

5669

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----- X

CAIRO GILLARD,

Plaintiff,

against -

**ORDER WITH NOTICE
OF ENTRY**

Index #: 80104/2009

THE CITY OF NEW YORK, THE OFFICE OF THE
DISTRICT ATTORNEY OF RICHMOND COUNTY,
ASSISTANT DISTRICT ATTORNEY "JANE AND/OR
JOHN DOES "1-10" and POLICE OFFICERS
"JANE/JOHN DOE "1-10" (presently unknown to
petitioner),

Defendants.

----- X

COUNSELORS:

PLEASE TAKE NOTICE, that annexed is a true copy of an Order duly entered in the
office of the Clerk of the within named Court on July 31, 2009.

Date: New York, New York
August 31, 2009

RICHMOND COUNTY CLERK
2009 SEP -1 A 10
RECEIVED COURT CLERK



ROTH & ROTH, LLP
By: Marc S. Hepworth
Attorneys for Plaintiff
CAIRO GILLARD
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020
Our File No. 5669

TO: MICHAEL A. CARDOZO, ESQ.
Office of Corporation Counsel
Attorneys for Defendant
60 Bay Street, 4th Floor
Staten Island, New York 10301
(718) 876-6428

In the Matter of the Application of

CAIRO GILLIARD,

Petitioner,

for Leave to Serve and File Late Notice of Claim
against,

DECISION & ORDER

HON. JOSEPH J. MALTESE

THE CITY OF NEW YORK,
THE OFFICE OF THE DISTRICT ATTORNEY OF
RICHMOND COUNTY,
ASSISTANT DISTRICT ATTORNEY "JANE AND/OR JOHN
DOES '1-10'" (*presently unknown to petitioner*), and
OFFICERS "JANE/JOHN DOE '1-10'"
(*presently unknown to petitioner*),

Respondents.

The following items were considered in the review of this petition for leave to serve and file a late notice of claim, *nunc pro tunc*.

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The petitioner, Cairo Gilliard, moves this court pursuant to *General Municipal Law* § 50-e (5) for an order allowing him to file a late notice of claim, *nunc pro tunc*. The petitioner's motion is granted in its entirety.

Facts

The petitioner was arrested on January 17, 2008 in connection with a robbery that occurred in November of 2007. After being interrogated, the petitioner was taken into a cell.

The following day, the petitioner alleges to have been placed in a lineup, consisting of four or five men who appeared to know each other and made causal conversation with one another. According to the petitioner, these men were clean shaven, in contrast to the petitioner's beard. The petitioner was then picked from the lineup, charged with robbery with a weapon, and taken to the Rikers Island detention facility. A grand jury decided not to indict him, resulting in his release on January 23, 2008.

The petitioner now moves this court to file a late Notice of Claim for negligence, false arrest, and malicious prosecution and violation of civil rights pursuant to 42 U.S.C. § 1983. The claims on negligence and false arrest accrued on January 18, 2008, the day on which the petitioner was released from custody, and the claim on malicious prosecution accrued when the charges were dismissed.

Discussion

General Municipal Law (“GML”) § 50-e(1)(a) requires service of a notice of claim within ninety days after the claims rises.¹ The purpose of this time restriction is to give the respondent municipality the sufficient opportunity to investigate and to explore the merits of the claim while information is available.² Pursuant to *GML* § 50-e(5), a trial court has the discretion to authorize the serving of a late notice of claim against a municipality.³ In exercising its sound discretion, the court should strike an “equitable balance between a public corporation’s reasonable need for prompt notification of claims against it and an injured party’s interest in just compensation.”⁴ In reviewing a petition for a late notice of claim ‘we are not here concerned

¹ General Municipal Law § 50-e(1).

² *Light v. County of Nassau*, 187 AD2d 720 [2d Dept 1992]; *Caselli v. City of New York*, 105 AD2d 251 [2d Dept 1984].

³ *Embery v. City of New York*, 250 AD2d 611 [2d Dept 1998].

⁴ *Reisse v. County of Nassau*, 141 AD2d 649 [2d Dept 1988], citing *Camarella v. East Irondequoit Central School Bd.*, 34 NY2d 139 [1974].

with the substantive merits of the lawsuit, but rather with whether the governing criteria properly invoke the discretionary power of the court to permit a late notice of claim to be filed.”⁵

Three key factors are considered in evaluating an application for leave to serve a late notice: (1) whether the movant has a reasonable excuse for the failure to serve a timely notice of claim, (2) whether the municipality or agency acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality in its defense.⁶ The statutory requirements of *GML* § 50-e(5) are to be liberally construed.⁷

Reasonable Excuse for Filing a Late Notice of Claim

A petitioner must provide a reasonable excuse for his failure to serve a timely notice of claim. In the case at bar, the petitioner maintains that he was not aware of the ninety day requirement and avers to have consulted with another attorney in Staten Island who told the petitioner he did not have a case, and who never advised him of any time restrictions for filing.⁸ Ignorance of the law does not amount to a sufficient excuse to satisfy the first prong of the General Municipal Law.⁹ However, the First and Second Departments of the Appellate Division have held that absence of an excuse is not necessarily fatal to the petitioner’s motion to file a late

⁵ *Reisse v. County of Nassau*, 141 AD2d 649 [2d Dept 1988], citing *Matter of Halperin v. City of New York*, 127 AD2d 461 [1st Dept 1987].

⁶ *In the Matter of Charles March et al., v Town of Wappinger et al.*, 29 AD3d 998, 999 [2d Dept 2006]; citing *Matter of Conroy v Smithtown Cent. School Dist.*, 3 AD3d 492, 493 [2004]; see *Matter of Termini v Valley Stream Union Free School Dist. No. 13*, 2 AD3d 866 [2003]; *Matter of DiBella v City of New York*, 234 AD2d 366 [1996].

⁷ *Reisse v. County of Nassau*, 141 AD2d 649, *supra*, citing *Matter of Cicio v. City of New York*, 98 AD2d 38 [2d Dept 1983].

⁸ Affidavit of petitioner.

⁹ *Pico v. City of New York*, 8 AD3d 287 [2d Dept 2004]; *Ragin v. City of New York*, 222 AD2d 678 [2d Dept 1995].

notice of claim. Instead, the courts have opted to consider all relevant factors in allowing the application to file a late notice of claim.¹⁰ Failure to provide an excuse, in and of itself, cannot be the sole ground to reject a late filing of a notice of claim.¹¹ When the Second Department has rejected a late filing of a notice of claim, this occurred when the lack of a reasonable excuse was accompanied by the petitioner's failure to demonstrate the respondent's knowledge of the facts and to rebut a prejudice assertion.¹² As this court will explain below, the petitioner provides a list of relevant factors that support his right to file a late notice of claim, including the respondent's necessary knowledge of the underlying facts and the lack of prejudice in defending this action.

Notice of the Essential Facts of the Claim

In satisfying the second prong, the respondent must have sufficient notice of the essential facts underlying a petitioner's claim. The Appellate Division, Second Department has declared that, "actual notice of a claim arises when it is the acts of the police which give rise to the very claim set forth in the proposed notice."¹³ Precisely when it comes to false arrest and imprisonment, knowledge of the essential facts of a claim is acquired because the police department and the District Attorney's Office conduct an extensive investigation of the imputed crime.¹⁴ In *Ragland v. New York City Housing Authority*, the Second Department elaborated, "Since the reason for the early filing of a notice of claim is to permit the public corporation to conduct a prompt investigation into the facts and circumstances giving rise to the claim, the

¹⁰ *Ragland v. New York City Hous. Auth.*, 201 AD2d 7 [2d Dept 1994]; *Diallo v. City of New York*, 224 AD2d 339 [1st Dept 1996].

¹¹ *Sanchez v. County of Westchester*, 146 AD2d 620 [2d Dept 1989].

¹² *Rush v. County of Nassau*, 24 AD3d 560 [2d Dept 2005]; *Pico v. City of New York*, 8 AD3d 287 [2d Dept 2004]; *Ragin v. City of New York*, 222 AD2d 678 [2d Dept 1995].

¹³ *Ragland v. New York City Hous. Auth.*, 201 AD2d 7, *supra*.

¹⁴ *Grullon v. City of New York*, 222 AD2d 257 [1st Dept 1995]; *Reisse v. County of Nassau*, 141 AD2d 649, *supra*.

existence of reports in its own files concerning those facts and circumstances is the functional equivalent of an investigation.”¹⁵

The respondent argues that because the criminal case against the petitioner has been dismissed and the petitioner’s arrest and other criminal records have been sealed, the Office of Corporation Counsel is precluded from accessing valuable information to prepare an adequate defense. The Appellate Division, Second Department has rejected this portion of the respondent’s argument and has interpreted the filing of the late notice of claims as an implied waiver of the petitioner’s privilege under the sealing statute.¹⁶ Hence, upon filing the late notice of claim, the petitioner is required to supply consents and authorizations to permit the respondent to examine and copy the record of the criminal case.¹⁷ This court therefore rules that the City’s investigation leading to the petitioner’s arrest and the opening of the petitioner’s sealed records affords the respondent with knowledge of the essential facts of the petitioner’s claim.

Prejudice to the Municipality

This court also rejects the respondent’s contention that memories have faded since the defendant’s arrest and release, prejudicing the respondent’s defense. As the Appellate Division, Second Department has pointed out, stenographic notes of criminal prosecutions must be preserved for two years in pursuance to *CPL* 160.50(1)(c).¹⁸ These stenographic notes will refresh any information that may be forgotten. Prejudice can neither be established as a matter of law when the employees of the municipal respondent investigated the crime imputed to the

¹⁵ *Ragland v. New York City Hous. Auth.*, 201 AD2d 7, *supra*.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

petitioner.¹⁹ Further, as this court pointed out above, the petitioner waives his right to sealed records, dissipating any prejudice that the respondent may encounter in accessing the essential facts to the petitioner's claim. The petitioner's authorizations will give the respondent the opportunity to establish an adequate defense.

Under these circumstances, actual knowledge of the petitioner's allegations may be imputed to the respondent through the petitioner's arrest and the investigations that followed. By filing the late notice of claim, the petitioner also waives his statutory right to sealed records and allows the respondent to access his criminal files. These sources of information mitigate any prejudice to prepare a meritorious defense.

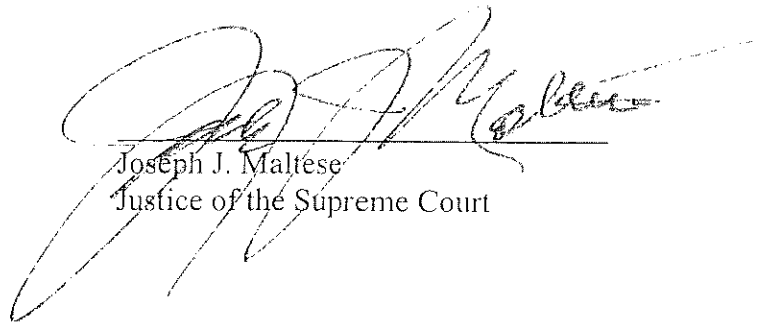
Accordingly, it is hereby:

ORDERED, that petitioner's motion is granted in its entirety and that she is permitted to serve and file a late notice of claim *nunc pro tunc*.

ENTER,

DATED: July 30, 2008

↑
2009



Joseph J. Maltese
Justice of the Supreme Court

¹⁹ *Nunez v. City of New York*, 307 AD2d 218 [1st Dept 2003]; *Grullon v. City of New York*, 222 AD2d 257, *supra*.

AFFIDAVIT OF SERVICE

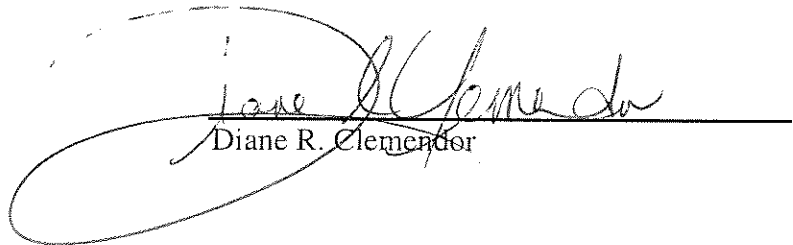
STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

I, Diane R. Clemendor, being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in the Kings County in the State of New York.

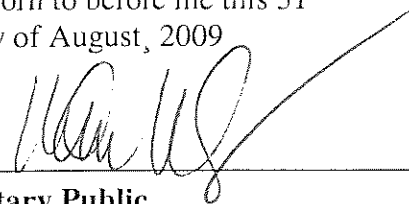
On, August 31, 2009, I served a true copy of the annexed, **Order with Notice of Entry**, by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

MICHAEL A. CARDOZO, ESQ.
Office of Corporation Counsel
By: Ann Broderick, Esq.
Attorneys for Defendant
60 Bay Street, 4th Floor
Staten Island, New York 10301



Diane R. Clemendor

Sworn to before me this 31st
day of August, 2009



Notary Public

WILMA VELEZ
Notary Public, State of New York
No. 03-4991782
Qualified in Bronx County
Commission Expires Feb. 10, 2010

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petitioner),

Defendants.
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ORDER WITH NOTICE OF ENTRY

The below signature attests to the following papers: *ORDER WITH NOTICE OF ENTRY*

By: _____


Marc S. Hepworth

ROTH & ROTH, LLP
Attorneys for Plaintiff
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020