tort action against a municipality, the claimant is required to serve a Notice of Claim within 90 days of the alleged injury (see GML§ 50-e(1)(a); *Jordan v. City of New York*, 41 A.D.3d 658, 659 [2d Dept. 2007]). The filing of a Notice of Claim is a condition precedent without which an action against a municipal entity is barred.

However, GML§ 50-e(5) confers upon a court discretion to determine whether to permit the filing a late Notice of Claim. In making this determination, the court must consider the factors set forth in said statute, which include: (1) an explanation for the delay in filing a timely Notice of Claim; (2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days or a reasonable time thereafter; (3) whether the late filing has substantially prejudiced the entity's ability to investigate and defend against the claim (see GML§50-e(5); *William v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 [2006], *Bazile v. City of New York*, 94

A.D.3d 929, 929-930 [2d Dept. 2012]; *Goldstein v. Clarkstown Cent. School Dist.*, 208 A.D.2d 537 [2d Dept.1994], *lv denied* 85 N.Y.2d 810 [1995]; *Plaza v. New York Health & Hosps.* Corp., Jacobi Medical Center, 97 A.D.3d 466 [1st Dept. 2012]; *Seif v. City of New York*, 218 A.D.2d 595 [1st Dept. 1995]; *Acosta v. City of New York*, 39 A.D.3d 629 [2d Dept. 2007]). While the court has discretion in determining these motions, the statute is remedial in nature and as such, should be liberally construed (see *Camacho v. City of New York*, 187 A.D.2d 262 [1st Dept. 1992]).

"However, whether the public corporation acquired timely knowledge of the essential facts constituting the claim is seen as a 'factor which should be afforded great weight' " (Matter of *Dell'Italia v. Long Is. R.R. Corp.*, 31 A.D.3d 758,759 [2d Dept. 2006], quoting *Matter of Morris v. County of Suffolk*, 88 A.D.2d 956, 956 [2d Dept. 1982], *affd* 58 N.Y.2d 767 [1982]). Indeed, actual knowledge of the essential facts of the claim must have been acquired by the City, not just knowledge of the occurrence (see *Matter of Santopietro v. City of New York*, 50 A.D.3d 390 [1st Dept. 2008]; *Chattergoon v. New York City Hous. Auth.*, 197 A.D.2d 397 [1st Dept. 1993]; *affd* 78 N.Y.2d 958 [1993]). "Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by such a delay" (*Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 539 [2006]; see also *Jordan v. City of New York*, 41 A.D.3d 658 [2d Dept. 2007]).

The First Department has specifically addressed the issues of what constitutes"actual knowledge," of the essential facts, and also if actual knowledge possessed by the police can be imputed to the City, and has rendered conflicting decisions. In *Evans v. New York City Hous. Auth.*, 176 A.D.2d 221[1st Dept. 1991], *lv denied* 79 N.Y.2d 754 [1992], the Supreme Court had granted leave to serve a late notice of claim, holding that the existence of a police aided report indicated that the Authority had actual knowledge of essential facts underlying the crime of rape. The Appellate

Division, First Department, reversed, noting that nothing in the aided report connected the rape with a defective lock or lack of security which was the basis of that petitioner's notice of claim. In *Chattergoon v. New York City Hous. Auth.*, supra, a majority of the Appellate Division, First Department, held that a police investigation of the homicide of petitioner's decedent did not give actual knowledge to the Housing Authority, since the police investigation was dedicated to locating the murderer and not toward defending any claim of negligence related to the Housing Authority.

The case of *Matter of Schiffman v. City of New York*, 19 A.D.3d 206 [1st Dept. 2005], (proffered as support by the instant petitioner), involved the actions of the police in response to an alleged assault and ensuing civilian struggle. As such, that court held that the City acquired notice of the essential facts based on the fact that the police called to the scene were directly involved in all aspects of the claims emanating from the death of that petitioner's decedent. The Appellate Division held that since such knowledge was documented in the individual officers' memo books and official Police Department reports, it was imputed to respondent municipality (see also *Johnson v. New York City Tr. Auth.*, 278 A.D.2d 83 [1st Dept. 2000]; *Miranda v. New York City Tr. Auth.*, 262 A.D.2d 199 [1st Dept. 1999]). As such, respondent was not prejudiced by the delay in filing the notice of claim.

The court in *Matter of Ragland v. New York City Hous. Auth.*, 201 A.D.2d 7 [2d Dept. 1994], found that "actual knowledge has been found to exist when there are other factors in addition to the existence of an accident or aided report. A factor of considerable significance in this regard arises when it is the acts of the police which give rise to the very claim set forth in the proposed notice" (*id.* at 9); see also *Tatum v. City of New York*, 161 A.D.2d 580 [2d Dept. 1990], [false imprisonment and malicious prosecution], *lv denied* 76 N.Y.2d 709 [1990]; *McKenna v. City of New York*, 154 A.D.2d 655 [2d Dept. 1998], [false arrest and imprisonment]; *Montalto v. Town of Harrison*, 151

A.D.2d 652 [2d Dept. 1989], [false arrest and imprisonment and malicious prosecution]; *Matter of Reisse v. County of Nassau*, 141 A.D.2d 649 [2d Dept. 1988], [false arrest and imprisonment, malicious prosecution, violation of civil rights); *Matter of Mazzilli v. City of New York*, 115 A.D.2d 604 [2d Dept. 1985], [assault]). "Where, as here, members of the municipality's police department participate in the acts giving rise to the claim, and reports and complaints have been filed by the police, the municipality will be held to have actual notice of the essential facts of the claim. Since the reason for the early filing of a notice of claim is to permit the public corporation to conduct a prompt investigation into the facts and circumstances giving rise to the claim, the existence of reports in its own files concerning those facts and circumstances is the functional equivalent of an investigation." (*Id.* at 11).

Similarly, in the case at bar, since the police were directly involved in the incident, from the initial stop and questioning to the actual arrest, it seems more than plausible that they filled out various documents detailing this event, in the form of *inter alia*, arrest reports, memo book entries, UF-61 reports, as well as signed affidavits necessary to corroborate a criminal court misdemeanor complaint. Therefore, it is also more than plausible to assume that the City would have access to said documentation, thereby providing it with actual notice of the essential facts of petitioner's claim. The City's contention that petitioner has not provided any authorizations enabling it to obtain the necessary police records from the NYPD or unsealing orders to access the sealed criminal court file, is of no consequence, in that these can be obtained during the discovery process that is expected to occur after the rendering of the instant decision/order.

Moreover, while the Court agrees that ignorance of the law is not a valid excuse for failure to serve a timely notice of claim, (see *Alper v. City of New York*, 228 A.D.2d 390 [1st Dept. 1996]; *Landa v. City of New York*, 252 A.D.2d 525 [2d Dept. 1998], it is well settled that the presence or

absence of any of the aforementioned three factors is not necessarily determinative, and the absence of a reasonable excuse for the delay is not necessarily fatal (see *Matter of Dell'Italia v. Long Is. R.R. Corp.*, 31 A.D.3d at 759; *Matter of Chambers v. Nassau City Health Care Corp.*, 50 A.D.3d 1134 [2d Dept. 2008]; *Nardi v. County of Nassau*, 18 A.D.3d 520 [2d Dept. 2005]).

The Court notes that although it is beyond the 90 day period, this application is still well within the one year and ninety day period during which courts are afforded broad discretion in deciding whether or not, to grant the filing of a late Notice of Claim. Furthermore, respondents' argument that inasmuch as the NYPD is an agency of the City of New York and cannot be sued independently, is premature at this juncture, since it cannot be determined with any semblance of certainty if petitioner intends to pursue a 42 U.S.C.§ 1983 claim.

Therefore, in accordance with the foregoing, it is hereby

ADJUDGED that petitioner is granted leave to serve and file a late notice of claim *nunc pro tunc* upon respondents; and it is further

ORDERED that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 5, 2013

AUG 0 5 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT