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

ADAN OROZCO,

Petitioner-Respondent,

against

THE CITY OF NEW YORK,

Defendant-Appellant.

Case No.
2021-01347

REPLY BRIEF

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PRELIMINARY STATEMENT

As noted in our opening brief, Orozco moved to serve a late notice of claim by arguing in a summary fashion that the City obtained actual, timely knowledge of his claims because, he claimed, it was City employees who fraudulently obtained the warrant for his arrest. He provided no documentary support for the claim. Now, in response to the City's brief, Orozco pivots away from the position he took below to contend that the NYPD conducted an extensive investigation that necessarily gave it contemporaneous notice of the essential facts of his claim. The problem is that his motion never made that showing.

Orozco failed to identify a single, specific fact that suggests that the City knew that, as he claims, officers fraudulently obtained the warrant for his arrest. Instead, he surmises that the City must have learned about his false arrest from unidentified police paperwork and during its investigation into Orozco's suspected criminal activity. But conjecture is not enough. Where he failed to identify a single record or present any concrete facts, his motion to serve a late notice of claim should have been denied.

ARGUMENT

OROZCO HAS FAILED TO SHOW THAT SUPREME COURT PROPERLY EXERCISED ITS DISCRETION HERE

A. Orozco has no record proof to support his claim that the City knew the essential facts underlying his claims within the notice-of-claim window.

As explained in the City's opening brief (Appellant's Brief ("App. Br.") 6–14), neither a City employee's involvement in his arrest and preparation of generic arrest-related paperwork, nor the police department's investigation into Orozco's suspected criminal activity provided the City with actual knowledge of the essential facts underlying his claim—that is, that an officer falsely procured a warrant for his arrest. Orozco's three arguments for why knowledge should be imputed to the City are meritless.

First, Orozco contends (Respondent's Brief ("Resp. Br.") 9–13) that actual knowledge of the facts underlying his claims can be imputed to the City simply because the police officers who allegedly unlawfully arrested him were employed by the City. But if that were enough, then there would never be a need to file a timely notice of claim in any false arrest or malicious prosecution

case. Had the legislature intended to create a police-employee exception to the notice-of-claim requirement, it would have done so explicitly. It did not, as courts have long recognized (*see* App. Br. 9, 12, citing *Powell v. City of N.Y.*, 32 A.D.3d 227, 228 (1st Dep't 2006); *Nunez v Vil. of Rockville Ctr.*, 176 A.D.3d 1211, 1215 (2d Dep't 2019); *Torres v. County of Westchester*, 176 A.D.3d 720, 721 (2d Dep't 2019)).

Second, Orozco speculates (Resp. Br. 10–11) that the City acquired actual knowledge of the facts underlying his arrest from routine police paperwork generated during the course of his arrest and prosecution. He does not identify any of this paperwork, never attached it to his proposed notice of claim, and thus has no record evidence to support it. Nor does he explain how generic arrest-related paperwork might have informed the City of the facts underlying of his claim—that police allegedly procured his arrest warrant by submitting a false statement to the issuing magistrate (R30). Significantly, he does not contend that he disputed the account provided by police officers in support of the arrest warrant at any point during his arrest or criminal prosecution—so as to

put the City on notice of the facts underlying his tort claims or to trigger an investigation into the basis for the warrant. And Orozco's assumptions about the "alleged existence of … police reports and records, without evidence of their content, and the involvement of the City's police officers in the alleged incident, without more," is not a sufficient basis on which to impute actual knowledge to the City. *Nicholson v. City of N.Y.*, 166 A.D.3d 979, 980 (2d Dep't 2018).

Indeed, Orozco admits that all of this arrest- and prosecution-related paperwork is actually sealed (R18). But sealed records cannot inform the City that anything at all occurred. *Powell*, 32 A.D.3d at 228 (rejecting late notice of claim in a malicious prosecution case premised on "access to relevant but sealed criminal court records"). Although Orozco could have had those records unsealed or obtained records from his criminal counsel in order to support his motion, he evidently did not do so, and he must face the consequences of that strategic decision.

Third, Orozco speculates (Resp. Br. 11–12) that the City obtained actual knowledge about the facts of his claim during the

course of an "extensive investigation" that members of the police department allegedly conducted. But as explained in the City's opening brief (App. Br. 7–8), the City must have had timely notice of the *essential facts underlying Orozco's claim*, not just knowledge that he was arrested and that the charges were later dismissed. *Horn v. Bellmore Union Free Sch. Dist.*, 139 A.D.3d 1006, 1007 (2d Dep't 2016).

Here, to learn the essential facts of Orozco's claims during an investigation, the City would have needed some reason to suspect that police officers who procured the arrest warrant made false statements (R30). But aside from Orozco's unsupported contention that an NYPD investigation had to have taken place, he provides no evidence of any investigation into the foundation for his arrest warrant, let alone an "extensive" one. The police's investigation into the crimes that Orozco was suspected of committing does not suffice as notice to the City of its employees' alleged misconduct during his arrest.

None of the cases on which Orozco relies (Resp. Br. 8, 11–12) supports his theory. As he did below, Orozco attempts to analogize

this case to *Grullon v. City of New York*, in which 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). But, unlike in *Grullon*, Supreme Court here did not find that any investigation took place that informed the City of the essential facts of Orozco's tort claims. Nor, as explained in the City's opening brief (App. Br. 13–14), could Supreme Court have made such a finding on this record, as Orozco did not include any facts about any police investigation in his boilerplate petition or sole exhibit, the proposed notice of claim (R14–33).

Likewise, in *Reisse v. County of Nassau*, the Second Department specifically found, based on the facts of that case, that Nassau County, "through the active investigation by the Police Department for nearly a month prior to the arrest of the petitioner, clearly had actual knowledge of all the facts relevant to the petitioner's claims at the time those claims arose." 141 A.D.2d 649, 651 (2d Dep't 1988). The Second Department emphasized that "this case is distinguishable from those situations," like here, "where the municipality did not have actual knowledge." *Id.*

There is no indication in either *Grullon* or *Reisse* that the courts presumed the existence of an investigation, much less one that put the municipality on notice, as Orozco asks this Court to do here. To the contrary, in *Reisse* there was evidence of a month-long investigation. 141 A.D.2d at 651. Orozco provides no legal support for his theory that mere conjecture should be enough to relieve him of his evidentiary burden in seeking late leave.

Orozco's reliance (Resp. Br. 8) on *Justiniano v. N.Y. City Hous. Auth. Police*, for the proposition that police officers' knowledge is always imputed to their employers, is similarly misplaced. 191 A.D.2d 252 (1st Dep't 1993). There, Housing Authority officers allegedly hit Justiniano's motor bike with their car, beat him up, and then ignored a doctor's advice to admit him to the hospital and give him medication, although x-rays showed that he had multiple fractures. The Court allowed petitioner to amend his notice of claim to name the Housing Authority, instead of the City—because actual knowledge of its employees' misconduct could be imputed to the Housing Authority under those specific factual circumstances. *Id.* at 252 (emphasis added).

Here, unlike in any of Orozco's cases, he did not identify any evidentiary basis from which Supreme Court could conclude that the City learned the essential facts that would have given it reason to believe that its employees committed misconduct and to investigate the matter.

B. Orozco has also failed to show that his delay cause the City no prejudice.

As for the issue of prejudice, Orozco admits (Resp. Br. 13−17) that he bore the initial burden of coming forward with some evidence demonstrating that his delay did not prejudice the City. *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 (2016). Buried in several pages of legal recitation is his single argument on prejudice—that the City would not be prejudiced in defending against a tort suit because he might still pursue federal civil rights claims based on the same arrest (Resp. Br. 16). But the *possibility* that he might pursue federal claims does not negate prejudice in this action, and thus the burden of proof on this issue never shifted to the City.

Orozco cannot assert a federal civil rights claim against the City because he does not allege that his arrest was the result of

any unlawful municipal pattern or practice. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). Thus, his only possible claim is against the individual officers who allegedly acted unlawfully under color of law.

While he might still elect to pursue constitutional claims against the officers who, on July 28, 2018, allegedly fraudulently procured a warrant for his arrest (R18), he has yet to do so. A remote possibility he may pursue a case against different defendants, involving different legal theories and different defenses, does not show a lack of prejudice to the City. *Newcomb*, 28 N.Y.3d at 466 (prejudice determination "must be based on evidence in the record," and cannot be based on speculation).

Had the City received notice within 90 days of August 2018, when Orozco was arrested, or December 2018, when charges against him were dismissed (R18), it could have investigated his false-arrest and malicious-prosecution allegations while the evidence was fresh. Orozco's years-long delay will irreparably prejudice the City's ability to investigate his now-stale claims.

C. Orozco did not offer a reasonable excuse for his delay in serving his notice of claim.

Orozco contends (Resp. Br. 18–20) that his delay in seeking leave to file a late notice of claim should be excused because he was focusing on his criminal case, is a California resident and non-native English speaker, and the world has been in the grips of the COVID-19 pandemic. None of these is a reasonable excuse, separately or together.

First, even if focusing on his criminal charges could excuse a delay in filing a notice of claim, (and it cannot, *see Nunez v. Vil. of Rockville Ctr.*, 176 A.D.3d 1211, 1214 (2d Dep't 2019)), his claims didn't accrue until the December 2018 favorable termination of the criminal charges against him, *Nicholson v. City of N.Y.*, 166 A.D.3d 979, 981 (2d Dep't 2018), and he waited 19 more months—until July 23, 2020—to make this motion. He never explained why he took no action in the 19 months following the termination of the charges when, presumably, he was no longer preoccupied with the criminal charges.

Second, neither Orozco's out-of-state residence, nor that he is a non-native English speaker, is a reasonable excuse, particularly

since he never explained how those factors stymied a timely notice of claim. Orozco had three full months to serve a notice of claim, which (like many other out-of-state litigants) he could have done from California and could have done with the help of a translator or attorney. He has not submitted an affidavit or any evidence explaining why that window of time was insufficient under these circumstances.

Third, Orozco's suggestion that the pandemic excuses his delay is meritless, because the State has already accounted for that by temporarily tolling statutory limitations periods, including the notice-of-claim period. *See* N.Y. Exec. Order 202.67 (Oct. 4, 2020). That aside, Orozco had a substantial window to file a timely notice of claim after December 2018, when all charges against him were dismissed, and before the pandemic struck in early 2020. The COVID-related tolling extended his time to for many more months. Thus, Orozco has already benefited from pandemic-related tolling and he cannot use the pandemic as a further excuse.

CONCLUSION

This Court should reverse.

Dated: New York, NY
August 20, 2021

Respectfully submitted,

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