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| Acosta v Markowski |
| 2019 NY Slip Op 31421(U) |
| May 21, 2019 |
| Supreme Court, Kings County |
| Docket Number: 509044/2019 |
| Judge: Reginald A. Boddie |
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At I.A.S. Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 21st day of May 2019.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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GETULIO ACOSTA,

Plaintiff,

Index No. 509044/2019
Cal. No. 1

-against-

DECISION AND ORDER

DET. STEPHEN MARKOWSKI, DET. KENNETH
ANDERSON, DET. GREGORY HERNANDEZ and
THE CITY OF NEW YORK,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Pl. Order to Show Cause & Annexed Affirmation/Affidavits | 1-2 |
| Df. Affirmation in Opposition | 3 |
| Pl. Reply | 4 |

Upon the foregoing cited papers, and after oral argument, the decision and order on plaintiff's order to show cause seeking leave to deem the notice of claim served on the City of New York timely *nunc pro tunc*, pursuant to General Municipal Law § 50-e [5], is as follows:

Plaintiff's claims for false arrest, false imprisonment, malicious prosecution, civil rights violations and personal injuries arise from his arrest on August 21, 2014. Plaintiff was exonerated by a jury on February 1, 2018, and served a late notice of claim on the City on December 20, 2018. Plaintiff now seeks leave to deem the late notice of claim timely served *nunc pro tunc* and compel the City to accept service.

Service of a notice of claim within 90 days of the accrual of the claim is a condition precedent to the commencement of a tort action against the City (*see* General Municipal Law § 50-e [1] [a]). In considering whether to exercise its discretion to extend plaintiff's time to serve a notice of claim, the court shall consider whether the City acquired actual knowledge of the essential facts constituting the claim within the 90-day statutory period or a reasonable time thereafter, the excuse for the delay, and whether the delay in serving the notice of claim substantially prejudiced the City in maintaining its defense on the merits (*see* General Municipal Law § 50-e [5]).

Petitioner contends actual knowledge of the facts constituting his claims was imputed to the City because defendant police officers coerced him to make false statements relating to the crime he was accused of and the coerced statement served as the basis for his arrest. "Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim [absent other factors]" (*Matter of Irizarry v City of New York*, 25 Misc 3d 1218[A], 2009 NY Slip Op 52169[U], *3 [Sup Ct, Kings Co 2009], quoting *Caselli v City of New York*, 105 AD2d 251 [2d Dept 1994]). Here, plaintiff failed to demonstrate there were "other factors" which imputed the City with actual knowledge (*cf. Ragland v New York City Housing Authority*, 201 AD2d 7 [2d Dept 1994]; *Tatum v City of New York*, 161AD2d 580 [2d Dept 1990]; *McKenna v City of New York*, 154 AD2d 655 [2d Dept 1990]; *Matter of Reisse v County of Nassau*, 141 AD2d 649 [2d Dept 1988]).

Petitioner averred there were voluminous documents created in connection with the investigation and prosecution, including a report that contained the allegedly coerced statements.

However, only the statement was attached and it cannot be determined which portions were allegedly coerced. Moreover, plaintiff alleged he was arrested without probable cause or a warrant, yet his acquittal after jury trial implies there was an indictment. Plaintiff's affidavit in support makes conclusory allegations as to the impropriety of his arrest, confinement and prosecution, but does not establish the existence of factors which would impute knowledge of the basis of plaintiff's claims to the City. Therefore, plaintiff failed to establish the City had actual notice of the essential facts which constitute his claims.

Plaintiff further argued there is no prejudice to the City because the City, through the District Attorney's office, investigated the facts and circumstances of plaintiff's arrest and prosecution. Plaintiff averred these are the same facts that gave rise to plaintiff's instant claims. The City argued plaintiff failed to demonstrate that plaintiff's claims of coercion were investigated or how the passage of time and fading of memories would not be prejudicial to the City in maintaining its defense on the merits. The Court agrees (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 456 [2016]). Moreover, plaintiff also claimed he suffered personal injuries when he was deprived of medical treatment while in custody, but failed to address how the City had actual notice of these claims or how the City would not be prejudiced.

It is well settled that ignorance of the law does not constitute a reasonable excuse for the delay (*Matter of Hampson v Connetquot Cent. Sch. Dist.*, 114 AD3d 790, 791 [2d Dept 2014]). Here, plaintiff avers the delay was due to his ignorance of the law, which does not constitute a reasonable excuse under the law. The lack of a reasonable excuse is not necessarily dispositive if there is actual notice and no substantial prejudice to the City (*Matter of Leon v New York City*

Health & Hosps. Corp., 163 AD3d 670, 672 [2d Dept 2018]). Here, however, plaintiff has failed to establish the City had actual notice or would not be substantially prejudiced by the delay. Accordingly, plaintiff's order to show cause is denied.

E N T E R:



Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.