

Orozco v City of New York

2020 NY Slip Op 33383(U)

October 14, 2020

Supreme Court, New York County

Docket Number: 155631/2020

Judge: Dakota D. Ramseur

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

PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5

Justice

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INDEX NO. 155631/2020

ADAN OROZCO,
Petitioner,

MOTION DATE 10/13/20

- v -

MOTION SEQ. NO. 001

CITY OF NEW YORK,
Respondent.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number, were considered on this petition/order to show cause for leave to file a late notice of claim (sequence 001): 3, 5, 6, 7.

BACKGROUND AND PROCEDURAL HISTORY

Petitioner moves, by order to show cause, for leave to file a late notice of claim, alleging false arrest, false imprisonment, illegal search and seizure, multiple assaults and batteries, malicious prosecution, and abuse of process stemming from Petitioner’s August 13, 2018 arrest in the vicinity of 19 Elizabeth Street, New York, New York, by NYPD officers and personnel from the Special Narcotics Prosecutor for the City of New York.¹ Respondent City of New York (the “City”) opposes. For the following reasons, after oral argument, the Petition is granted to the extent discussed below.

Petitioner alleges that an arrest warrant was fraudulently procured on July 26, 2018, resulting in his August 13, 2018 arrest and subsequent detention before favorable termination of the proceedings on December 24, 2018 (*Petition* ¶ 3). Petitioner argues that, accounting for the tolling period in effect for all legal deadlines pursuant to Governor Cuomo’s Covid-19 Executive Orders, any state law claims will be timely filed within the 1-year, 90-day statute of limitations (*id.*).² Petitioner also argues that: (1) based on the nature of the claims—“intentional and unlawful acts of [R]espondent’s employee police officers”—Respondent would have acquired actual knowledge of the facts (*Petition* ¶¶ 4-11); (2) the City will not be prejudiced if Petitioner is permitted to file a late notice of claim (*Petition* ¶¶ 12-17); and (3) Petitioner has demonstrated a reasonable excuse for the delay (*Petition* ¶¶ 18-20).

¹ Petitioner withdrew the malicious abuse of process claim at oral argument.

² When the Petition was filed on July 23, 2020, the most recent executive order in effect at the time extended tolling until August 5, 2020.

DISCUSSION

I. *Timeliness*

General Municipal Law (GML) § 50-e(5) provides that a court may extend the 90-day notice of claim filing deadline up to the expiration of the 1-year and 90-day statute of limitations for claims against the City (*Plaza v NY Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 467 [1st Dept 2012] [The failure to seek a court order excusing an untimely notice of claim within one year and 90 days after accrual of the claim requires dismissal of the action]). The City does not dispute that the false arrest and imprisonment and malicious prosecution claims would have begun to accrue on December 24, 2018, upon Petitioner's release from custody, meaning that the notice of claim should have been filed on March 25, 2019, and this Petition by March 23, 2020 (*City Opp* ¶ 12; see *Palmer v City of NY*, 226 AD2d 149, 149 [1st Dept 1996] [False arrest and false imprisonment claims accrue upon release from custody]; *Nunez v City of NY*, 307 AD2d 218, 219 [1st Dept 2003] [malicious prosecution claim accrued when the proceeding was terminated in plaintiff's favor by dismissal]; see also *Val. Stream v Zulli*, 64 AD2d 609, 610 [2d Dept 1978] ["At the latest, the [abuse of process action] accrued on January 23, 1974, the date upon which defendants last appeared under compulsion of the abused process and the criminal complaints were withdrawn"]). However, the notice of claim was attached for the first time to this Petition, which was itself filed on July 23, 2020.

However, the Covid-19 pandemic intervened. As the City concedes, on March 20, 2020, Governor Cuomo signed the first of a series of executive orders tolling filing deadlines, "including those relating to the notice of claim process" (*City Opp* ¶ 12). The City references Executive Order 202.8, which provided, in relevant part, that

...any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to ... the [CPLR], ... or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

Governor Cuomo periodically extended the tolling period including, most recently, until November 5, 2020 (*Executive Order 202.68* [<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.68.pdf>]). Thus, as the City further concedes, "because March 20, 2020 was a Friday, the toll began exactly one business day before the Petition would have been deemed untimely in every respect" (*City Opp* ¶ 12). This is, however, merely another way of saying that the statute of limitations has effectively remained tolled—that is, suspended—as of the date of this decision, and thus that, as of the date of this decision, the complaint is not untimely (see *Matter of M.R.*, 2020 N.Y. Misc. LEXIS 4225, at *10 [Fam Ct Aug. 10, 2020, No. D-08439/20] ["The effect of a toll is to stay the running of the statute of limitations during the time that the toll is in effect, and that the statutory period resumes running upon the termination of that toll."]).

The City urges that the Court “should not adopt a rule that in effect would state that a petition may be granted under these circumstances”; that is, the “mere filing of a technically timely petition, one business day before the expiration of the statute of limitations,” because this “does not comport with the stated intentions of the notice of claim process, which is to ensure the City has the ability to timely develop a defense to claims alleged against it.” To the extent that the City acknowledges that the Petition is “technically timely,” that is the determinative factor; that is, the City does not question the Governor’s authority to issue the orders, or the favorable impact of the orders upon the timeliness of Petitioner’s notice. Moreover, the City has not articulated any specific prejudice arising from any delay. Accordingly, the Court may entertain this Petition, as it relates only to the claims of false arrest and imprisonment and malicious prosecution.³

However, any other state claims not specifically related to the resolution of the criminal action accrued earlier, “upon the happening of the event upon which the claim is based” (*see e.g. Murray v City of NY*, 283 AD2d 560, 561 [2d Dept 2001], citing GML § 50-i [holding that actions for negligent hiring, training, and retention and negligent impounding accrued when they first happened, and were not impacted by resolution of the criminal action]). Unlike the claims for false arrest and malicious prosecution, all other state claims, including assault, battery, emotional distress, negligence, search and seizure, and negligent hiring, training, and retention, began to accrue upon Plaintiff’s arrest on August 23, 2018.⁴ Accordingly, the 1-year and 90-day statute of limitations on such claims expired on November 11, 2019, well before the Covid-19 pandemic and the tolling provisions discussed above. Because those claims are untimely, the Court does not have the discretion to consider their inclusion in a late notice of claim.

II. GML § 50-e(5) factors

Turning to whether a late notice of claim can be filed including the malicious prosecution and false imprisonment and arrest claims, GML § 50-e(5) provides, in relevant part, that courts

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 specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including; ... and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits (*see also Melendez v City of NY*, 245 AD2d 564, 564 [2d Dept 1997] [reasons for permitting a

³ Because the tolling period remains in effect, this decision does not address the eventual timeliness of the complaint itself, should Petitioner ultimately file one (*see Bayne v City of NY*, 137 AD3d 428, 428-429 [1st Dept 2016] [“Assuming...that the statute of limitations was tolled during the pendency of plaintiff’s petition, ... plaintiff was required to commence an action against the City within 13 days, on or before September 26, 2013, which he failed to do.”]). Notably, there is no current limitation on new filings. Moreover, this decision should not be read to bar timely discrimination claims, which need not be asserted in a notice of claim (*Rose v NY City Health & Hosps. Corp.*, 122 AD3d 76, 79 [1st Dept 2014] [discrimination claimants do not need to file notices of claim]).

⁴ Indeed, Petitioner recognized this at oral argument, and conceded that as to potential state personal injury torts, only malicious prosecution and false arrest/imprisonment claims would be viable.

late notice of claim include a petitioner's infancy, minimal delay beyond the statutory 90-day period, a respondent's possession of records containing the essential facts constituting the claim, and the absence of actual prejudice to the respondent in the preparation of its defense]).

With respect to the City's acquisition of actual knowledge of the claims, in actions for false arrest and false imprisonment, "where the police department conducted an extensive investigation in which the District Attorney's Office joined, knowledge of the essential facts constituting the claims within the statutory period can be imputed to the City" (*Grullon v City of NY*, 222 AD2d 257, 258 [1st Dept 1995] [permitting claims for false arrest and imprisonment, but not claims for assault or negligence in handcuffing and physically handling petitioner at the time of the arrest, where there was no showing that the City had timely notice, and therefore a timely opportunity to investigate those claims]). Similarly, actual knowledge of a malicious prosecution claim can also be imputed to the City where the NYPD possessed all essential facts (*Nunez v City of NY*, 307 AD2d 218, 220 [1st Dept 2003]). This situation is distinguishable from the cases cited by the City, which do not involve a robust investigation and prosecution into facts related to the surviving claims (*see City Opp* ¶ 21, *et seq.*, citing, *e.g.*, *Olivera v City of NY*, 270 AD2d 5, 6 [1st Dept 2000] [police reports of property damage]; *Burns v NY City Tr. Auth.*, 213 AD2d 300, 300 [1st Dept 1995] [plaintiff's alleged telephone conversation with "someone in the claims processing unit"]; *Chattergoon v NY City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990] ["The police investigation into the murder of the petitioner's decedent was geared toward finding the murderer and not toward preparation of a possible claim for pain and suffering *on the basis of alleged negligence by the respondent.*"] [emphasis added]).

With respect to prejudice to the City, Petitioner correctly highlights in reply that upon an initial showing of lack of prejudice to the City, the City must demonstrate particularized, substantial prejudice (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466-467 [2016] [holding that the lower courts applied the incorrect legal standard by placing the burden solely on petitioner to establish lack of substantial prejudice and by failing to consider whether petitioner's initial showing shifted the burden to the School District]). Here, the City's "investigation of the underlying crime for which the claimant was arrested and its continuing involvement until such time as he was released, reasonably precludes substantial prejudice arising from any impediments to an investigation of the civil claim" (*Nunez v City of NY*, 307 AD2d 218, 220 [1st Dept 2003]). In opposition, other than the issue of timeliness addressed above, the City does not sufficiently identify any particularized prejudice. Accordingly, this factor weighs in favor of Petitioner.

Finally, with respect to the reason for the delay, "[t]he absence of an acceptable excuse for the delay is not necessarily fatal to a motion for leave to serve a late notice of claim" (*Justiniano v NY City Hous. Auth. Police*, 191 AD2d 252, 252 [1st Dept 1993]). "Rather, all relevant factors are to be considered, in particular, whether respondent acquired actual knowledge of the essential facts constituting the claim within the 90-day statutory period or shortly thereafter" (*id.* [holding that knowledge of claims for false imprisonment and malicious prosecution could be imputed to the municipality through the officers in its employ who made the arrest or initiated the prosecution]). To the extent that Petitioner argued, for the first time at

oral argument despite having filed a reply in further support of the order to show cause, that any delay should also be excused based on Plaintiff's California residence, the Court does not consider this argument given its absence from the moving papers.

However, as Petitioner did argue in the papers, the prosecution provided an excuse for at least a portion of the delay. As the Supreme Court has said, in deciding whether to file a civil action while a criminal action is pending,

A significant number of criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them. The first option is obviously undesirable, but from a criminal defendant's perspective the latter course, too, is fraught with peril: He risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context (*McDonough v Smith*, 139 S Ct 2149, 2158 [2019]).

CONCLUSION/ORDER

For the reasons above, it is

ORDERED that the Petition for leave to file a late notice of claim is **GRANTED**, and the notice of claim attached to the Petition (*NYSCEF 2*) is deemed timely filed and served solely to the extent that Petitioner's state claims for malicious prosecution and false arrest and imprisonment contained therein shall be considered timely; and it is further

ORDERED that Petitioner shall, within 30 days, e-file and serve a copy of this order with notice of entry upon Respondent.

This constitutes the decision and order of the Court.



10/14/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE