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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PHYLLIS ORLIKOFF FLUG IA Part 9
Justice

KELVIN LAYNE x

- against -

THE CITY OF NEW YORK, et al. x

Index Number 19978 2007

Motion Date October 23, 2007

Motion Cal. Number 20

Motion Seq. No. 1

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The following papers numbered 1 to 9 read on this application by petitioner Kelvin Layne for an order granting leave to serve a late notice of claim on the respondents.

	Papers Numbered
Notice of Petition-Petition-Affidavit - Exhibits (A-L)	1-5
	6-7
Opposing Affirmation	8-9
Reply Affirmation	

Upon the foregoing papers this application is determined as follows:

On April 26, 2002, Michael Pruden was murdered in Queens County, at which time police officers in the 105th Precinct began its investigation. On April 30, 2002 the police received an anonymous phone call from a woman who stated that the shooter was named Stephon, and that the driver of the getaway car was named "Nicky." Another person later provided information to the police regarding the murder but could not provide accurate and non-contradictory testimony as to the identity of the shooter.

On May 3, 2002 petitioner Kelvin Layne was arrested in connection with the murder of on April 26, 2002. At the time of his arrest Mr. Layne and Michael Colas were passengers in a car driven by Jessica Colas.

Mr. Layne states in his affidavit that he was placed in a jail cell and interrogated by the police for some 18 to 20 hours, during which time he continuously denied any involvement with the murder of Michael Pruden. Although he signed three written statements while in police custody implicating others in the shooting, he never admitted to participating in the shooting of Michael Pruden. Mr. Layne was charged with murder in the second degree, and criminal possession of a weapon in the second and third degree, and in August 2002 he was indicted by a grand jury.

Michael Colas was arrested on May 3, 2002, and later charged with the murder of Mr. Pruden. In November 2002, Stephon Blakely was arrested and later indicted for the murder of Mr. Pruden. Some time prior to May 2006, Mr. Blakely entered a plea and he remains incarcerated.

Mr. Layne was incarcerated, without bail, from May 2002, until May 17, 2006. In December 2004, Mr. Layne appeared in court, at which time the District Attorney offered a sentence of time served, if he testified against Mr. Blakely. This offer was repeated in late 2004. Mr. Layne refused these offers, as he maintained that he neither witnessed nor was involved in the shooting of Pruden, and thus could not offer any testimony against Mr. Blakely. Mr. Layne's trial was adjourned by the prosecution on many occasions and he remained in custody until May 17, 2006, when he was acquitted of all charges.

Petitioner Kelvin Layne commenced the within proceeding for leave to file the late notice of claim on August 10, 2007. On August 10, 2007 Mr. Layne commenced a separate action (Index Number 19976/07) against the City of New York, the Office of the District Attorney of Queens County, and the individually named or otherwise identified Assistant District Attorneys and Police Officers, to recover damages for various civil rights violations; negligent training and supervision; intentional infliction of emotional distress; false arrest; false imprisonment; and malicious prosecution.

A notice of claim must be filed within 90 days after the claim arose (GML § 50-e[1][a]), although a court may grant the claimant leave to file a late notice of claim within one year and 90 days of accrual (GML § 50-e[5]; Pierson v City of New York, 56 NY2d 950 [1982]). False arrest and unlawful imprisonment claims

accrue upon the claimant's release from custody (see Nunez v City of New York, 307 AD2d 218, 219 [2003]), and the malicious prosecution and civil rights claims accrue when the proceeding is terminated in favor of the claimant (see Molyneaux v County of Nassau, 16 NY2d 663 [1965]; Avgush v Town of Yorktown, 303 AD2d 340, 341 [2003]; Bennett v City of New York, 204 AD2d 587 [1994]; Ragland v New York City Housing Authority, 201 AD2d 7 [1994]; McElveen v Police Department of the City of New York, 70 AD2d 858, 859 [1979]). The claim for intentional infliction of emotional distress arose from the 2002 arrest and culminated in the release from custody (see Avgush v Town of Yorktown, supra at 341; Murray v City of New York, 283 AD2d 560, 561 [2001]). Here, as petitioner was not released from custody until he was acquitted, his claims for civil rights violations, malicious prosecution, false arrest, unlawful imprisonment, and negligent infliction of emotional distress all accrued on May 17, 2006. As regards these claims, petitioner's motion for leave to serve a late notice of claim was made within the applicable one year and ninety day statute of limitations.

In determining whether to grant an application for leave to serve a late notice of claim, the court considers whether the petitioner has demonstrated a reasonable excuse for the failure to serve a timely notice of claim, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality's maintaining its defense on the merits (see Nieves v Girimonte, 309 AD2d 753, 755 [2003]). The most significant factor is whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day period or within a reasonable time thereafter (see Casias v City of New York, 39 AD3d 681, 682 [2007]; Medina v City of New York, 16 Misc 3d 1130A [2007]). While the court has discretion in determining this application, the statute is remedial in nature and as such should be liberally construed (Schiffman v City of New York, 19 AD3d 206, 207 [2005]; Camacho v City of New York, 187 AD2d 262 [1992]).

Mr. Layne, in his affidavit, offers as an excuse that he was unaware of the 90 day deadline following his acquittal and release from custody, that he was not represented by counsel during said 90-day period, that he had difficulty retaining counsel, and that as the police department conducted an extensive investigation in which the District Attorney's office joined, knowledge of the essential facts pertaining to his arrest, incarceration and prosecution was always within the possession of the New York City Police Department and the District Attorney of Queens County.

The court notes that the failure to proffer a reasonable excuse is not fatal to the application (see Casias v City of New York, 39 AD3d at 682; Shapiro v County of Nassau, 5 AD3d 690, 691 [2004]; Matter of Affleck v County of Nassau, 240 AD2d 569, 570 [1997]; Matter of Morgan v New York City Hous. Auth., 181 AD2d 890, 891 [1992]; Goodall v New York, 179 AD2d 481 [1992]; Montalto v Town of Harrison, 151 AD2d 652, 653 [1989]; Medina v City of New York, supra). In view of the police department's investigation of the underlying crime for which Layne was arrested and its continuing involvement, in which the District Attorney's office joined, through the indictment and trial, knowledge of the essential facts constituting the claims for civil rights violations, malicious prosecution, false arrest and false imprisonment within the statutory period can be imputed to the respondents (see Tatum v City of New York, 161 AD2d 580, 581 [1990] lv denied 76 NY2d 709 [1990]; see also Grullon v City of New York, 222 AD2d 257, 258 [1995]; Justiniano v New York City Hous. Auth. Police, 191 AD2d 252 [1993]; Matter of Reisse v County of Nassau, 141 AD2d 649 [1988]; Medina v City of New York, supra; Pullum v City of New York, 2007 NY Misc LEXIS 7824, 238 NYLJ 89 [October 11, 2007]). Although respondents claim that they will be substantially prejudiced if petitioner is permitted to serve a late notice of claim, they point to nothing in this case that suggests substantial prejudice (see Nunez v City of New York, supra; Grullon, supra; Santana v City of New York, 183 AD2d 665 [1992]; Medina v City of New York, supra).

With respect to petitioner's claim of negligent hiring, training and retention of police officers, this claim is barred by the statute of limitations. General Municipal Law § 50-i provides that a cause of action against the City accrues upon "the happening of the event upon which the claim is based." Although the continuation of the criminal action delayed accrual of any possible claim alleging malicious prosecution, false arrest, malicious prosecution and civil rights violations, it did not delay accrual of the claim based on negligent hiring, training, and retention of police officers (Murray v City of New York, 283 AD2d 560, 561 [2001]). Since petitioner's claim for negligent hiring, training and retention accrued at the time of his arrest on May 3, 2002, the statute of limitations expired on August 4, 2003. The court lacks the authority to permit a late notice of claim as to this claim (see Pierson v City of New York, supra at 954).

In view of the foregoing, the petition is granted only to the extent that, within thirty (30) days after entry of this order, petitioner may serve upon respondents a notice of claim alleging claims for civil rights violations, false arrest, false imprisonment, malicious prosecution, and negligent infliction of

emotional distress, together with the appropriate consents and authorizations to unseal the criminal files and records, which were sealed upon Mr. Layne's acquittal. To the extent that petitioner seeks to serve a late notice of claim for negligent hiring, training and retention of police officers, the petition is denied.

Dated: January 2, 2008

J.S.C.