

**Ferreira v City of New York**

2019 NY Slip Op 31122(U)

April 16, 2019

Supreme Court, New York County

Docket Number: 152728/2019

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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INDEX NO. 152728/2019

ULICE FERREIRA,

MOTION DATE 04/10/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, CHRISTOPHER MCGEE, ARROWCARS LTD, VALERIE CIAMPA

DECISION AND ORDER

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19

were read on this motion to/for LEAVE TO FILE

Petitioner moves this court pursuant to General Municipal Law (GML) § 50-(e) seeking leave to file a late notice of claim for injuries allegedly sustained when petitioner was a passenger in a vehicle, operated by a member of the New York City Police Department, that was rear ended by another vehicle.

Respondents, the City of New York, New York City Police Department and Christopher McGee, oppose the instant motion.

Legal Standard

It is well settled law that granting a petition to file a late notice of claim is discretionary. GML § 50-e (5), which pertains specifically to an application to file a late notice of claim, states in pertinent part that, "Upon application, the court, in its discretion, may extend the time to serve a notice of claim... [and] the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time period specified... or within a reasonable time thereafter. The court

shall also 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.”

Additionally, it is well settled that courts consider “whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame.”

(see *GML § 50-e [5]*). The presence or absence of any one factor is not determinative.

(*Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], quoting *Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003].)

Specifically, the failure to assert a reasonable excuse, alone, is not fatal to the application.

*Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, citing (*Ansong v City of NY*, 308 AD2d 333 [1st Dept 2003].)

#### Actual Knowledge

In the context of *GML § 50-e*, "actual knowledge" means that the respondent acquired knowledge of the essential facts forming the basis of the claim, not simply knowledge of the occurrence of an accident. *Kim v City of New York*, 256 AD2d 83 [1st Dept 1998], app. Denied, 93 NY29 896 [1999]. Petitioner has the burden of establishing this element. *Washington v City of New York*, 72 NY2d 881 [1988].

It is undisputed that the petitioner was in the custody of members of the New York City Police Department when he was being transported in a vehicle that was rear ended by another vehicle. Petitioner’s affidavit indicated he was in an awkward position and that he suffered injury as a result of being in such a position. He also alleges that he complained of injury but was not given aid.

The City asserts that the it was not on notice of any negligence on behalf of the City driver or any member of the New York City Police Department.

The Court finds that the City did not obtain actual knowledge of the essential facts constituting petitioners claim. Notably, petitioner was not listed as an injured party on the police accident report of the subject incident. Furthermore, even if petitioner was noted to have been injured in the accident report, courts have found that even where an injury report was filed, “it did not constitute notice of an intention to file a civil lawsuit based on claims of negligence or intentional torts.” *Matter of Virella v City of NY*, 137 AD3d 705 [1st Dept 2016], citing *Zapata v NY City Hous. Auth.*, 115 AD3d 606 [1st Dept 2014] and *Matter of Rivera v NY City Hous. Auth.*, 25 AD3d 450 [1st Dept 2006]. The City must have notice or knowledge of the specific claim and not general knowledge that a wrong was committed. *Matter of Virella v City of NY*, citing *Sica v Bd. of Educ.*, 226 AD2d 542 [2d Dept 1996]. This appears especially true in the context of this case, where it was reasonable for the City to assume that any wrongdoing would be found on the part of the offending rear-ending driver, and not on the part of the City.

Prejudice

The burden initially rests on the petitioner to show that a late notice of claim will not substantially prejudice the public corporation. *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016].

The petitioner alleges that there is a lack of prejudice on behalf of the City from the late notice of claim. Petitioner asserts that based on his allegation that the City had actual knowledge of the claim there can be no prejudice to the City. The Court rejects that argument for the reasons it rejects that the City had actual knowledge of the claim.

Petitioner's alleged injuries occurred on December 18, 2017. Petitioner had until March 19, 2018 to file a timely notice of claim. Instead, petitioner delayed until March 15, 2019<sup>1</sup> to make the instant application, 3 days shy of the expiration of the statute of limitations. This substantial delay will indeed prejudice the municipal defendants, as shorter periods of delay have been deemed to be prejudicial. ("delay of approximately seven months prejudiced respondent's ability to investigate..., identify witnesses, and collect their testimony based on fresh memories.") *Arias v New York City Hous. Auth.*, 40 A.D.3d 298, [1st Dept 2007]; *Rivera v New York City Hous. Auth.*, 25 A.D.3d 450, 451 [1st Dept 2006]; *Matter of Rodriguez v City of NY*, 168 AD3d 481, 481 [1st Dept 2019]).

The plaintiff also argues that a no-fault claim was made as a result of the subject car crash. It is this Court's position, however, that such an argument works against the petitioner's position, as the City could have reasonably believed, upon the filing of a no-fault claim but not a notice of claim, that the petitioner was not going to be seeking any damages in tort against the City.

#### Reasonable Excuse

Petitioner states that he has a reasonable excuse for his delay in filing a notice of claim and does not address that point further in his petition. During oral argument, petitioner informed the Court that "law office failure", was the reason for this late filing. While the Court is aware and sympathetic that "law office failure" occurs, without further detail on the issue, the Court cannot credit this argument.

#### Conclusion

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<sup>1</sup> The Court notes that petitioner filed a summons and complaint on March 14, 2019, it is unclear why petitioner waited an extra day to file the instant application.

Here, the petition fails to demonstrate that the City acquired actual knowledge of the essential facts constituting petitioner's claim and that the City will not be prejudiced by petitioner's delay. This, coupled with the absence of any proffered excuse for the delay, is insufficient to warrant a basis upon which to grant the instant application. As such it is hereby,

ORDERED that the application for leave to file a late notice of claim is denied and the petition is dismissed.

This constitutes the decision and order of the Court.

4/16/2019  
DATE

  
LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**HON. LYLE E. FRANK  
J.S.C.**