

Abi-Saab v City of New York

2020 NY Slip Op 33189(U)

September 29, 2020

Supreme Court, New York County

Docket Number: 151554/2020

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

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

Justice

-----X

INDEX NO. 151554/2020

RAMZY ABI-SAAB,

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT

**AMENDED DECISION + ORDER
ON MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for ORDER/JUDGMENT NUNC PRO TUNC.

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 as a result of being struck by a motor vehicle on November 15, 2018. Respondents oppose the instant petition.

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." The burden rests on petitioner to establish lack of prejudice. If petitioner

satisfies its burden, the burden then shifts to the respondent to show that they are substantially prejudiced by the late service. (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016])

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].)

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].

The petition is silent as to the reason for the delay; while this alone is not fatal, petitioner does not satisfy its burden with respect to the other factors. The petition does not establish that respondents had actual knowledge of the *claim* within 90 days or a reasonable time thereafter. The petition attempts to impute respondents with actual knowledge of the incident, based on the law enforcement response and subsequent prosecution; however, this is insufficient to establish that respondents had actual knowledge of petitioner’s claim. As noted below, plaintiff’s only potentially cognizable claim is that of exacerbation of the injuries by the action and/or inaction

of the police officers involved. That the respondent knew of this crash does not provide notice of a claim of exacerbation of injury. The respondent would only have learned about this theory through filing of this application, which occurred nearly one year after the conclusion of the applicable ninety-day period.

Moreover, petitioner does not establish that respondents will not be prejudiced by the delay. Petitioner's conclusory allegation that respondents cannot establish that prejudice exists, is inaccurate application of the standard and improper burden shifting. Accordingly, petitioner has not met its burden with respect to any of standards delineated in GML § 50-e. Moreover, the Court agrees with respondents that there is no cognizable cause of action against respondents. There is no cause of action for negligent investigation, nor may the City of New York (the "City") be held liable here for the actions that allegedly occurred where the City employee was off duty.

In reply, petitioner argues that it is not the actions of the off-duty officer for which it seeks to hold respondents liable, rather it is the City's failure to investigate and promptly provide petitioner medical care. However, the underlying petition contradicts that contention and asserts that the basis of the claim is within the criminal complaint of the off-duty officer. Moreover, as stated above, petitioner has failed to demonstrate that respondents have actual knowledge of the facts underlying the petitioner's **claim** as petitioner is silent as to this factor, rather petitioner relies on the police accident report to impute knowledge of the occurrence. Additionally, as the City points out in its sur reply, petitioner's proposed notice of claim is silent as to the new theory raised in its reply papers. Petitioner also fails to demonstrate a lack of prejudice and to demonstrate a reasonable excuse for this petition being filed nearly one year after the applicable ninety-day period has run. Accordingly, it is hereby

ADJUDGED, that the petition to serve a late notice of claim is DENIED.

9/29/2020
DATE


LYLE E. FRANK, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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HON. LYLE E. FRANK
J.S.C.