

<b>Hernandez v City of New York</b>
2011 NY Slip Op 30917(U)
April 11, 2011
Supreme Court, New York County
Docket Number: 104935/2009
Judge: Saliann Scarpulla
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: SALIANN SCARPULLA

PART 9

Index Number : 104935/2009  
HERNANDEZ, RUSSELL  
VS.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No *motion to hear argue and renew and petition*

Upon the foregoing papers, it is ordered that this ~~motion~~ *is decided in accordance with the accompanying memorandum decision*

*This constitutes the decision, order and judgment of the Court.*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/11/11

SALIANN SCARPULLA  
S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

----- X  
RUSSELL HERNANDEZ,  
Plaintiff,

Index Number 104935/2009  
Submission Date 12/8/2011  
Mot. Seq. No. 002

-against-

**DECISION, ORDER AND  
JUDGMENT**

THE CITY OF NEW YORK, "JOHN DOE" and "JANE  
DOE," the names of the last defendants being fictitious,  
the true names of the defendants being unknown to the  
plaintiff(s),  
  
Defendant(s).

----- X  
RUSSELL HERNANDEZ,  
Plaintiff,

Index Number 111100/2009  
Submission Date 12/8/2011  
Mot. Seq. No. 001

-against-

THE CITY OF NEW YORK, "JOHN DOE" and "JANE  
DOE," the names of the last defendants being fictitious,  
the true names of the defendants being unknown to the  
plaintiff(s)  
  
Defendant(s).

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Appearances: **For Plaintiff:**  
By Ugo Uzoh, P.C.  
By Ugochukwu Uzoh, Esq.  
255 Livingston Street, 4<sup>th</sup> Floor  
Brooklyn, New York 11217  
718-874-6045

**For Defendant the City:**  
New York City Corporation Counsel  
By Anthony Bila, Esq.  
100 Church Street, 4<sup>th</sup> Floor  
New York, New York 10007  
212-788-1411

---

**HON SALIANN SCARPULLA, J.:**

In Index No. 104935/2009, plaintiff Russell Hernandez (“Hernandez”) moves to reargue or renew this Court’s June 3, 2009 denial of leave to file late notice of claim on defendant the City of New York (“the City”). On April 15, 2009, Hernandez petitioned this Court for leave to file a notice of claim against the City, asserting claims of violation of civil and due process rights, U.S. Constitution, unlawful/false arrest, unlawful/false imprisonment, excessive use of force, assault and battery, illegal and unreasonable search and seizure, cruel and unusual punishment, conspiracy, intentional infliction of emotional distress, and negligent hiring and retention of employment services. In the original application, Hernandez alleged only that the City held him in custody for two years, from March 23, 2006 until May 15, 2008, issuing at the end of confinement only a certification of incarceration bearing “NYSID 5530100K”.

The Court denied the original application without prejudice, because of Hernandez’s omission of proof necessary to determine the facts underlying his claims, and to assess whether the state tort causes of action are timely under the applicable statute of limitations, whether Hernandez was mentally or physically incapacitated, whether the municipality acquired knowledge of the essential facts regarding the cause of action within ninety days of accrual or shortly thereafter, and whether the municipality would be substantially prejudiced if the motion were to be granted. *See Nunez v City of New York*, 307 A.D.2d 218, 220 (1<sup>st</sup> Dep’t 2003).

On the motion to reargue or renew, Hernandez attests that the City removed him from the custody of the United States Citizenship and Immigration Services (“U.S.C.I.S.”) at the behest of the Bronx District Attorney’s Office on March 23, 2006, held him for two years at one of the institutions managed by the City’s Department of Corrections without any hearing before a judge and then summarily placed him back in U.S.C.I.S. custody on May 15, 2008. As a result of his removal by the City’s Department of Corrections, Hernandez’s family was unable to post bail set by U.S.C.I.S. at \$6,500.00, and it was not until the Department of Corrections returned Hernandez to U.S.C.I.S. that he was able to post bail and be released, pending his immigration hearing.

Hernandez submits an affidavit of merit explaining that he did not timely file a notice of claim because he was emotionally traumatized by his allegedly unlawful incarceration. Hernandez now attaches the documents he received from U.S.C.I.S. after his original petition was denied. Exhibits 1 through 5 contain documents indicating that Hernandez was being held at an Immigration Detention Center pending the conclusion of a deportation proceeding against him. A federal immigration judge imposed a bail of \$6,500.00 as condition of Hernandez’s release, but Hernandez was not released, because he was transferred to Rikers Island. By order dated June 15, 2006, U.S.C.I.S. closed its proceeding as a result of “other custody (witness, N.Y.C).”

Hernandez also submits an order of the Supreme Court, Bronx County, dated March 14, 2006, which authorized the City to take Hernandez into custody and hold him

at Rikers Island to ensure his presence as a witness at an indictment hearing in Bronx County Supreme Court until such time that his witness testimony was no longer required. Hernandez attests that he was never brought to testify in any proceeding and never appeared in court. Hernandez infers from the March 14, 2006 order that the requested testimony related to a car hijacking in which he himself was a victim.

The City cross-moves to dismiss Hernandez's complaint that was filed under Index No.104935/2009 with this special proceeding. Hernandez also separately filed an identical complaint in a plenary action under Index No. 111100/2009, which is currently pending before Justice Barbara Jaffe in the City Part of Supreme Court, New York County. In Index No. 111100/2009, the City moves to dismiss the complaint under CPLR 3211(a)(4), arguing that this special proceeding is identical to the related plenary action. Hernandez cross-moves primarily to join the plenary action with the special proceeding and permit Hernandez to amend the complaint to join additional parties to the plenary action. These respective motions are consolidated herein for disposition.

### **Discussion**

A motion to reargue is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72 (1<sup>st</sup> Dept. 1994). A motion to renew is designed to afford a party an opportunity to present "new facts not offered on the prior motion that would change the

prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” CPLR 2221(e); *see also Henry v Peguero*, 72 A.D.3d 600, 602 (1<sup>st</sup> Dep’t 2010). To prevail on a motion to renew, the movant must show that the proof being offered has been only recently discovered, and the movant is acting promptly. *Id.*

Because Hernandez admittedly does not argue that the Court misconstrued any facts or law presented on his prior application, the Court denies the part of the motion in which Hernandez seeks reargument. As to renewal, the Court now reviews whether the newly offered proof warrants grant of leave to file a late notice of claim.

Pursuant to General Municipal Law (“Gen. Mun. Law”) § 50-e(1), in an action against a municipality seeking to recover damages for personal injury or property damages, claimant must serve a notice of claim against the municipality within ninety days after the claim arises. *Nunez v. City of New York*, 307 A.D.2d 218, 219 (1<sup>st</sup> Dep’t 2003). A timely notice of claim is required to proceed against a municipality, and cannot be waived. *Kroin v. City of New York*, 210 A.D.2d 95, 96 (1<sup>st</sup> Dep’t 1994) (municipality may not waive requirements as to matter or time of service of notice of claim). An “untimely notice of claim, served without leave of court, is a nullity.” *Wollins v. New York City Board of Education*, 8 A.D.3d 30 (1<sup>st</sup> Dep’t 2004). “[A] court may grant the claimant leave to file a late notice of claim within one year and 90 days of accrual.”

*Nunez*, 307 A.D. 2d at 219 (citing Gen. Mun. Law §50-e(5); *Pierson v. City of New York*, 56 N.Y.2d 950 (1982)).

When exercising its discretion to grant leave to file a late notice of claim, the Court must consider (a) whether the application was brought within the time which the action could have been commenced against the municipality; (b) whether the municipality acquired actual knowledge of the essential facts constituting the causes of action within 90 days of their accrual or within a reasonable time thereafter, (c) whether the petitioner failure to timely serve the notice of claim is excusable and (d) whether the delay in serving the notice of claim substantially prejudiced the municipality in maintaining its defense on the merits. *See Ragland v New York City Hous. Auth.*, 201 A.D.2d 7, 10 (2<sup>nd</sup> Dep't 1994).

Here, while Hernandez's original notice of claim was not timely, Hernandez did commence this special proceeding on April 15, 2009, within the one-year-and-ninety-day outside limit for moving to extend his time to file a notice of claim. The statute of limitations had not expired on Hernandez's claims of false arrest and imprisonment, as they accrued on May 15, 2008, when the Department of Corrections removed Hernandez back to the custody of U.S.C.I.S., and thus this application was made within a year and ninety days of Hernandez's release. *Nunez*, 307 A.D.2d at 219; *Roche v. Village of Tarrytown*, 309 A.D.2d 842, 843 (2d Dep't 2003). *Ragland v. New York City Hous. Auth.*, 201 A.D.2d 7, 9 (2d Dep't 1994). With respect to Hernandez's federal claims, a

notice of claim is unnecessary for claims premised on 42 U.S.C. §1983, as “[t]he notice of claim requirements of General Municipal Law §50-e do not apply to Federal civil rights claims brought pursuant to 42 USC §1983.” *Zwecker v. Clinch*, 279 A.D.2d 572, 574 (2d Dep’t 2001).<sup>1</sup>

With additional submissions, Hernandez remedied some of the past defects in his application. The documents from U.S.C.I.S. and a personal affidavit of merit indicate that Hernandez’s incarceration at Rikers Island precluded him from posting bail and being released from federal detainment.

Considering that Hernandez was held at Rikers Island for two years, without ever being charged with any crime, ostensibly being held as a material witness for a case in which he never even testified, and the emotional toll the two-year unexplained confinement took on him,<sup>2</sup> the Court deems his delay in filing a notice of claim excusable. The City will not be substantially or unfairly prejudiced by the late notice of claim, because the City had actual knowledge of all the pertinent facts giving rise to the claims of unlawful arrest and imprisonment: it was the Department of Corrections, a city agency, that held Hernandez in physical custody. *See Ragland*, 201 A.D.2d at 11 (concluding that

---

<sup>1</sup> The Court construes the cause of action for “violation of civil and due process rights, U.S. Constitution and NY [sic] Constitution . . . Illegal and Unreasonable Search and Seizure, Cruel and Unusual Punishment,” included in the proposed notice of claim, to be asserted under 42 USCS § 1983.

<sup>2</sup> In support of his petition Petitioner submits an unverified and undated letter by Dana Ashley, MSW, of the Albert Einstein College of Medicine of Yeshiva University, discussing his poor psychological condition after the car hijacking.

when the affirmative acts of municipal employees and agents give rise to an alleged cause of action, actual knowledge is presumed); *see also Matter of Schiffman v City of New York*, 19 A.D.3d 206, 207 (1<sup>st</sup> Dep't 2005); *Goodall v City of New York*, 179 A.D.2d 481, 481 (1<sup>st</sup> Dep't 1992); *Tatum v City of New York*, 161 A.D.2d 580, 581 (2<sup>nd</sup> Dep't 1990); *McKenna v City of New York*, 154 A.D.2d 655, 661 (2<sup>nd</sup> Dep't 1989). Under these circumstances, the Court grants leave to renew Hernandez's prior petition to file a late notice of claim to include, among state law causes of action, only unlawful/false arrest, unlawful/false imprisonment and negligent hiring and retention of employment services.

However, without specific allegations as to when and what actions by the City gave rise to Hernandez's claims of assault and battery, excessive use of force, conspiracy and intentional infliction of emotional distress, and the timing of such actions, Hernandez has not shown that these claims are timely under the relevant statute of limitations. Moreover, New York does not recognize a civil cause of action for conspiracy. Accordingly, upon renewal the Court denies Hernandez's motion to file a late notice of claim as to the assault, battery, excessive use of force, conspiracy and intentional infliction of emotional distress claims.

With respect to the City's cross-motion to dismiss Hernandez's complaint for failure to state a claim, on this renewal motion the Court will not address the merits of the claims Hernandez is permitted to assert in the notice of claim. The complaint Hernandez filed with this special proceeding is a nullity because its filing is not supported by CPLR

and was done without leave of court. Further, on petition for leave to file late notice of claim, the Court does not rule on the ultimate merits of claims that petitioner intends to file. *See Metzger v Town of Warwick*, 294 A.D.2d 503, 504 (2<sup>nd</sup> Dep't 2002). As Hernandez's plenary action is currently pending in the City Part before Justice Barbara Jaffe, the City may renew its motion to dismiss before Justice Barbara Jaffe under Index No.111100/2009. The Court also may not grant Hernandez's motion to consolidate this special proceeding with the plenary action, as the special proceeding terminates with this decision, order and judgment. *See CPLR 411*. Hernandez may also renew the remainder of his motion in the City Part, where his action Index No. 111100/2009 is currently pending.

In accordance with the foregoing, it is

ORDERED AND ADJUDGED that plaintiff Russell Hernandez's motion for leave to reargue the Court's decision, order and judgment, dated June 3, 2009, is denied; and it is further

ORDERED AND ADJUDGED that plaintiff's motion for leave to renew the Court's decision, order and judgment, dated June 3, 2009, is granted, and upon renewal, the Court grants Russell Hernandez leave to file a late notice of claim with respect to his unlawful/ false arrest, unlawful/false imprisonment, and negligent hiring and retention of employment services claims, and denies Russell Hernandez leave to file a late notice of

claim with respect to his remaining claims for which a notice of claim is required; and it is further

ORDERED AND ADJUDGED that the City of New York's cross-motion to dismiss plaintiff's complaint for failure to state a cause of action under CPLR 3211(a)(7) is denied with leave to renew in the action with Index No. 1111000/2009; and it is further

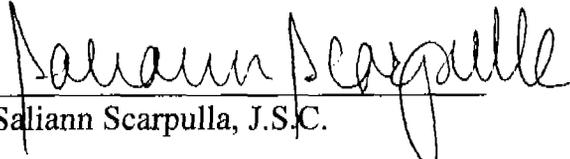
ORDERED AND ADJUDGED that the motion and cross-motion in Index No. 111100/2009 are denied with leave to renew before Justice Barbara Jaffe, before whom the action with Index No. 111100/2009 is pending; and it is further

ORDERED AND ADJUDGED that the notice of claim annexed to the papers in plaintiff's original application is deemed timely served upon service of a copy of this decision, order and judgment with notice of entry thereof on the respondent the City of New York, as to the causes of action for unlawful/false arrest, unlawful/false imprisonment and negligent hiring and retention of employment services only.

This constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York  
April 11, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry has not been served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**