SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 159183/2022

In the Matter of

MOTION DATE 12/16/2022

DIAMOND CARTER,

MOTION SEQ. NO. 001

Petitioner,

- v -

DECISION, ORDER, and JUDGMENT

THE CITY OF NEW YORK,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for LEAVE TO SERVE LATE NOTICE OF CLAIM.

In this proceeding pursuant to General Municipal Law § 50-e, the petitioner seeks leave to serve a late notice of claim upon the City of New York in connection with a July 24, 2021 incident, which the petitioner asserts involved an assault and battery by several officers of the New York City Police Department (NYPD). The City opposes the petition. The petition is granted.

Service of a notice of claim upon City in accordance with General Municipal Law § 50-e is a condition precedent to the commencement of a tort action against it (*see Parker v City of New York*, 206 AD3d 936, 937 [2d Dept 2022]; *Glasheen v Valera*, 116 AD3d 505, 505 [1st Dept 2014]). Nonetheless,

> "[t]he 1976 amendments to section 50-e of the General Municipal Law permit a court to grant an application to file a late notice of claim after the commencement of the action but preclude the court from granting an extension which would exceed 'the time limited for the commencement of an action by the claimant against the public corporation' (L 1976, ch 745, § 2 [now General Municipal Law, § 50-e, subd 5]). That means that the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled"

(*Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Thus, where a claimant seeks leave to serve a late notice of claim, and the application is made after the applicable limitations period has lapsed, the court is without authority to consider the motion or petition (*see Preston v Janssen Pharmaceuticals., Inc.*, 171 AD3d 572, 572-573 [1st Dept 2019]; *Young v New York City Health & Hosps. Corp.,* 147 AD3d 509, 509 [1st Dept 2017]; *see also Townsend v City of New York*, 173 AD3d 809, 810 [2d Dept 2019]; *Chtchannikova v City of New York*, 138 AD3d 908, 909 [2d Dept 2016]). Here, however, the petitioner commenced this proceeding on October 24, 2022, the very last date before the lapse of the applicable 1-year-and-90-day limitations period of General Municipal Law 50-i(1). The proceeding is thus timely. The court notes that, simultaneously with the commencement of this proceeding, the petitioner also commenced a civil action in the Supreme Court, Kings County, seeking to recover damages for the alleged tortious conduct of the NYPD officers that is described in this proceeding.

Contrary to the City's suggestion, the petitioner had the option of either prosecuting the instant proceeding, or moving for the same relief in the timely commenced Kings County action (*see Matter of Antine v City of New York*, 14 Misc 3d 161, 170 [Sup Ct, N.Y. County 2006]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2211:1, at 36). Hence, the petitioner was not obligated to make the instant application solely in the context of the Kings County action. Moreover, regardless of whether the venue of this proceeding was laid in an improper county, the City could only raise that issue if it (1) served a demand for change of venue on the ground of improper venue prior to serving its answer (*see* CPLR 511[a]) and (2) moved to transfer venue within 15 days of serving the demand (*see* CPLR 511[b]). Where, as here, a defendant or respondent asserting improper venue "failed to serve a timely demand for a change of venue and failed to make a motion within the 15-day period required under the statute, it [is] not entitled to a change of venue as a matter of right" (*Harleysville Ins. Co. v Ermar Painting & Contr., Inc.*, 8 AD3d 229, 230 [2d Dept 2004]).

As to the merits of the petition, General Municipal Law § 50-e(1)(a) requires that service of a notice of claim must be effectuated within 90 days after the claim arises, unless extended by the court. The petitioner alleged that the subject incident occurred on July 24, 2021. Since the 90-day period applicable here lapsed on October 22, 2021, the petitioner, in the absence of a court-authorized extension of time, would had to have served the notice of claim by that date. Inasmuch as the petitioner failed to do so, leave to extend that period of time is required.

In considering a request to extend the time for service of a notice of claim,

> "the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted."

(General Municipal Law § 50-e[5]). The court must also consider whether there was a reasonable excuse for the delay in service the notice of claim (*see Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824 [1st Dept 2010]; *see also Matter of Grajko v City of New York*, 150 AD3d 595 [1st Dept 2017]). In addition, the court must assess whether the delay in service substantially prejudiced the public corporation's ability to defend on the merits (*see Rivera v City of New York*, 169 AD2d 387 [1st Dept 1991]).

No one factor articulated in the statute is determinative (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]), "and since the notice statute is remedial in nature, it should be liberally construed" (*id.*; s*ee Pearson v New York City Health & Hosps. Corp. [Harlem Hosp. Ctr.]*, 43 AD3d 92, 94 [1st Dept 2007], *affd* 10 NY3d 852 [2008]; *see also Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). In fact, even "[t]he lack of a reasonable excuse for failing to serve a timely notice of claim is not determinative" (*Matter*

of Meacham v New York City Health & Hosps. Corp., 77 AD3d 570, 570 [1st Dept 2010]). The most important factor is whether the public corporation, its attorney, or its insurer acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter (*see Matter of Gasperetti v Metropolitan Transp. Auth.,* 169 AD3d 564 [1st Dept 2019]; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138 [2d Dept 2008]).

General knowledge that a wrong has been committed is not enough to satisfy the actual knowledge requirement (*see Matter of Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037 [2d Dept. 2009]).

> "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves"

(*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d at 148; *see Matter of Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672 [2016]; *Iglesias v Brentwood Union Free Sch. Dist.,* 118 AD3d 785 [2d Dept 2014]).

> "[K]nowledge of the accident itself and the seriousness of the injury does not satisfy this enumerated factor where those facts do not also provide the public corporation with knowledge of the essential facts constituting the claim"

(*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d at 155; *see Horn v Bellmore Union Free Sch. Dist.*, 139 AD3d 1006 [2d Dept 2016]). Knowledge of facts that merely suggest the possibility of liability is insufficient, as a claimant must demonstrate the municipal corporation's actual knowledge of the tortious acts or omissions that allegedly injured the claimant (*see Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401 [1st Dept 2018]; *see also Matter of Wally G. v. New York City Health & Hosps. Corp. [Metro. Hosp.],* 27 NY3d at 677).

As the Appellate Division, First Department, has observed, General Municipal Law § 50-e (5) "should not operate as a device to defeat the rights of persons with legitimate claims"

(*Matter of Annis v New York City Tr. Auth.*, 108 AD2d 643, 644 [1st Dept 1985]). Here, the City's "claimed lack of actual knowledge is completely refuted by the fact that the officers who allegedly assaulted petitioner would, as respondent's employees, have had immediate knowledge of the events giving rise to this dispute" (*Ansong v City of New York*, 308 AD2d 333, 333 [1st Dept 2003]; *see Matter of Jaime v City of New York*, 205 AD3d 544, 544 [1st Dept 2022]; *Matter of Orozco v City of New York*, 200 AD3d 559, 560 [1st Dept 2021]; *Diallo v City of New York*, 224 AD2d 339, 340 [1st Dept 1996]). The City

> "has failed to make a particularized showing that the delay caused it substantial prejudice. . . and, in any event, a lack of a reasonable excuse is not, standing alone, sufficient to deny an application for leave to serve and file a late notice of claim"

(*Matter of Jaime v City of New York*, 205 AD3d at 544-545). Hence, the petition should be granted.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, and the petitioner's time to serve a notice of claim upon the City of New York is extended so that the petitioner's proposed notice of claim, as uploaded to the New York State Court Electronic Filing system as Docket Entry No. 2, is deemed to have been timely served upon the City of New York.

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

3/20/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE