To be argued by:
ELINA DRUKER
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New York Supreme Court
Appellate Division: First Department

Case No.
2021-01347

ADAN OROZCO,

Petitioner-Respondent,

against

THE CITY OF NEW YORK,

Defendant-Appellant.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

PRELIMINARY STATEMENT

Adan Orozco alleges in a proposed notice of claim that New York City police officers fraudulently obtained a warrant for his arrest, and falsely arrested and maliciously prosecuted him. As a precondition to suing the City in tort based on these allegations, Orozco was statutorily required to serve the City with a notice of claim within 90 days of his claims' accrual—upon his release from custody and the favorable termination of criminal proceedings against him. But he did not do so. Instead, after benefitting from a pandemic-related filing toll, he filed a boilerplate petition for leave to serve a late notice of claim, which Supreme Court, New York County (Ramseur, J) granted.

This Court should reverse. Orozco failed to carry his burden on any of the applicable statutory factors. Most importantly, he failed to show that the City was aware of the essential facts of his claim within or shortly after expiration of the 90-day statutory claim period. His barebones claim that the warrant for his arrest was fraudulently obtained did not show that the City had such knowledge, nor did he show that the City would not be prejudiced

by his very lengthy delay, or that he had a reasonable excuse for it. With such a conclusory and undocumented showing, Supreme Court abused its discretion in granting his petition.

QUESTION PRESENTED

Was it an abuse of discretion to grant Orozco's petition to serve a late notice of claim where he failed to show that the City knew the essential facts underlying his claims during the requisite 90-day period or within a reasonable time thereafter; that the City would not be prejudiced by his delay; or that he had a reasonable excuse for delaying?

STATEMENT OF THE CASE

Adan Orozco was arrested for a narcotics-related offense in August 2018 based on what he now alleges was a "fraudulently procured" arrest warrant (R14–15).[1] The criminal charges against him were dismissed on December 24, 2018, when he was also released from custody. His arrest- and prosecution-based claims accrued on that date.

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[1] This brief does not address petitioner's search- and force-based claims, which he expressly abandoned at oral argument before Supreme Court (R7 n.4).

As a precondition to pursuing claims for false arrest and malicious prosecution against the City, Orozco was required under General Municipal Law ("GML") § 50-e to serve a notice of claim on the City within 90 days of the claims' accrual—or no later than March 24, 2019. He did not do so.

Orozco could still petition for leave to serve a late notice of claim under GML § 50-e(5). Absent any toll, his petition was due no later than one year and 90 days after accrual of his claims—or by March 24, 2020. But on March 20, 2020, four days before that deadline, Governor Cuomo signed the first of a series of COVID-19 pandemic-related executive orders extending certain filing-related deadlines, including those relating to petitions for leave to serve a late notice-of-claim. On July 23, 2020, within the extended deadline, Orozco filed a petition seeking leave to file a late notice of claim based on his August 2018 arrest and prosecution.

In the petition, Orozco's attorney alleged that Orozco satisfied the factors set out in GML § 50-e(5) that support granting leave to file a late notice of claim because: (1) the City acquired actual knowledge of the essential facts of Orozco's claims

within 90 days of their accrual through its involved police-officer employees (R17–20); (2) the City would not be prejudiced by the delay, because it had records relating to the warrant, arrest, and prosecution, and might have to defend against timely federal claims by petitioner regardless (R21–22); and (3) Orozco had a reasonable excuse for the delay because, according to his lawyer, he was focused on the defense of his criminal case until late December 2018 (R23–24). The petition was not supported by an affidavit from Orozco.

Supreme Court, New York County granted the petition, after concluding that a police investigation put the City on notice and eliminated prejudice to the City (R5–9).

ARGUMENT

IT WAS AN ABUSE OF DISCRETION TO PERMIT OROZCO TO SERVE A LATE NOTICE OF CLAIM

As a statutory precondition to bringing a tort claim against the City, a would-be plaintiff must serve a notice of claim within 90 days after the claim arises. *See* GML § 50-e. A timely notice of claim facilitates an early investigation allowing the City to "decide

whether the case is one for settlement or litigation." *Rosenbaum v. City of N.Y.*, 8 N.Y.3d 1, 11 (2006).

A claimant who misses the 90-day deadline may seek leave from Supreme Court to serve a late notice of claim up until the expiration of the year-and-90-day limitations period. *See* GML § 50-e(5). The statute strikes a balance between, on the one hand, protecting taxpayer funds from payment on stale or unfounded claims, and, on the other, allowing meritorious claims to proceed. *Mercedes v. City of N.Y.*, 169 A.D.3d 606, 607 (1st Dep't 2019).

When deciding whether to grant leave to serve a late notice of claim, courts must consider all "relevant facts and circumstances," but, "in particular," whether the City received "actual knowledge of the essential facts constituting the claim" within the 90-day period or a reasonable time thereafter. GML § 50-e(5). Courts must also consider whether the petitioner has proffered a reasonable excuse for the delay and whether an untimely notice will substantially prejudice the City's ability to investigate, respond to, and defend against the proposed claim. *Id.* The party seeking leave to serve the late notice of claim bears the

burden to prove these elements. *Lauray v. City of N.Y.*, 62 A.D.3d 467, 467 (1st Dep't 2009).

Here, Supreme Court improvidently granted Orozco's petition because the petition and its lone supporting document—the proposed notice of claim—failed to satisfy any of the three statutory factors: actual knowledge, absence of prejudice, or reasonable excuse. *Smiley v. Metro. Transp. Auth.*, 168 A.D.3d 631, 631 (1st Dep't 2019) (reversing grant of late-notice-of-claim petition as improvident, where respondents did not have actual notice of the facts, and petitioner failed to show an absence of prejudice or proffer a reasonable excuse for the delay).

A. Orozco failed to show that the City acquired actual knowledge of the essential facts constituting his claims.

Although no one factor in GML § 50-e(5) controls a court's decision whether to grant a petitioner leave to serve a late notice of claim, this Court has set apart one as the most important: the municipality's actual knowledge of the essential facts constituting the claim. *Corwin v. City of N.Y.*, 141 A.D.3d 484, 489 (1st Dep't 2016). If the City had timely actual knowledge of a claim, even

absent a formal notice of claim, it could have investigated the incident promptly and "explore[d] the merits of the claim while information [wa]s still readily available." *Porcaro v. City of N.Y.*, 20 A.D.3d 357, 357 (1st Dep't 2005) (citation omitted).

The mere fact that the City is aware of an incident—such as Orozco's arrest and the later dismissal of the related criminal charges—does not alone establish the City's "actual knowledge of the essential facts" of a tort claim. *Rodriguez v. City of N.Y.*, 172 AD3d 556, 557 (1st Dep't 2019) (documentation that does not reflect the facts underlying the theory of liability does not provide "timely actual notice"). Rather, to demonstrate "actual knowledge," a petitioner must show that the City had "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim." *Horn v. Bellmore Union Free Sch. Dist.*, 139 A.D.3d 1006, 1007 (2d Dep't 2016).

Thus, simply knowing that Orozco was arrested, charged, and then that charges were dismissed is insufficient to confer timely actual knowledge of a claim of wrongdoing. Instead, the City must have known the alleged facts underling his legal theory.

Williams v. Nassau Cnty. Med. Ctr., 6 N.Y.3d 531, 537 (2006); *Bermudez v. City of N.Y.*, 167 A.D.3d 733, 734 (2d Dep't 2018) (reversing grant of late notice of claim where the City had prior knowledge of the defect, but not "the facts constituting the claim," including "the facts underlying her theory of liability"). Here, to show actual knowledge of the essential facts underlying Orozco's claim that he was arrested on a fraudulently obtained arrest warrant, he would need to show that the City, as a potential tort defendant, knew that police officers had intentionally given false information to the criminal court that had issued the arrest warrant. But no facts pled in the petition support the conclusion that the City was aware of such facts.

Instead, Orozco argued below that the City had actual notice of his claims, *as a matter of law,* because the claims involve intentional torts and the City presumptively knows when its agents have intentionally violated the law (R16, "the City of New York[] necessarily acquires notice of *any* event through its employees, as the City, itself, … is obviously incapable of acquiring notice of any event"). This is not a correct statement of

the law, as is evident from the courts' repeated rejection of late-notice-of-claim petitions in false arrest and malicious prosecution cases for lack of the City's timely knowledge. *See, e.g, Powell v. City of N.Y.*, 32 A.D.3d 227, 228 (1st Dep't 2006) (rejecting late notice of claim in a malicious prosecution case); *Nunez v Vil. of Rockville Ctr.*, 176 A.D.3d 1211, 1215 (2d Dep't 2019) ("the involvement of a Village police officer in arresting the petitioner did not, without more, establish that the Village acquired actual knowledge of the essential facts constituting" a false arrest claim).

In support of his novel theory, Orozco mistakenly cited a string of cases for the proposition that "[t]he First and Second Departments have consistently held" that actual knowledge of "false arrest and malicious prosecution" claims is imputed to the City when the arrest was "investigated by the NYPD and then prosecuted by one of the City's district attorneys" (R18).[2] But each of those cases, unlike this one, involved actual, concrete evidence

[2] Contrary to petitioner's suggestions, the City and the district attorneys' offices within it are distinct legal entities and their actions are not imputed to one another. *See Brown v. City of N.Y.*, 60 N.Y.2d 897, 898 (1983).

of extensive investigations. For example, in Orozco's only case from this Court, *Grullon v. City of New York*, this Court noted that, before making an arrest, the "police department conducted an extensive investigation in which the District Attorney's Office joined." 222 A.D.2d 257, 258 (1st Dep't 1995).[3]

Orozco also suggested below that, as a matter of law, under the doctrine of respondeat superior, the City presumptively has actual knowledge of the essential facts underlying a false arrest or malicious prosecution claim simply because its officers effectuated the arrest (R15, "The City should be prohibited from arguing that it did not acquire actual notice … when it is irrefutable that respondent's officers perpetrated the subject arrest and initiated

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[3] The Second Department cases likewise differ from this case because they involved extensive investigations. In *Reisse v. Cnty. of Nassau*, 141 AD2d 649, 651 (2d Dep't 1988), the County learned the facts "through the active investigation by the Police Department for nearly a month prior to the arrest of the petitioner." In *Weinzel v. Cnty. of Suffolk*, 92 A.D.2d 545 (2d Dep't 1983), in which an officer with mental illness stabbed his wife, the department knew the facts underlying her special duty claim "through its police department investigation and … request that [she] co-operate with it in locating her husband and persuading him to seek psychiatric evaluation." *Justiniano v. N.Y. City Hous. Auth. Police*, 191 A.D.2d 252, 252 (1st Dep't 1993), involved the unique situation in which the plaintiff filed a timely notice of claim against the City based on a vicious attack that was documented by hospital records but later corrected the notice of claim to identify his attackers as NYCHA officers.

the subject criminal prosecution"). That theory makes no sense. Respondeat superior is a theory under which an employer such as the City can be held responsible for the wrongdoings of its employees or agents. The theory is completely unconcerned with the employers' subjective knowledge, instead reflecting a societal judgment to allocate the cost for injuries sustained by innocent third-parties to employers, nor workers. In sharp contrast, the central focus of the notice of claim statute is actual knowledge by the City, as an organizational entity, reflecting the legislature's judgment that municipalities should only be held to account for wrongdoings they actually knew about and had a fair chance to investigate.

At bottom, Orozco's various theories for imputing knowledge to the City as a matter of law are mistaken because the cases establish that whether the City had actual notice of an alleged tort is a question of fact that turns on the specific details and records documented in the petition. An officer's mere involvement in an arrest, preparation of arrest paperwork, or assistance with an investigation "without more" does not establish the City's "actual

knowledge of the essential facts" pertinent to defense of a false arrest or malicious prosecution claim, but only shows that the petitioner was arrested. *Torres v. Cnty. of Westchester*, 176 A.D.3d 720, 721 (2d Dep't 2019) ("the involvement of a County [officer] in arresting the petitioner and … allegedly investigating the incident did not, without more, establish" actual knowledge of a false arrest claim); *Nicholson v. City of N.Y.*, 166 A.D.3d 979, 980 (2d Dep't 2018) ("the mere alleged existence of other police reports and records, without evidence of their content, and the involvement of the City's police officers in the alleged incident, without more, were insufficient to impute actual knowledge to the City").

Without specifically grappling with Orozco's misreading of the law, Supreme Court quoted *Grullon* and found it applicable, presumably because the court assumed there some investigation must have occurred (R8). As a result, the court made no factual findings about how the petition established the City's contemporaneous knowledge of Orozco's claims. Nor could it have on this record, as no facts about the police investigation are

offered in the boilerplate petition and sole exhibit, the proposed notice of claim (R14–33).

Orozco's petition merely claims that he was arrested without probable cause, that charges were "unconditionally dismissed and sealed," and that unidentified records "adequately set forth the relevant facts, including detailed police reports and files maintained by the District Attorney's Office" (R18, 20). The petition implies that there was some investigation, but includes no information whatsoever about it, although information would have been disclosed to Orozco and his criminal defense counsel. And, more importantly, Orozco does not allege, much less establish, that the NYPD undertook an extensive investigation into his arrest or the circumstances of the arrest warrant, nor does his petition append or even identify the paperwork that he suggests reflects the City's knowledge that he was arrested on a "fraudulently procured" arrest warrant (R15). To the contrary, the petition acknowledges that his criminal court record (the contents of which are unknown) was sealed (R18). *Powell v. City of N.Y.*, 32 A.D.3d 227, 228 (1st Dep't 2006) (rejecting late notice of claim in a

malicious prosecution case premised on "access to relevant but sealed criminal court records").

The petition was thus wholly insufficient. It is well-established that "[w]here it is argued that records and documentation provided the municipality or public corporation with actual knowledge of the essential facts, the *evidence submitted* must establish such actual knowledge on the part of the municipality or public corporation." *Islam v. City of N.Y.,* 164 A.D.3d 672, 673 (2d Dep't 2018) (emphasis added). The entirely conclusory and factually unsupported account of events presented in Orozco's petition did not meet his burden to show that the City had actual notice of the facts underlying his claims.

B. Orozco failed to show prima facie that his delay did not prejudice the City's ability to investigate and defend against his claims.

As for the issue of prejudice, Orozco had the initial burden of coming forward with some evidence or argument demonstrating that his delay in seeking leave did not prejudice the City. *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 (2016). He did not meet this burden.

His attorney argued below only that unknown and undescribed facts somehow learned in connection with Orozco's sealed criminal case shifted the burden to the City on the question of prejudice (R22). But this assertion did not meet Orozco's burden given the utter lack of factual support for it. And, as demonstrated above, Orozco has not shown that any facts known to the City put it on notice of his claims.

Nor does his stated plan to pursue federal civil rights claims—based on different theories, against different defendants, involving different defenses—show a lack of prejudice to the City. Contrary to the court's conclusion below (R21), since Orozco made no initial showing of lack of prejudice to the City, the burden of proof on that issue never shifted to the City.

C. Orozco offered no reasonable excuse for his delay in serving his notice of claim.

Orozco's attorney argued that Orozco's delay in seeking leave to file a late notice of claim should be excused because he was focusing on his criminal case until it concluded in December 2018

and was a California resident at the time (R24). Orozco provided no affidavit of his own.

The first explanation—his choice to focus on criminal charges—makes no sense because Orozco's civil claims did not even accrue until the December 2018 favorable termination of the criminal charges against him. *See Nicholson*, 166 A.D.3d at 981 (holding that "petitioner's incarceration did not constitute … an excuse, since the relevant state law claims did not accrue, and the petitioner's time to serve a notice of claim did not begin to run, until he was released from custody."). Orozco provided no explanation whatsoever for the subsequent 19-month delay—from December 2018 to July 23, 2020, when he finally made his motion. In any event, a "petitioner's assertion that he knowingly delayed commencing any action … while the criminal charges were pending due to unsubstantiated claims of fear and intimidation does not constitute a reasonable excuse." *Nunez*, 176 A.D.3d at 1214.

The second purported excuse—his out-of-state residence—is no excuse at all. After the dismissal of criminal charges in

December 2018, Orozco had three full months to serve a timely notice of claim. He could have done so from California and never convincingly contended otherwise. He provided no explanation for why that window of time was insufficient or how his out-of-state residence impeded his ability to serve a timely notice of claim.

What's more, Orozco had a substantial window to petition for leave to serve a late notice of claim; mere days before that window closed, COVID-related tolling extended it, and only several months later did he finally seek leave to serve a late notice of claim. He offered no explanation for his prolonged inaction or how that delay could be attributed to his out-of-state residence.

Supreme Court should have denied his petition because Orozco's delays in asserting his arrest- and prosecution-based claims are effectively entirely unexcused, and prejudiced the City in defending against claims about which it did not have notice.

CONCLUSION

This Court should reverse.

Dated: New York, NY
May 26, 2021

Respectfully submitted,

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