Demirovic v City of New York
2013 NY Slip Op 33380(U)
May 1, 2013
Sup Ct, Queens County
Docket Number: 4867/13
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Nderim Demirovic,

Plaintiff,

- against -

The City of New York, New York City Health and Hospitals Corporation and the New York City Police Department, Detectives "John Doe" and "John Roe", being NYPD Detectives whose names are unknown Plaintiff,

Defendant.

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Index Number: 4867/13

Motion Date: 4/24/13

Motion Cal. Number: 43

Motion Seq. No.: 1

The following papers numbered 1 to 18 read on this motion by plaintiff for leave to serve the notice of claim *nunc pro tunc;* and cross-motion by defendants, The City of New York to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation.....	6-8
Affirmation in Opposition.....	9-10
Reply-Affirmation-Exhibit.....	11-14
Reply-Affidavit-Exhibits.....	15-18

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by for leave to serve a late notice of claim, nunc pro tunc, pursuant to General Municipal Law §50-e(5), is denied. Cross-motion by the City to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted.

Plaintiff alleges that he was falsely imprisoned by defendants and involuntarily committed to the psychiatric ward of Elmhurst Hospital in Queens County on December 8, 2011, where he remained until his discharge from said facility on December 16, 2011.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Plaintiff served a notice of claim on March 13, 2013 and on said date also served a summons with notice upon defendants, approximately one year after the expiration of the statutory 90-day period.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Plaintiff has failed to proffer an adequate excuse for his delay in filing a notice of claim. He avers in his affidavit in support of the motion that he was unable to file a timely notice of claim because he was depressed and "stressed out" as a result of his confinement in the psychiatric ward of Elmhurst Hospital for eight days and that was being treated thereafter for depression and anxiety on a weekly basis by a Dr. Stanley Kaster.

Plaintiff's allegation that he was unable to file a timely notice of claim because of a psychological condition is unsupported by the affirmation of a physician and, therefore, may not be considered (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2nd Dept 1994]). Notably, plaintiff fails to annex an affirmation from Dr. Stanley Kaster. Moreover, none of the medical records annexed to his reply and opposition to the City's cross-motion contains any statement by a physician that his condition prevented him from filing a timely notice of claim. The Court notes that plaintiff was released from Elmhurst Hospital and thereafter merely went for psychotherapy sessions on an outpatient basis. There is no indication or allegation that he was confined to the hospital or at home after December 16, 2011 and the records do not

otherwise show that his condition was so obviously severe that common sense would dictate, even absent an affirmation from a physician, that he would be unable to file a timely notice of claim. That he was emotionally unable to attend to his affairs is not obvious or reasonable based upon his averments alone so as to render unnecessary an affirmation of a psychiatrist. As noted, nothing contained in the copies of medical records annexed to the opposition and reply papers indicates that he was unable to file a timely notice of claim. Indeed, the notes of his psychotherapist of, inter alia, April 2012, approximately one year ago, inform that plaintiff was satisfied with his life, was planning a summer vacation, that he believed that he had reached a point that he no longer needed medication, that his feelings of frustration over the alleged incident had decreased and that he believed that what remained of those feelings was only a temporary derailment from his career and that he was still able to pursue law enforcement in some capacity. The psychotherapist also noted that he discussed termination with plaintiff and that plaintiff acknowledged that the therapist's time in the clinic was ending soon.

Thus, plaintiff has failed to proffer any probative evidence that he was incapacitated to such an extent that he could not have complied with the statutory requirement to file the notice of claim in a timely manner (see Bergmann v. County of Nassau, 297 A.D.2d 807 [2d Dept. 2002]).

The contention of petitioner's counsel that defendants acquired timely actual knowledge of the facts underlying plaintiff's claim through the police records surrounding the 911 call and the police involvement in "influencing" the Elmhurst Hospital psychiatric ward to admit and retain plaintiff for eight days is without merit. Plaintiff has not annexed any police records to his moving, opposition or reply papers. Moreover, the medical records do not on their face indicate any negligence or wrongdoing on the part of the police.

Plaintiff's counsel's bare assertion, without any evidence, that the police wrongfully "influenced" the decision of Elmhurst Hospital staff to admit plaintiff to the psychiatric ward fails to establish that defendants acquired actual knowledge of the facts underlying the claim (see Carbone v Town of Brookhaven, 176 AD 2d 778 [2nd Dept 1991]). The mere fact that the police were involved in the incident by responding to a 911 call and transporting plaintiff to Elmhurst Hospital does not establish that the City acquired timely actual knowledge of the essential facts of plaintiff's claim and does not apprise the City that any negligence or wrongdoing on the part of the police was committed.

Finally, plaintiff's contention that the City would suffer no prejudice is based solely upon his erroneous contention that the City acquired timely actual knowledge of the facts underlying the claim and has, thus, failed to meet his affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]). In any event, the Court finds that the City would suffer substantial prejudice by the inordinate delay of one year in serving a notice of claim.

Finally, even if there were no prejudice, it would be an abuse of discretion to grant the instant motion where plaintiff has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]). Indeed, as heretofore noted, counsel's contention that the City would suffer no prejudice is based solely upon his unmeritorious argument that the City acquired timely actual knowledge of the facts constituting the claim.

Under the totality of the circumstances, it would be an improvident exercise of the Court's discretion to allow the filing of a notice of claim at this late juncture based upon the record presented on this motion and cross-motion.

Since the service of a timely notice of claim is a condition precedent to commencement of an action, the complaint heretofore filed is a nullity.

Accordingly, the motion is denied, the cross-motion is granted and the complaint is dismissed.

Dated: May 1, 2013

KEVIN J. KERRIGAN, J.S.C.