

**Matter of Canario v City of Newburgh**

2021 NY Slip Op 32527(U)

November 10, 2021

Supreme Court, Orange County

Docket Number: Index No. EF004030-2021

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

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**In the Matter of CARLOS J. CANARIO**  
Petitioner,

**INDEX NO.: EF004030-2021**  
**Motion Date: 9/14/21**  
Sequence Nos. 1 & 2

vs.

**CITY OF NEWBURGH,**  
Respondent.

**DECISION AND ORDER**

For an Order Pursuant to Article 78 of the Civil Practice Law & Rules

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**SCIORTINO, J.**

The following papers numbered 1 to 25 were considered in connection with the petition of CANARIO (Seq. #1) seeking reinstatement to his position as a police officer and the cross-motion of CANARIO for an order pursuant to General Municipal Law §50-e(5) granting leave to serve a late Notice of Claim:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Petition/Verified Petition (Seq. #1)/Exhibits 1-2	1 - 4
Verified Answer/Affidavit (Kelson)/Exhibits A-F/ Affidavit (Cotten)/Exhibit A/Affirmation (Ross)/ Exhibits G-H/Respondent's Memorandum of Law	5 - 18
Notice of Cross-Motion (Seq. #2)/Affirmation (Bergstein)/ Exhibit 1/Petitioner's Memorandum of Law	19 - 22
Respondent's Memorandum of Law in Opposition to Cross-Motion/Exhibit A	23 - 24
Petitioner's Memorandum of Law in Reply	25

**Background and Procedural History**

This Article 78 proceeding arises out of petitioner's termination from his position as a police officer with the City of Newburgh after a hearing pursuant to Civil Service Law §75. By Report and

Recommendations dated April 2, 2021 (Exhibit D), the Hearing Officer found that, on May 5, 2019, petitioner used excessive force against a suspect and he did not tell the truth in his reports and at an interview with the Police Chief about why he used Oleoresin Capsicum (pepper) spray. Subsequent to the hearing, the City Manager, by letter dated April 20, 2021 (Exhibit E), adopted the Hearing Officer's findings and recommendations and terminated petitioner's employment effective the same day.

**Petition**

On June 15, 2021, the Notice of Petition and Verified Petition (Sequence #1) were filed. The Petition contains two causes of action (with sub-sections): first, the adverse findings were not supported by substantial evidence; and, second, termination was an excessive punishment. Petitioner seeks annulment of the Hearing Officer's findings, reinstatement to his position and payment of lost wages.

The City of Newburgh's (City) Verified Answer, filed on August 6, 2021, includes four objections in points of law. As is relevant here, the first objection notes petitioner's failure to file and serve a notice of claim prior to the commencement of the instant action, as required by Section C6.47 of the City Charter. The City further filed the affidavit of Katrina Cotten, Deputy City Clerk, who avers that no notice of claim was filed. The City's Memorandum of Law in Opposition argues that the failure to file a notice of claim is fatal to the petition.

Section C6.47 provides:

No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to city property or involving the rights or interests of the city shall be prosecuted or maintained against the city unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was served on the

city, in the same manner as a summons under the Civil Practice Law and Rules, within three (3) months after the accrual of such claim.

The requirement to file a notice of claim is a statutory pre-requisite to any petition, and without such a showing, the petition must be dismissed.

### **“CROSS MOTION”**

On August 10, 2021, after filing of the City’s verified answer, petitioner filed an application denominated as a “Cross-Motion” (Sequence #2) seeking an order granting leave to file a late notice of claim. Petitioner argues that his cross-motion for such relief is timely as a court has discretion to extend the time to serve a notice of claim for up to one year and 90 days after accrual of the cause of action. While petitioner offers no excuse for the failure file the notice of claim, the absence of a reasonable excuse is not fatal to an application, particularly where there is no prejudice to the municipality. The primary purpose of a notice of claim requirement is to put the municipality on notice of the claims against it, and to provide an opportunity to investigate the claims prior to engaging in litigation. The petition fully sets forth the claims and the basis for the requested relief. Here, the facts were fully investigated by the City prior to the commencement of the disciplinary action against petitioner. The sole exhibits which will determine the issue of substantial evidentiary basis are the exhibits which were presented at the hearing, which are in the possession of the City. There is no risk that missing witnesses or lost records will prevent the City from defending itself. The City’s lack of prejudice is evidenced by the extensive, merits-based opposition contained in the Answer. Moreover, because the Article 78 petition was filed within the city’s 90-day notice of claim period, it serves as the functional equivalent of a timely notice of claim.

Finally, petitioner notes that, while this Court is authorized to determine the application to file

a late notice of claim, the merits of the petition itself must be determined by the Appellate Division.

### **Opposition to Cross-Motion**

The City reiterates its argument that service of a notice of claim is a condition precedent to commencing an action against the City. Defendant argues that, while petitioner relies on cases which construe the provisions of General Municipal Law §50-e, it is section C6.47 of the City Charter which controls this issue. That section includes no provision authorizing the Court to extend the time for filing a notice of claim. GML §50-e specifically applies *only* to a notice of claim issued under section 50-e(1)(a). Statutory requirements conditioning suits against a governmental entity are strictly construed, even where the entity had actual knowledge of the claim, and even where no prejudice is demonstrated. The Court of Appeals has consistently rejected proposals to compromise the strict statutory requirements for notices of claim.

Similarly, the statutory language does not permit the filing of a petition to substitute for a timely-filed notice of claim. The notice of claim is a precondition to the filing of any such petition, and every complaint or moving paper must allege that a verified claim was filed and served on the City. By its language, City Charter §C6.47 requires a notice of claim to be filed before a petition, and that the petition contain a statement that the notice of claim had already been served. There is nothing in the nature of the petition or the claim which excuses petitioner from strict compliance with the requirements of the City Charter.

If, however, the petition is not dismissed, the City agrees that the petition must be transferred to the Appellate Division, pursuant to CPLR 7804(g) for determination of the merits.

### **Reply**

Petitioner notes that the City offers no authority to support its argument that the Court cannot

grant leave to file a late notice of claim because the City Charter contains no such provision. Contrary to respondents's argument, petitioner states that GML §50-e applies to any case founded upon a tort. Where a notice of claim is required by law as a condition precedent to the commencement of the action, the notice of claim shall comply with and be served in accordance with the provisions of this section. The section covers any notice of claim against any public corporation, including cities. Since the City Charter does not contain a provision for the filing of a late notice of claim, it must necessarily be governed by the GML, which also governs, *inter alia*, applications for leave to amend a notice of claim. Further, section C6.47 echoes and incorporates the language of the GML in its service and timing requirements.

#### Discussion

Upon the foregoing papers, it is ORDERED that petitioner's application for leave to file a late notice of claim (Sequence #2) is granted.

A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality. (Gen. Mun. Law §50-e[1][a]; *Johnson v. County of Suffolk*, 167 AD3d 742 [2d Dept 2018]) The purpose of the notice of claim is to afford a municipality timely notice of a tort claim so that they can investigate, collect evidence and evaluate the merits of the claim while the facts are still fresh. (*O'Dowd v. Jericho Fire Department*, 161 AD3d 981 [2d Dept 2018])

The City argues that, because section C6.47 contains no provision for the late filing of a notice of claim, the Court is without jurisdiction to grant the application. However, the caselaw relied upon by the City is inapposite. The City cites a recent decision of this Court, *Sylcox v. City of Newburgh*, EF002147-2021. However, *Sylcox*, unlike the matter at bar, did not involve an application to file a late notice of claim. Rather, no notice of claim was filed, and petitioner's argument, rejected by the

Court, was that the nature of the claim (violations of the Human Rights Law) did not require such a filing.

In *Clayton Indus., Inc. v. City of Newburgh*, 17 AD3d 309 (2d Dept 2005), the Second Department rejected plaintiff's service of a notice of claim more than three months after the accrual of the causes of action. Once again, there is no consideration of a motion for leave to file a late notice. Nor does *Varsity Transit, Inc. v. Bd. of Educ. of City of New York*, 5 NY 3d 532 (2005), mandate such a result.

The City correctly cites *Transit* for the proposition that statutory requirements conditioning suit against a governmental entity must be strictly construed, even if the municipality gained actual knowledge of the claim or failed to demonstrate prejudice. (*id.* at 536)

But unlike *Transit*, in this matter, the issue before the Court now is an application on which the City Charter is silent. The City argues that the CPLR is "irrelevant" to this proceeding. The Court cannot agree. The language of section C6.47 itself cites to, and incorporates by reference, the service of process provisions of the CPLR. Had the City intended to completely eliminate the CPLR's provision regarding the late notice of claim, the Charter provisions could have said so.

Neither the submissions of the parties, nor the independent research of the Court has revealed any authority directly speaking to this issue. However, in *Picciano v. Nassau County Civ. Serv. Commn.*, 290 AD2d 164 [2001], the Second Department considered a motion for leave to file a late notice of claim, filed simultaneously with the complaint for violations of the Human Rights Law. Plaintiff's attorney in *Picciano* argued that it was unclear whether a notice of claim was required, and, in any event, defendants had notice of the essential facts within 90 days of the date the cause of action accrued. (*id.* at 166) Similar to the facts at bar, neither County Law §52 nor the Nassau County

Administrative Code contained any provision for a late notice. The Court found that defendants had actual knowledge of the facts underlying the plaintiff's claim. On that basis, and because the statute was unclear regarding the need for a notice of claim in the circumstances, the Second Department found that permitting plaintiff to serve a late notice of claim was a provident exercise of its discretion. (*id.* at 174)

In the matter at bar, the City does not seriously dispute that it lacked notice of petitioner's claims, or the facts underlying the matter. It has not alleged any prejudice that would inure to it as a result of a late filing of the notice of claim. As petitioner argued, the City's comprehensive arguments advanced in response to the merits of the petition evidences its investigation and knowledge of the underlying facts.

For those reasons, the application of petitioner for leave to file a late notice of claim (Sequence #1) is granted. Petitioner shall serve and file the notice of claim appended to the moving papers within twenty days of the date hereof.

Having disposed of the single objection that could have terminated this proceeding, in accordance with CPLR 7904(g), the Court hereby transfers this matter for disposition to the Appellate Division, Second Department.

The Clerk of the Court is hereby directed to transfer the file forthwith.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 10, 2021  
Goshen, New York

ENTER

  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*