Matter of Pinkett v City of New York
2014 NY Slip Op 30083(U)
January 13, 2014
Sup Ct, New York County
Docket Number: 158266/2013
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____ **PART** ✓
Justice

Index Number : 158266/2013
PINKETT, EDWARDO
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LATE SERVE NOTICE OF CLAIM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: JAN 13 2014

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

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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In the Matter of the Application of

EDWARD PINKETT,

Petitioner,

for Leave to file a late Notice of Claim,

- against -

THE CITY OF NEW YORK,

Respondent.

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DECISION/ORDER
Index No. 158266/2013
Seq. No. 001

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.....	1,2.(Exs A, B)
AFFIRMATIONS IN OPPOSITION.....	.....
REPLYING AFFIRMATION.....	.....
OTHER.....	.....

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

Petitioner moves, via Petition, for an Order permitting him to serve and file a late Notice of Claim *nunc pro tunc* upon respondent The City of New York (hereinafter "the City") pursuant to General Municipal Law § 50-e (5). The City does not oppose the motion. After a review of the papers presented, all relevant statutes and case law, the Court **grants** the petition.

Factual Background

Petitioner Edwardo Pinkett alleges that, on April 4, 2013, he was walking on Park Avenue, between 114th and 115th Streets, New York, New York when he slipped on a banana,

which caused the crowbar he was holding to fly out of his hand, breaking the window of a car parked on the street. On that date, at approximately 3:30 p.m., the Petitioner alleges that he was assaulted by Police Officers George Annareuva, Badge Number 13728, and Police Officer Nelson Quinones, Badge Number 6999, of the 23rd Precinct. As a result of this assault, Petitioner allegedly suffered serious injuries including, but not limited to, a hallux sesamoid fracture of the left foot. Petitioner alleges that the aforementioned assault and his injuries were caused by the negligence of the City, its employees, servants, and agents, including Police Officers Annereuva and Quinones.[1]

Positions of the Petitioner

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. Pursuant to GML § 50-e (5), an application to file a late notice of claim must be made within the applicable statute of limitations for the commencement of an action by the claimant against the municipality, and the statute of limitations for an action based on negligence is one year and ninety days. *See* GML § 50-i (l). Since Petitioner's cause of action accrued on April 4, 2013, the instant petition is timely, having been brought prior to July 2, 2014, the date on which the statute of limitations for initiating a negligence claim against the City in this matter will expire. Petitioner argues that "[T]he only legitimate purpose served by [section] 50-e is to protect the public corporation against spurious claims and to assure it an adequate opportunity...to explore the merits of the claim while information is still readily available. *Gerzel v City of New York,* 117 A.D.2d 549 (1st

[1]A copy of Petitioner's Affidavit of Merit, dated August 12, 2013, was annexed as Exhibit "A" to his Petition.

Dept. 1986), *quoting Teresta v City of New York*, 304 N.Y. 440, 443 (1952)" (*internal quotation marks omitted*).

Petitioner asserts that, in determining whether to grant an extension of time, GML §50-e (5) provides that "the court shall consider, in particular, whether the public corporation...acquired actual knowledge of the essential facts constituting the claim within ...[90 days of its occurrence] or within a reasonable time thereafter." Relying on *Santana v Western Regional Off-Track Betting Corp.*, 2 A.D.3d 1304 (4th Dept. 2003) and *McKenna v. Citv of New York*, 154 A.D.2d 655 (2nd Dept. 1989), Petitioner further argues that the Appellate Division has consistently held that, whether or not the public corporation or those acting for it acquired actual knowledge of the essential facts of the claim is a factor that should be accorded "great weight." Citing *Heiman v Citv of New York*, 85 A.D.2d 25 ,28 (1st Dept 1982), Petitioner further asserts that this factor is "central" to the application of GML § 50-e(5).

In addition, Petitioner argues that, in this case, the City had actual knowledge of the essential facts of his claim on the day he was assaulted since the allegedly wrongful conduct was committed by its own employees. Petitioner, citing *Toro v New York City Hous. Auth.*, 182 A.D.2d 358 (1st Dept. 1992), *McKenna v. City of New York, supra,* and *Goodall v City of New York,* 179 A.D.2d 481 (1st Dept. 1992), asserts that Courts have consistently held that, where respondent's employees participated in the acts giving rise to a petitioner's claim, and where reports containing the facts essential to the petitioner's claim had been filed by a municipal respondent's employees, sufficient basis to allow the filing of a late notice of claim exists.

Petitioner also argues that GML § 50-e (5) directs the Court to "consider all other relevant facts and circumstances, including...whether the delay in serving the notice of claim substantially

prejudiced the public corporation in maintaining its defense on the merits" and that allowing the filing of a late notice of claim in this matter will not substantially prejudice the City.

Petitioner also maintains that the City's ability to defend on the merits would not be substantially prejudiced if he were permitted to file a late notice of claim since the information available to the City with regard to the essential facts of the claim would have been substantially the same as that which is now available. He notes that, in *Beary v Citv of Rye,* 44 N.Y.2d 398, 412 (1978), the Court of Appeals held that "...when a public body has had no formal alert that a claim in fact will be brought, actual knowledge of the facts within 90 days or shortly thereafter makes it unlikely that prejudice will flow from a delay in filing..." Petitioner argues that the City has in its possession all incident reports and investigative documents regarding the incident. Relying on *McKenna v City of New York, supra* and *Haynes v City of New York,* 100 A.D.2d 572 (2nd Dept. 1984), he asserts that these documents, in addition to giving actual notice and knowledge of the essential facts of the claim, can be used to restore any diminished memories of personnel involved in the aforementioned incident and aid in its ability to investigate and defend. Therefore, as a practical matter, claims Petitioner, allowing him to serve a late notice of claim places the City in the same position it would have been in if he had filed a timely notice of claim.

Finally, petitioner asserts that he failed to file a timely notice of claim because he was unaware of the requirement to do so and because he could not retain counsel since he was incarcerated. While he concedes that this is not an acceptable excuse for his failure to file in a timely fashion, he reiterates that the City was not prejudiced his delay in filing because it had notice of all of the relevant facts.

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 AD3d 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.

Despite the foregoing, GML § 50-e (5) confers upon a court the discretion to determine whether to permit the filing of a late notice of claim. In making this determination, the court must consider the factors set forth in the 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; and (3) whether the late filing has substantially prejudiced the entity's ability to investigate and defend against the claim. *See* GML §50-e (5); *Williams v Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006), *Plaza v New York Health & Hosps. Corp.*, 97 A.D.3d 466 (1st Dept. 2012); *Bazile v City of New York*, 94 A.D.3d 929, 929-930 (2d Dept. 2012); *Acosta v City of New York*, 39 A.D.3d 629 (2d Dept. 2007); *Seif v City of New York*, 218 A.D.2d 595 (1st Dept. 1995); *Goldstein v Clarkstown Cent. School Dist.*, 208 A.D.2d 537 (2d Dept.1994), *lv denied* 85 N.Y.2d 810 (1995). 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 (2d Dept. 1982), *affd* 58 N.Y.2d 767 (1982). Indeed, actual

knowledge of the essential facts of the claim, not just knowledge of the occurrence, must have been acquired by the City. *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., supra* at 539; *see also Jordan v. City of New York, supra, at* 659.

The Appellate Division, First Department has specifically addressed the issues of what constitutes"actual knowledge" of the essential facts, and also whether 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 respondent had actual knowledge of essential facts underlying the crime of rape. The 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 First Department held that a police investigation of the homicide of petitioner's decedent did not give actual knowledge to the respondent, since the police investigation was dedicated to locating the murderer and not toward defending any claim of negligence related to the respondent.

Matter of Schiffman v City of New York, 19 A.D.3d 206 (1st Dept. 2005), involved the actions of the police in response to an alleged assault and ensuing civilian struggle. In that case, the First Department 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 court further held that, since such knowledge was documented in the individual officers' memo books and official Police Department reports, it was imputed to the 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). Thus, held the First Department, the respondents in these matters were not prejudiced by any delay in the 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), *lv denied* 76 N.Y.2d 709 (1990) (false imprisonment and malicious prosecution); *McKenna v. City of New York, supra* (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." *Ragland*, 201 AD2d, *supra*

at 11.

Since the police in this case were directly involved in the incident, from the initial stop and questioning until 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 the said documentation, thereby providing it with actual notice of the essential facts of petitioner's claim.

Moreover, while the Court agrees that ignorance of the law is not a valid excuse for a failure to serve a timely notice of claim (*see Landa v City of New York*, 252 A.D.2d 525 [2d Dept. 1998]; *Alper v City of New York*, 228 A.D.2d 390 [1st Dept. 1996]), it is well settled that the presence or absence of any of the aforementioned 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., supra* at 759; *Matter of Chambers v. Nassau Co. 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 the Petition herein has been brought beyond the 90 day period set forth in GML 50-e(1)(a), it was still filed 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. *See* GML § 50-e (5).

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 respondent; 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: January 13, 2014

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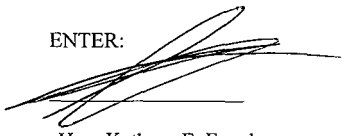

JAN 13 2014

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