To be argued by:
LORENZO DI SILVIO
15 minutes requested

Bronx County Clerk's Index No. 806290/2021E

New York Supreme Court
Appellate Division: First Department

Case No.
2021-02848

LUIS JAIME,

Petitioner-Respondent,

against

THE CITY OF NEW YORK,

Respondent-Appellant.

BRIEF FOR APPELLANT

GEORGIA M. PESTANA
Corporation Counsel
of the City of New York
Attorney for Appellant
100 Church Street
New York, New York 10007
212-356-1671 or -0853
ldisilvi@law.nyc.gov

INGRID R. GUSTAFSON
LORENZO DI SILVIO
of Counsel

February 22, 2022

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

PRELIMINARY STATEMENT

Petitioner Luis Jaime alleges in five proposed notices of claim that corrections officers "and/or" fellow inmates assaulted him on Rikers Island. As a precondition to suing the City in tort based on those allegations, Jaime was statutorily required to serve the City with notice of the claims within 90 days after each incident occurred. But this he did not do. Instead, Jaime filed a boilerplate petition for leave to serve the late notices of claim seven months after the latest alleged incident and almost two years after the first. Supreme Court, Bronx County (Danziger, J.), granted the petition.

This Court should reverse. Jaime failed to carry his burden on any of the factors that govern a court's discretion to grant leave. Most importantly, he failed to show that the City was aware of the essential facts constituting his claims within or shortly after the 90-day statutory claim period. His only showing on that front was (1) the speculation of his attorney that the City had documented the alleged assaults and medical treatment Jaime received, and (2) his assertion that courts assume actual knowledge whenever a petitioner alleges that City employees engaged in intentional

conduct. But as to the first contention, well-established precedent holds that an attorney's bare allegation that a municipal defendant may possess records, without any competent proof as to the records' existence or their contents, is not enough to establish actual knowledge. And as to the second, courts have, consistent with the plain language of the governing statute, instead required a showing of actual knowledge even where the petitioner alleges intentional conduct. In overlooking this, Supreme Court abused its discretion.

Jaime also failed to demonstrate the other two factors. First, Supreme Court failed to explain how Jaime met his initial burden to show that his delay did not prejudice the City. Jaime's argument on this front relied almost exclusively on his incorrect assertion that he had demonstrated the City's actual knowledge of his claims. Because his premise was flawed, the court's conclusion was also error. And second, Jaime did not submit an affidavit or provide any details to substantiate his alleged excuse for his months- (and, as to some of the alleged assaults, almost years-) long delay. Accordingly, this Court should reverse and deny the petition for leave to serve a late notice of claim.

QUESTION PRESENTED

Did Supreme Court abuse its discretion in granting Jaime leave to serve the late notices of claim, where Jaime (a) relied on speculation and an incorrect legal theory to argue that the City had actual knowledge of the essential facts constituting his claims, (b) did not carry his initial burden to show the lack of prejudice to the City from his delay; and (c) failed to provide a reasonable excuse for that delay?

STATEMENT OF THE CASE

A. Jaime's vague allegations about the nature of his claims

Jaime alleges that on five occasions between June 2019 and October 2020, corrections officers "and/or inmates" at Rikers assaulted him (Record on Appeal ("R") 27, 34, 41, 48, 55). He named the same five corrections officers as allegedly among his "numerous" assailants for the first, second, third, and fifth incidents, and listed three different officers as among his assailants for the fourth (*id.*). According to Jaime, he received medical treatment after each incident; he claims that he suffered a

fractured arm after the first, and had to have stitches to his index finger after the second and third (*see id.*).

Apart from those details, Jaime's allegations were not only full of identical boilerplate, but also vague about the precise nature of his claims. On the one hand, Jaime asserted in conclusory fashion that the City had not provided adequate supervision at Rikers, and had thus failed to safeguard him from a foreseeable risk of physical harm from other inmates—indicating that inmates had assaulted him, yet corrections officers did not intervene (*id.*). At the same time, Jaime also asserted that the City was negligent in its hiring, retention, and supervision of the officers involved—suggesting that the officers, not other inmates, were the assailants (*id.*).

B. Jaime's petition for leave to serve five late notices of claim, filed 23 months after the first alleged incident and 7 months after the last, and supported by no evidence

To maintain a tort action against a municipal defendant, a plaintiff must serve a notice of claim on the defendant within 90 days after the claim arises. GML § 50-e(1)(a); *id.* § 50-i(1)(a). For Jaime, this meant that, to bring a tort suit against the City arising from the first alleged assault, he had until September 19, 2019 to

serve a notice of claim; for the last, he had until January 6, 2021 (*see* R11 (table, compiled by Jaime's attorney, showing expiration of 90-day period for each alleged assault)). Jaime indisputably did not meet these deadlines. Instead, he sought leave to serve five late notices of claim on the City, seven months after the latest alleged incident, and almost two years after the first (R10–24).

Though the law offers a plaintiff who fails to timely serve a notice of claim a second bite at the apple, by petitioning a court for leave to serve a late notice of claim, leave is not automatic. Rather, GML § 50-e requires the petitioner to show that several statutory factors support excusing their failure to timely serve a notice of claim. Under the statute, courts consider whether: (1) the municipal defendant had actual knowledge of the essential facts of the claim within 90 days; (2) the petitioner's delay substantially prejudiced the defendant's ability to respond to and defend against the claim; and (3) the petitioner had a reasonable excuse for their failure to timely serve a notice of claim and the subsequent delay in seeking leave. *See* GML § 50-e(5); *Plaza v. N.Y.C. Health & Hosps. Corp.*, 97 A.D.3d 466, 467 (1st Dep't 2012).

But instead of adducing evidence to establish any of these factors, Jaime supported his application only by an affirmation from his attorney, to which he attached no records or affidavits that could have provided proof that any of the late-notice-of-claim factors weighed in his favor (*see* R10–24). Indeed, when verifying the petition, Jaime's attorney conceded that some of the allegations were based on information and belief, not his personal knowledge, though he did not identify to which allegations that applied, or even the basis for his belief that such allegations were true (R24).

As for actual knowledge, Jaime's attorney baldly asserted that the City had timely notice of his client's claims simply because Jaime alleged that employees of the New York City Department of Corrections (DOC) had been involved in or present for the alleged assaults, and that those employees acted intentionally (R12–15, 17, 22–23). Though the attorney correctly noted that courts have found actual knowledge when a municipal defendant possesses records that reflect the essential facts constituting a claim (R16–17), he did not identify, much less annex to his affirmation, any records in DOC's possession relating to any of the alleged incidents, nor did

he describe any diligent efforts Jaime had made to obtain copies of any records he believed could show actual knowledge. Jaime's attorney also failed to explain what within such records, if any, would have given the City notice that his client was likely to assert a negligence or assault-and-battery claim, particularly when Jaime's notices of claim were unclear regarding whether his alleged assailants were corrections officers, other inmates, or both.

Next, the attorney sought to satisfy Jaime's initial burden to show that granting his client leave would not prejudice the City by again referring to records supposedly created, but which the attorney did not provide to the court, after each of the alleged assaults, and by opining without elaboration that the City's ability to defend against the claims "ha[d] remained unchanged" (R18). The attorney also argued that the City would not be prejudiced because Jaime could assert federal claims for false arrest and malicious prosecution subject to a three-year statute of limitations under 42 U.S.C. § 1983 (*see* R18–19).

But beyond this, the attorney did not address the prejudice the City would suffer in defending against a negligence claim after

such a lengthy delay—23 months for the first assault—particularly when Jaime had not identified anything that, at the time of the alleged incidents, would have put the City on notice of the essential facts constituting his claims. Nor did Jaime's attorney identify the defendants named in his client's purported federal false-arrest and malicious-prosecution claims, or explain how those claims could even relate to any of the alleged assaults at Rikers when Jaime did not allege that he was arrested or prosecuted in connection with any of the claimed incidents.

Finally, as for Jaime's substantial delay, his attorney merely asserted in passing that Jaime had been detained on Rikers pending a criminal trial that his client had "understandably devoted" his time and attention to, and claimed that Jaime had made many attempts to find a lawyer to represent him before contacting the attorney (R21). Jaime's attorney did not provide any details, however, or even state when Jaime had first contacted him. The attorney also sought to excuse Jaime's delay by reference to the Covid-19 pandemic (R21–22), even though the first three alleged assaults took place, respectively, nine, four, and two months before

the pandemic began (*see* R11). Jaime's attorney also seemed to suggest that his client's substantial delay should be excused so as to avoid parallel civil and criminal proceedings (R21), though he did not allege that any of the claimed incidents were in fact the subject of a parallel proceeding.

C. Supreme Court's grant of Jaime's petition without any explanation

The City opposed the petition on the grounds that Jaime had failed to establish either that the City had actual knowledge of the essential facts constituting his claims or that it was not prejudiced by Jaime's delay (R61–66).

In reply, Jaime's attorney submitted several grievances Jaime had filed, but without introducing them through an affirmation that could have explained their significance (R68–72, 74–77). Moreover, far from reporting any assault on Jaime, each grievance challenged the alleged loss of visitation, food, shower time, property, or money from his account (*id.*). Though one grievance fleetingly mentioned an "altercation" with correction officers (R74–75), it offered no additional details about the nature of the

altercation, and certainly did not state that Jaime had complained of an assault, by either correction officers or other inmates.

Jaime's attorney also submitted records reflecting the balance of his client's account at Rikers over time, again without explaining their relevance (R73, 78–83). Though the records indicate that DOC withdrew money from Jaime's account for disciplinary reasons several times, none reports an assault on Jaime of any sort.

In a two-sentence order, Supreme Court granted the petition (R5). Even though Jaime had offered no evidence that the alleged assaults had been investigated or documented in DOC records, and no detailed explanation for why his delay in seeking leave should be excused, the court authorized him to serve his proposed notices of claim on the City (*id.*). Nowhere in the short order did the court include any discussion of the facts or analysis of the late-notice-of-claim factors (*id.*).

ARGUMENT

SUPREME COURT IMPROVIDENTLY GRANTED JAIME LEAVE TO SERVE THE LATE NOTICES 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(1)(a); *id.* § 50-i. 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 New York*, 8 N.Y.3d 1, 11 (2006) (quotation marks omitted).

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 General Municipal Law's one-year-and-90-day limitations period. *See* GML § 50-e(5); *id.* § 50-i(1)(c). The statute strikes a balance between, on the one hand, allowing meritorious claims to proceed, and, on the other, protecting taxpayer funds from payment on stale or unfounded claims. *Matter of Mercedes v. City of New York*, 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 an untimely notice will substantially prejudice the City's ability to investigate, respond to, and defend against the proposed claim, and whether the petitioner proffered a reasonable excuse for their delay. *See id.*; *Plaza*, 97 A.D.3d at 467. The party seeking leave to serve the late notice of claim bears the burden to prove these elements. *See Matter of Lauray v. City of New York*, 62 A.D.3d 467, 467 (1st Dep't 2009).

Notwithstanding a trial court's "broad discretion" to evaluate the factors enumerated by GML § 50-e(5), the "lower court's determinations *must* be supported by record evidence." *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 467–68 (2016) (emphasis added). When the record does not support a trial court's conclusion, the grant of leave is an abuse of discretion requiring reversal. *See id.* at 465–68 (reversing grant of leave to

serve late notice of claim because trial court's conclusion as to prejudice prong not supported by record); *Plummer v. N.Y.C. Health & Hosps. Corp.*, 98 N.Y.2d 263, 268 (2002) (reversing grant of leave where record evidence did not support it).

Here, there is no dispute that Jaime missed the 90-day deadline to serve each of his five notices of claim (*see* R11 (conceding that notices were dated five months to almost a year and a half after each alleged assault)). However, in granting Jaime leave to serve the late notices, Supreme Court erred. The court misapplied the law and abused its discretion by concluding that Jaime, through the bare speculation of his attorney's affirmation alone, had met his burden on any of the late-notice-of-claim factors.

A. Jaime failed to adduce any evidence that the City had actual knowledge of the essential facts constituting his claims.

In determining whether to grant leave to serve a late notice of claim, actual knowledge of the essential facts of a claim is the "most important factor" based on its placement in the statute and its relation to other relevant factors. *Matter of Corwin v. City of New York*, 141 A.D.3d 484, 489 (1st Dep't 2016); *see* GML § 50-e(5). Its

importance reflects that it can serve as a fair substitute for timely notice of a claim, such that a municipal defendant would know to start a prompt investigation and preserve relevant evidence. *See Gibbs v. N.Y.C. Health & Hosps. Corp.*, 101 A.D.3d 557, 558 (1st Dep't 2012).

Given the purpose underlying the actual-knowledge factor, a petitioner must do more than show that a municipal defendant was aware that an incident underlying a later-asserted claim occurred—in this case, alleged assaults by corrections officers, other inmates, or perhaps both. Rather, to satisfy this factor, a petitioner must put forth competent evidence showing that the municipal defendant was aware of "the essentials facts constituting the claim," GML § 50-e(5), including facts from which it could "readily infer … that a potentially actionable wrong had been committed" by the defendant or its employees, *Matter of Kuterman v. City of New York*, 121 A.D.3d 646, 647 (2d Dep't 2014); *accord Alexander v. NYCTA*, 200 A.D.3d 509, 510 (1st Dep't 2021). In other words, a petitioner seeking leave to excuse their failure to timely serve a notice of claim must show that the municipal defendant had

timely notice of an injury, an actionable wrong, and a connection between the two.

Here, support for Jaime's contention that the City acquired timely actual knowledge of the essential facts constituting his claims boils down to: (1) his attorney's bald speculation that the City has records documenting not only the alleged assaults, but also how they occurred, and (2) his attorney's assertion that, because he alleged that City employees acted intentionally, Jaime need not make any showing of actual knowledge (*see* R12–15, 17, 22–23).

But conjecture divorced from proof that a municipal defendant may possess records regarding an incident that allegedly took place is insufficient to establish that the defendant had actual knowledge of the essential facts constituting a claim. This is even more so here, where Jaime's attorney did not even point to any specific portions of the purported records that would have put the City on notice of Jaime's negligence claims by documenting an injury Jaime suffered that was even connected to an actionable wrong by the City. And Jaime is also mistaken that the mere

allegation of intentional conduct relieves him of his burden to make a showing on actual knowledge, the most important factor.

1. Speculation that a municipal defendant possesses records regarding an incident is insufficient to establish actual knowledge as a matter of law.

For more than three decades, courts have been clear that a petitioner may not meet the actual-knowledge factor merely by alleging that a municipal defendant possesses records relating to an incident. *See Washington v. City of New York*, 72 N.Y.2d 881, 883 (1988); *Matter of Ruiz v. City of New York*, 154 A.D.3d 945, 946 (2d Dep't 2017) (holding, in context of false arrest claim, that "[u]nsubstantiated contentions that the municipality acquired timely actual knowledge of the essential facts constituting the claim through the content of reports and other documentation are insufficient"); *Matter of Walker v. NYCTA*, 266 A.D.2d 54, 55 (1st Dep't 1999) (holding, in context of negligence claim, that attorney's "conclusory allegation that respondents' employee prepared a report describing the manner in which the claim arose" was not enough to prove actual knowledge). The Court of Appeals in *Washington*, for example, rejected the plaintiff's assertion that the

City had acquired actual knowledge of his claim simply because he alleged that the accident in which he had been involved was reported to City employees. 72 N.Y.2d at 883. The Court held that such a conclusory allegation, without any "reliable basis" to support it, was insufficient to satisfy the plaintiff's burden of proof. *Id.*

Likewise, just last year in a case similar to this one, this Court applied the rule that mere conjecture that a defendant must have made records giving notice of a claim is not enough to establish actual knowledge. *See Matter of Figueroa v. City of New York*, 195 A.D.3d 467, 468 (1st Dep't 2021). There, the Court reversed Supreme Court's grant of leave to serve a late notice of claim for negligence arising out of the alleged assault of petitioner by other inmates while he, too, was detained at Rikers. *Id.* at 467–68. Like Jaime here, Figueroa sought to show actual knowledge solely through his attorney's affirmation speculating that records of the assault and subsequent medical treatment must have existed. *See id.* at 468. But because the petitioner "d[id] not offer any evidence that records exist of the [alleged] incident," the Court concluded that Supreme Court had abused its discretion in finding that

Figueroa had met his burden to show actual notice. *See id.* at 468–69.

That same conclusion is warranted here because Jaime has offered neither any evidence nor even any basis to conclude that records exist. Instead, just like the petitioner in *Figueroa*, Jaime did not submit "any records," or "offer any first-hand description of the incident, or of any investigation that occurred in its aftermath," much less any complaints he had made to document that the assaults had even occurred. *Id.* at 468. And as fully explained above at pages 9 to 10 and below at pages 25 to 26, though Jaime submitted (for the first time on reply) what appear to be prior complaints he made to DOC, none addressed an alleged assault or even the injuries he claims he sustained as a result.

Indeed, only Jaime's proposed notices of claim contain any descriptions of the alleged assaults at all. But even the notices are primarily made up of boilerplate allegations, and as to the assaults, they include nearly identical conclusory allegations that Jaime was violently assaulted by correction officers "and/or" inmates (*see* R27, 34, 41, 48, 55). Further, the notices of claim do not contain any

signature or verification from Jaime himself (*see id.*). Such bare, conclusory allegations do not constitute evidence that there are records of the alleged incidents, let alone proof that the City has actual knowledge based on such records.

Accordingly, Supreme Court erred in granting Jaime leave to serve a late notice of claim (*see* R5). In doing so on this record, the court essentially absolved Jaime of his evidentiary burden, contrary to this Court's precedent. *See, e.g.*, *Matter of Tavarez v. City of New York*, 26 A.D.3d 297, 297–98 (1st Dep't 2006) (petitioner had burden of procuring report she believed established defendant's actual knowledge). That legal error constitutes an abuse of discretion warranting reversal. *See Newcomb*, 28 N.Y.3d at 465–66.

This Court's recent decision in *Matter of Orozco v. City of New York*, 200 A.D.3d 559 (1st Dep't Dec. 16, 2021), does not support a contrary result. There, the Court affirmed the exercise of Supreme Court's discretion in granting leave to serve a late notice of claim for false arrest and malicious prosecution. *See id.* at 560–62. The Court found that the City had actual knowledge of the petitioner's claim that the warrant for his arrest was fraudulently procured

based on allegations that City employees had both participated in obtaining the warrant and created records and documents pertinent to the warrant and arrest, and that there was a robust adversarial process during the criminal proceeding during which the petitioner repeatedly attacked the probable cause for his arrest and prosecution. *See id.*

Here, in contrast, there are no clear allegations from either Jaime or his attorney about the nature of the purported assaults or the extent of corrections officers' involvement in them. And where this Court in *Orozco* relied on the conclusion that police officers effectuating an arrest are "required to contemporaneously record factual details, including those related to any probable cause determination," *id.* at 561, there are no allegations here supporting the conclusion that records of the purported assaults or complaints or investigations about them even exist. Indeed, the record tends to rebut that conclusion; the records submitted by Jaime's attorney below on reply show that Jaime knew how to file complaints when he felt his rights had been violated (*see* R68–77). This case, then, is governed by the rule that conjecture alone cannot establish actual

knowledge. *See, e.g.*, *Washington,* 72 N.Y.2d at 883; *Figueroa*, 195 A.D.3d at 468–69; *Ruiz*, 154 A.D.3d at 946.[1]

2. The mere possession of records, without proof that a claim can be readily inferred from their contents, in any event cannot establish actual knowledge.

Because Jaime has not offered any evidence that records of the alleged assaults exist, he has not established actual knowledge on this ground, and this Court need go no further. That aside, the mere existence of records regarding an alleged assault would be insufficient to satisfy Jaime's burden under established law. For a record to provide actual knowledge of the essential facts of a claim, a municipal defendant must be able to readily infer from the record that its employees committed a potentially actionable wrong causing the petitioner injury, such that it is on notice of the need to

[1] To the extent this Court affirmed the grant of leave to serve a late notice of claim in *Orozco* without requiring the petitioner to produce the records of his arrest and prosecution, an affidavit by someone with first-hand knowledge, or any evidence of the contents of those records, the City respectfully agrees with the dissent that the Court's holding was error. *See Orozco*, 200 A.D.3d at 564–65 (Moulton, J., dissenting). The City thus filed a motion for leave to appeal the Court's order on January 18, 2022. In any event, for the reasons explained above, *Orozco* is inapposite.

investigate the claim. *See Kuterman*, 121 A.D.3d at 647–648; *Matter of Rivera v. NYCHA*, 25 A.D.3d 450, 451 (1st Dep't 2006).

For this reason, courts have repeatedly rejected attempts by petitioners to satisfy the actual-knowledge factor simply by pointing to a municipality's mere possession of a report of an incident. *See, e.g.*, *Matter of Singleton v. City of New York*, 198 A.D.3d 498, 499 (1st Dep't 2021) (that City employees arrested petitioner insufficient to show actual knowledge); *Matter of Etienne v. City of New York*, 189 A.D.3d 1400, 1402 (2d Dep't 2020) ("[T]he mere alleged existence of reports and other records created by the FDNY and the [NYPD], without evidence of their content, is insufficient to impute actual knowledge to the City."); *Zapata v. NYCHA*, 115 A.D.3d 606, 606 (1st Dep't 2014) (NYCHA's alleged knowledge of police report not same as notice of plaintiff's intention to file civil suit claiming negligent security).

And indeed, courts have endorsed this argument in contexts similar to the one here. In *Matter of Virella v. City of New York*, for instance, this Court held that DOC's possible possession of an injury report after an assault on an inmate did not, without more,

establish actual knowledge of a claim that correction officers were negligent. 137 A.D.3d 705, 705–06 (1st Dep't 2016); *see also Figueroa*, 195 A.D.3d at 468 (inmate's allegations that he sustained hand injury during assault insufficient to provide City with actual knowledge of his negligence claim); *Matter of Sandlin v. State*, 294 A.D.2d 723, 724 (3d Dep't 2002) (reports allegedly documenting assaults on inmate, if any, did not apprise State of petitioner's claim that State permitted or was responsible for assaults).

Here, not only did Jaime fail to provide proof that relevant records exist, he also failed to establish that the content of such records, if any, "would provide actual notice to the City of his intention to file a civil suit based on claims for negligence within 90 days or a reasonable time thereafter." *Figueroa*, 195 A.D.3d at 468. Instead, Jaime's attorney improperly speculated that employees of the City must have "documented their findings and recorded the facts underlying" the alleged assaults (R23). And even he is unclear about what those underlying facts are, as each of the five notices of claim uses boilerplate language to allege that corrections officers "and/or" inmates assaulted Jaime (R27, 34, 41, 48, 55).

This Court's decision in *Orozco* is again not to the contrary. As noted above at pages 19 to 21, in that case, the Court credited the petitioner's allegations that City employees had been involved in his arrest and prosecution, that the City had records documenting the allegedly fraudulent application for his arrest warrant, and that he had made "numerous" motions challenging the existence of probable cause during his criminal case. *See* 200 A.D.3d 559 at 560–62. But again, Jaime here has failed to make detailed allegations on any of these fronts, instead leaving ambiguous the facts and circumstances of the alleged assaults, and of any purported investigations and complaints that resulted. Absent such a showing, Jaime has offered no evidence, or even explanation, why the City would have had reason to know that an injury occurred or to connect it to an act or omission on the part of City employees. Conjecture from Jaime's attorney does not cut it.[2]

[2] As noted above, at page 21 n.1, to the extent this Court affirmed the grant of leave to serve a late notice of claim in *Orozco* without requiring the petitioner to produce an affidavit or any evidence of the contents of the records, the City respectfully agrees with the dissent that the Court's holding was error. *See Orozco*, 200 A.D.3d at 564–65 (Moulton, J., dissenting).

Although Jaime's attorney submitted what appear to be grievances that his client filed as well as several records reflecting the balance of Jaime's personal account on Rikers, neither Supreme Court nor this Court could properly consider those records as they were introduced for the first time on reply (*see* R68–83). *See Nationstar Mortg., LLC v. Tamargo*, 177 A.D.3d 750, 753–54 (2d Dep't 2019). In any event, even considering those records now, they still fail to establish that the City had actual knowledge of the essential facts constituting Jaime's claims.

As an initial matter, Jaime failed to accompany the submitted records with any affirmation or other document explaining their source, contents, or relationship to any of the late-notice-of-claim factors. And even looking at the records, none reflects evidence that Jaime even complained that he had been assaulted. For instance, the grievances—which demonstrate that Jaime knew how to make a complaint when he felt his rights had been violated—showed Jaime challenging the alleged loss of certain benefits, not complaining of assault, and the records of his account reflect no assault on Jaime either (*see* R68–83). Accordingly, the records could

not provide the City with timely actual knowledge of the essential facts constituting his claims here.

At bottom, to allow a petitioner to obtain leave to serve a late notice of claim based on nothing more than speculation that records with unspecified contents may exist would turn well-settled precedent on its head. It would seemingly permit an allegation of the existence of municipal records to substitute for a timely notice of claim in *every* instance, and "effectively vitiate the protections afforded public corporations by General Municipal Law § 50-e." *Olivera v. City of New York*, 270 A.D.2d 5, 6 (1st Dep't 2000) (cleaned up). Therefore, any finding of actual knowledge by Supreme Court on this front would have been based on a misapplication of law, be unsupported by the record, and should not stand. *See Newcomb*, 28 N.Y.3d at 465–66.

3. Allegations that City employees engaged in intentional conduct are wholly insufficient to show actual knowledge.

Before Supreme Court, Jaime also argued that the mere fact that he alleged that City employees engaged in intentional conduct, by itself, was enough to impute actual knowledge of his claims to

the City (*see* R12–15). But that contention has no place here when it is not even clear that Jaime is alleging that correction officers engaged in intentional conduct. Instead, each of his notices of claim prevaricates as to whether the claimed assaults were committed by correction officers, other inmates, or both (*see* R27, 34, 41, 48, 55).

In any event, Jaime's contention has no basis in the late notice of claim statute and is also contrary to established precedent. For starters, the Legislature enacted GML § 50-e, in part, to give municipalities an opportunity to promptly investigate and possibly settle tort claims asserted against them. *See Beary v. Rye*, 44 N.Y.2d 398, 407 (1978). The rule the Legislature created is the same whether the case involves an intentional tort or a negligence claim, *see id.* at 408–09, as the plain language of the statute does not distinguish between the two, *see* GML § 50-e; *id.* § 50-i.

Case law reflects as much. Indeed, rather than automatically impute actual knowledge to a municipality whenever one of its agents has been accused of committing an intentional tort, courts have instead insisted that petitioners substantiate their claims of actual notice with competent proof. *See, e.g.*, *Singleton*, 198 A.D.3d

at 499; *Matter of Nicholson v. City of New York*, 166 A.D.3d 979, 980 (2d Dep't 2018); *Matter of Islam v. City of New York*, 164 A.D.3d 672, 674 (2d Dep't 2018). To hold otherwise, and allow petitioners to show actual knowledge through a mere allegation of intentional conduct by a municipal employee, would not only downgrade the late notice of claim statute's "most important factor," *Corwin*, 141 A.D.3d at 489, from actual notice to constructive knowledge, contrary to the law's plain text, but would also "effectively vitiate" the statute's protections in the myriad of cases asserting intentional tort claims, *Olivera*, 270 A.D.2d at 6 (quotation marks omitted).

B. Supreme Court's decision also wrongly relieved Jaime of his burden to establish prejudice.

Supreme Court also abused its discretion in granting Jaime leave despite his failure to satisfy his initial burden to show that doing so would not prejudice the City. That result directly contradicts the Court of Appeals's reaffirmation in *Newcomb* of the established principle that "the burden initially rests on the petitioner to show that the late notice will not substantially

prejudice the public corporation." 28 N.Y.3d at 466; *accord Matter of Kelley v. N.Y.C. Health & Hosps. Corp.*, 76 A.D.3d 824, 829 (1st Dep't 2010). Under *Newcomb*, before the burden could shift to the City, Jaime was required to "present some evidence or plausible argument that supports a finding of no substantial prejudice." 28 N.Y.3d at 466. This initial inquiry is nowhere to be found in the court's two-sentence order (R5). In any event, Jaime failed to meet his burden.

Before Supreme Court, Jaime argued, through circular reasoning, that there could be no prejudice because DOC investigated and documented the alleged assaults and thus had actual knowledge of them (R18). But as explained above at pages 15 to 26, to the extent that records even exist, there is no evidence that they provided the City with actual knowledge. *See Matter of Grajko v. City of New York*, 150 A.D.3d 595, 596 (1st Dep't 2017) (mere reference to records that purportedly could be examined, with no indication of information in them, insufficient to show lack of prejudice). And records that do not provide actual knowledge "obviously cannot, ipso facto, establish a lack of prejudice." *Kelley*,

76 A.D.3d at 828; *see also Matter of Maldonado v. City of New York*, 152 A.D.3d 522, 523 (2d Dep't 2017) (rejecting unsupported assertion in attorney's affirmation that respondents were not substantially prejudiced by delay in serving notice of claim because they were aware of facts and circumstances of the case).

Nor does Jaime's stated plan to pursue federal claims for false arrest and malicious prosecution show a lack of prejudice to the City (R18–19). False arrest and malicious prosecution are plainly different theories than those alleged here, and would presumably involve different defendants and different defenses. And the assertion of federal claims after the expiration of the 90-day period notice-of-claim period—even if the claims were similar—would still prejudice the City in investigating the claims in either case.

Finally, Jaime's notices of claim also named specific officers who he says assaulted him (R27, 34, 41, 48, 55), but that does not help to show a lack of prejudice. By offering these names 7 to 23 months after the events in question, Jaime failed to show that the lost opportunity to speak to these potential witnesses "while their memories were still fresh" did not cause prejudice. *Matter of Mehra*

v. City of New York, 112 A.D.3d 417, 419 (1st Dep't 2013). Had he timely served the notices of claim identifying those officers, the City could have investigated whether his claims had merit, determined if those officers had even witnessed the claimed assaults, and if they did, find out what actions they took to stop them. To the extent Jaime's assailants were other inmates, the City could have also determined whether the named officers or any others were aware of prior threats or assaults by other inmates, or had previously experienced altercations involving Jaime. Likewise, the City could have investigated what, if any, medical treatment Jaime had received showing that he had, or had not, sustained any injuries.

Now, it is almost a year and a half after the last alleged assault and nearly three years since the first (*see* R11). Jaime has put forth no evidence or viable argument to show that this delay has not impaired the City's ability to reconstruct those events. To the extent that the corrections officers or DOC medical personnel who could testify to the relevant facts are even still under the City's control, Jaime has made no showing that their memories are still fresh. Accordingly, Jaime failed to meet his initial burden to show

that the passage of time, fading memories, and the departure of personnel did not prejudice the City's ability to defend against this lawsuit. This factor, too, weighs against Supreme Court's decision to grant him leave to file a late notice of claim. *See Newcomb*, 28 N.Y.3d at 465–66.

C. Jaime also offered no reasonable excuse for his significant delay.

Supreme Court also erred in granting the petition for leave to serve a late notice of claim where Jaime had not shown a reasonable excuse for his delay, as is required. As with the other two factors, Jaime failed to make any evidentiary showing, or even provide a detailed explanation, why his lengthy delay in seeking leave to serve his five notices of claim should be excused.[3]

Instead, Jaime's attorney simply asserted, without providing further information or attaching an affidavit from Jaime, that his client was focused on his pending criminal trial while incarcerated,

---

[3] The City recognizes that it did not expressly make this argument in Supreme Court (*see* R61–66). But because a petitioner "is required to provide an adequate excuse for the[ir] delay," *Matter of Seif v. City of New York*, 218 A.D.2d 595, 596 (1st Dep't 1995), and Jaime did not do so here, this Court can and should consider this issue on appeal.

and had been unable to find a lawyer despite "numerous" attempts (R21). But that does not suffice, as a conclusory allegation—particularly from an attorney without first-hand knowledge—that a petitioner is incarcerated and unable to locate a lawyer is not a reasonable excuse. *See, e.g.*, *Sandlin*, 294 A.D.2d at 724; *Matter of Duarte v. Suffolk Cty.*, 230 A.D.2d 851, 852 (2d Dep't 1996). Rather, as this Court reasoned in *Figueroa*, Jaime's "failure to submit his own affidavit also undercuts his claim of a reasonable excuse for his delay," particularly when, as in that case, the Court has "only counsel's conclusory statement on the subject." 195 A.D.3d at 468.

But even if a petitioner's incarceration could under other circumstances constitute a reasonable excuse, it cannot do so on this record. Although Jaime's attorney suggests—again, without any first-hand knowledge or details given—that Jaime had difficulty obtaining an attorney (*see* R21), he fails to explain, let alone substantiate, how much of the 23-month delay (as to the first alleged assault) or the 7-month delay (as to the most recent) was due to this difficulty or why Jaime was unable to serve the notices of claim himself. Jaime could have submitted an affidavit in support

of his petition to provide a direct explanation of what led to his multi-month delay as to each of the claimed assaults. But this he declined to do.

Contrary to Jaime's attorney's next contention before Supreme Court (*see* R21–22), the beginning of the Covid-19 pandemic does not excuse Jaime's failure to timely serve the notices of claim on the City either. First, although the effects of a global pandemic may provide a reasonable excuse in some situations, Jaime's attorney declined to offer any details of how the onset of the pandemic in March 2020 prevented his client from timely serving the notices of claim on the City, and instead relied on conclusory and unsubstantiated assertions. Second, Jaime claims that the first three times he was allegedly assaulted occurred nine, four, and two months before the pandemic even began (*see* R27, 34, 41). Wholly absent from his attorney's affirmation is any adequate explanation as to why he was unable to serve notices of claim for those incidents.

Jaime's attorney also seemed to suggest below that his client's substantial delay should be excused so as to avoid parallel civil and criminal proceedings (*see* R21 (citing *McDonough v. Smith*, 139 S.

Ct. 2149 (2019))). But here, Jaime has wholly failed to explain how there was ever any danger of parallel proceedings. The notices of claim do not assert causes of action for false arrest or malicious prosecution based on the charges for which he is incarcerated; instead, he alleges that corrections officers engaged in intentional or negligent conduct during five incidents *after* he was already detained on Rikers, none of which is claimed to be the subject of a criminal prosecution (*see* R27, 34, 41, 48, 55). Put differently, nothing about this case would implicate the criminal proceeding that led to Jaime's pre-trial detention on Rikers, or any other proceeding.

CONCLUSION

This Court should reverse Supreme Court's order granting Figueroa's petition for leave to file a late notice of claim.

Dated: New York, New York
February 22, 2022

Respectfully submitted,

GEORGIA M. PESTANA
Corporation Counsel
of the City of New York
Attorney for Appellant

By: _____
LORENZO DI SILVIO
Assistant Corporation Counsel

100 Church Street
New York, New York 10007
212-356-1671
ldisilvi@law.nyc.gov

INGRID R. GUSTAFSON
LORENZO DI SILVIO
of Counsel

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word 2010, the portions of the brief that must be included in a word count contain 6,814 words.

STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

---------- x

LUIS JAIME,

Docket No.
2021-02848

Petitioner-Respondent,

against

CITY OF NEW YORK,

Respondent-Appellant.

---------- x

1. The index number in the Court below is 806290/2021E.

2. The full names of the original parties appear in the caption above. There have been no changes in the parties.

3. This proceeding was commenced in the Supreme Court, Bronx County.

4. This proceeding was commenced by the Petitioner's Order to Show Cause for leave to serve late Notices of Claims on or about May 10, 2021. The Verified Petition was served on or about May 5, 2021. Issue was joined by the service of Respondent's Affirmation in Opposition to Petitioner's Order to Show Cause on May 20, 2021.

5. Petitioner alleges that the defendants intentionally assaulted and battered him and also denied adequate medical attention. Petitioner further claims a breach of duty of care which the defendant had towards him.

6. This appeal is from a decision and order of the Honorable Mitchell J. Danziger, Supreme Court, County of Bronx, dated May 27, 2021.

7. This appeal is being taken on a fully reproduced record.