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.

REPLY BRIEF

HON. SYLVIA O. HINDS-RADIX
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

April 1, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

Other Authority

PRELIMINARY STATEMENT

In its opening brief, the City showed that Supreme Court abused its discretion in granting Jaime leave to serve five late notices of claim because Jaime had failed to carry his burden on the three factors courts must consider. Most notably, Jaime adduced no evidence that the City obtained actual, timely knowledge of his vague allegations that he had been assaulted five times by other inmates "and/or" correction officers. Instead, he relied solely on his attorney's speculation that records of the incidents must exist, and on the fact that assaults by corrections officers would be intentional. But as the City explained, he produced neither the records, nor any evidence that they exist. And his intentionality theory failed both because it was not clear that he was alleging intentional conduct, and because it lacked any basis in law.

In response, Jaime addresses none of the City's arguments, relying instead on citations to general legal principles. He does not identify any evidence that even suggests the City knew that he had been assaulted by anyone. And his brief confirms the vague nature of his allegations, merely citing the boilerplate in his notices of

claim, which do not even make clear who was purportedly at fault for the incidents. When even Jaime is uncertain about the essential facts constituting his claims, there is no reason to conclude that the City had actual knowledge of them.

Jaime has similarly failed to rebut the City's showing that he did not carry his initial burden to show that granting leave would not substantially prejudice the City. As before Supreme Court, he primarily relies on his unsubstantiated argument that the City was not prejudiced because it had actual knowledge of his claims. And Jaime wholly fails to explain his only other argument that the City will not be prejudiced because he can still pursue federal claims for false arrest and malicious prosecution—claims that would be against different defendants and based on different facts.

Finally, Jaime still has not identified a reasonable excuse for his delay in seeking leave to serve the late notices of claim. His attorney simply repeats the arguments he made in his petition. But, as the City explained in its opening brief, such uncorroborated and conclusory allegations do not establish a reasonable excuse. This Court should reverse and dismiss Jaime's petition for leave.

ARGUMENT

JAIME OFFERS NO PERSUASIVE DEFENSE OF SUPREME COURT'S IMPROVIDENT GRANT OF LEAVE

A. Contrary to his contentions, actual knowledge of the essential facts constituting Jaime's claims cannot be presumed or based on attorney speculation.

Jaime concedes in his brief that whether the City acquired timely actual knowledge of the essential facts constituting his claims within 90 days after his claims arose or a reasonable time thereafter is the most important factor when determining whether to grant leave to serve a late notice of claim (*see* Resp. Br. 9). But here, the City established in its opening brief that the two arguments Jaime offered in Supreme Court on this factor were pure speculation, and certainly did not amount to the evidentiary showing that is required to establish actual knowledge.

As to Jaime's first argument, the City explained that speculation by an attorney that a municipal defendant may possess records regarding an incident—which is all Jaime offered here (*see* R12–15, 17, 22–23)—is not enough to establish actual knowledge (App. Br. 16–21). *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); *Matter of Walker v. NYCTA*, 266 A.D.2d 54, 55 (1st Dep't 1999). Rather, "actual knowledge cannot be presumed," and must be established through competent evidence. *Bornschein v. City of New York*, 2022 N.Y. App. Div. LEXIS 1848, at *1 (1st Dep't Mar. 22, 2022) (citing *Matter of Orozco v. City of New York*, 200 A.D.3d 559, 562–63 (1st Dep't 2021)).

And even if there were evidence that records existed, the City explained that possession of records is not the same as showing that knowledge of the essential facts constituting Jaime's claims could be readily inferred from the contents of those records (App. Br. 21–26). *See Matter of Kuterman v. City of New York*, 121 A.D.3d 646, 647–648 (2d Dep't 2014); *Matter of Rivera v. NYCHA*, 25 A.D.3d 450, 451 (1st Dep't 2006).

On appeal, Jaime merely cites a number of cases for the proposition that records of an incident may afford a municipality actual knowledge of a claim (Resp. Br. 8). He does not dispute that he failed to produce any records of the alleged assaults here, let alone articulate how those records could afford the City knowledge

of the essential facts of his claims. Nor does he dispute that the only records he did submit were improperly introduced for the first time on reply and in any event could not have afforded the City actual knowledge (*see* App. Br. 25). Those records address complaints by Jaime about entirely different incidents and do not reflect any physical injury Jaime sustained at all, let alone one for which fault is attributable to the City or its employees (*see* R68–72, 74–77).

Whether Jaime neglected to obtain the relevant records, or got them and found nothing helpful, his failure to submit evidence of the City's actual notice precludes him from obtaining leave to file a late notice of claim. *See, e.g.*, *Nicholson v. City of New York*, 166 A.D.3d 979, 980 (2d Dep't 2018) (leave improvidently granted where petitioner alleged existence of records without providing evidence of their contents); *Grajko v. City of New York*, 150 A.D.3d 595, 596 (1st Dep't 2017) (same where, among other things, petitioner referred to, but did not submit, records and failed to identify their specific contents). And because Jaime's brief does not identify a single record in the City's possession, much less any other evidence that would have provided notice of his claims, he did not show

actual knowledge, and leave should have been denied. *Wally G. v. N.Y.C. Health & Hosps. Corp.*, 27 N.Y.3d 672, 677 (2016).

Indeed, Jaime does not dispute, based on the insufficient attorney affirmation he did submit, that there is no basis to even infer that the City had actual knowledge or that records exist. On appeal, as before Supreme Court, he seems confused about what the essential facts of his claims against the City even are, and whether he is alleging negligence or intentional torts. In his brief, he indicates that *only* corrections officers assaulted him (*see, e.g.*, Resp. Br. 9). But that's not what he alleged below. Instead, he alleged that corrections officers "*and/or inmates*" had assaulted him in his five notices of claim, without providing any further detail about any of the incidents (R27, 34, 41, 48, 55 (emphasis added)). Jaime offers no persuasive explanation for how the City could have had actual knowledge of the essential facts constituting his claims when he himself cannot clearly articulate what those essential facts are.

As to Jaime's second argument, the City showed that simply asserting claims that municipal employees committed intentional conduct cannot show actual knowledge, either (App. Br. 26–28). Not

only is it unclear whether Jaime is alleging that City employees actually engaged in intentional conduct in this case, as explained, but there is no exception for intentional torts in the late-notice-of-claim statute. *See* GML § 50-e; *id.* § 50-i. Rather, the statute reflects that when a notice of claim is required, but not timely served, a would-be plaintiff must show entitlement to discretionary leave to proceed with *any* tort claim. Those points defeat each of the arguments Jaime raised below, yet he does not engage with any of them in his brief (*see* Resp. Br. 7–9).

Instead, on appeal, Jaime asserts that actual knowledge is imputed to the City for any claims for false arrest or malicious prosecution (Resp. Br. 8). But Jaime is not alleging false arrest or malicious prosecution here (*see* R27, 34, 41, 48, 55). In any event, the cases he cites for this proposition do not hold that, any time there is an allegation of false arrest or malicious prosecution—let alone any time the plaintiff alleges an intentional tort—actual knowledge by the City is presumed. Instead, the reviewing courts in those cases found that the plaintiffs carried their burden on actual knowledge, generally because there was evidence that there

had been a timely investigation surrounding the underlying incidents that conferred notice of the facts constituting the claims. *See Grullon v. City of New York*, 222 A.D.2d 257, 258 (1st Dep't 1995); *Justiniano v. NYCHA*, 191 A.D.2d 252, 252–53 (1st Dep't 1993); *Matter of Reisse v. Cty. of Nassau*, 141 A.D.2d 649, 651 (2d Dep't 1988); *Weinzel v. Cty. of Suffolk*, 92 A.D.2d 545, 546 (2d Dep't 1983). None of these courts reasoned that actual knowledge could be premised based solely on the vague allegations and attorney speculation that Jaime offers here.

In fact, one of the cases Jaime cites actually refutes his theory. In *Grullon*, after holding that the City had acquired timely, actual knowledge of the plaintiff's false arrest and imprisonment claims based on an investigation, this Court held that the plaintiff had not shown that the City had actual knowledge of his claim for assault. *See* 222 A.D.2d at 258. In that case, then, the mere allegation of an intentional tort, including one for assault, was not enough to show actual knowledge.

Jaime also seems to suggest that actual knowledge may be presumed simply because he alleged that corrections officers

"perpetrated," "participated in," or "were present" for the alleged assaults (Resp. Br. 9; R17). But Jaime cites no authority for those propositions. In any event, appellate courts have repeatedly rejected the argument that the mere presence and involvement of municipal employees during an incident is sufficient to afford a municipality with actual knowledge of a claim. *See Verizon N.Y., Inc. v. City of New York*, 26 A.D.3d 247, 248 (1st Dep't 2006); *Matter of Crocco v. Town of New Scotland*, 307 A.D.2d 516, 517 (3d Dep't 2003); *Caselli v. New York*, 105 A.D.2d 251, 255 (2d Dep't 1984); *see also Adkins v. New York*, 43 N.Y.2d 346, 352 (1977). And even if it were, Jaime has offered no evidentiary basis, or even detail, from which the nature of the involvement of City employees could be inferred here.

Thus, unlike in any of his cited cases, Jaime 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 or were negligent—whether through an unjustified application of force or by failing to protect Jaime from harm from other inmates—and to

diligently investigate the matter. His boilerplate allegations are certainly not enough to show actual knowledge of the essential facts constituting his claims, the standard under GML § 50-e.

B. Jaime's brief fails to explain how he satisfied his initial burden to show the absence of prejudice to the City.

On appeal, as before Supreme Court, Jaime's argument on the prejudice factor relies principally on his faulty and unsupportable claim that the City acquired actual knowledge of the essential facts constituting his claims (Resp. Br. 10–12, 15). But as the City explained in its opening brief (App. Br. 29–30), because there is no evidence that the City had timely actual notice, this contention cannot establish a lack of prejudice. *Smiley v. MTA*, 168 A.D.3d 631 (1st Dep't 2019); *Kelley v. N.Y.C. Health & Hosps. Corp.*, 76 A.D.3d 824, 828 (1st Dep't 2010).

Indeed, Jaime admits in his brief, as he must, that he bore the initial burden to come forward with some evidence or argument demonstrating that his delay did not prejudice the City (Resp. Br. 14–15). *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 (2016). Somewhat confusingly, however, he also asserts that

the City failed to offer "specific evidence" of prejudice, citing *Matter of Lanphere v. County of Washington*, 301 A.D.2d 936 (3d Dep't 2003), for the proposition that the passage of time alone does not satisfy the City's burden (Resp. Br. 11). But the Third Department decided *Lanphere* before the Court of Appeals clarified in *Newcomb* that the City is not required to adduce any evidence of prejudice when, as is the case here, Jaime did not first carry his initial burden of showing that his delay would *not* cause substantial prejudice.

Buried in several pages of legal recitation is Jaime's only other argument on prejudice: that the City would not be prejudiced in defending against this tort suit as he plans to pursue federal claims for false arrest and malicious prosecution (Resp. Br. 12–13). But Jaime wholly fails to explain how any decision to pursue those claims would mean that the City was not prejudiced. Allegations of false arrest and malicious prosecution would be brought against different defendants and be unrelated to any of the events underpinning Jaime's claims in this case. And even where the claims are related, courts regularly hold that a plaintiff has failed to show a lack of prejudice despite the presence of parallel federal

claims that are not subject to the notice of claim requirement. *See Matter of Nunez v. Vill. of Rockville Ctr.*, 176 A.D.3d 1211, 1213–14 (2d Dep't 2019); *Matter of Royes v. City of New York*, 136 A.D.3d 1042, 1043–44 (2d Dep't 2016); *Meyer v. Cty. of Suffolk*, 90 A.D.3d 720, 721–22 (2d Dep't 2011).

This result makes sense for multiple reasons. The mere assertion of parallel federal claims does not somehow eliminate the prejudice the City had already sustained when it was denied a timely opportunity to investigate the state-law claims, which is the relevant inquiry for the notice of claim statute. Moreover, § 1983 claims involve different elements as well as substantially different defenses than do state tort claims of the kind Jaime seeks to assert here. Unlike for state common-law claims against an individual, the City does not face vicarious liability for federal claims under § 1983. *See Lepore v. Town of Greenburgh*, 120 A.D.3d 1202, 1204 (2d Dep't 2014). Thus, to defend against any state-law claims, the City would conduct different or additional investigations than it would to defend against a § 1983 claim, which entails proof that the alleged constitutional violation arises from a municipal custom or policy.

See generally Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). The filing of a federal claim thus cannot compensate for Jaime's failure to take appropriate, timely steps to notify the City of his state tort claims.

This Court's decision in *Orozco*, 200 A.D.3d at 563, is not to the contrary, as the petitioner in that case asserted federal claims against the same defendants he named in his tort suit, and where both sets of claims involved the same underlying events. Here, in contrast, Jaime does not allege that he was arrested or prosecuted in connection with any of the alleged assaults, and he declines to explain how a § 1983 suit against the officers who caused him to be detained at Rikers could even relate to the assaults he alleges while incarcerated.

C. Jaime ignores case law holding that an attorney's conclusory allegations are insufficient to establish a reasonable excuse for delay.

As the City explained in its opening brief (App. Br. 32–35), Jaime failed to offer a reasonable excuse for his delay in seeking leave to serve any of the five proposed notices of claim. Under well-established precedent, an attorney's conclusory allegation that a

petitioner is incarcerated and unable to find an attorney (R21) does not constitute a reasonable excuse (*see* App. Br. 32–33). Jaime simply ignores the cases cited in the City's brief, and instead repeats his conclusory and generic assertion that his incarceration resulted in his delay (Resp. Br. 10). His lawyer's bare assertion, without any evidentiary support, is not enough. *See, e.g.*, *Matter of Figueroa v. City of New York*, 195 A.D.3d 467, 468 (1st Dep't 2021). *Sandlin v. State*, 294 A.D.2d 723, 724 (3d Dep't 2002); *Duarte v. Suffolk Cty.*, 230 A.D. 2d 851, 852 (2d Dep't 1996).

Besides, as the City also explained (App. Br. 33–34), even crediting counsel's assertion that Jaime had difficulty finding an attorney despite "numerous" attempts, and was focused on his trial on criminal claims with no explained connection to this case (R21), that is still not a reasonable excuse. Jaime did not provide any information about 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 his inability to connect with any attorney sooner or his decision to focus on the criminal charges against him. Nor does he explain why he was unable to serve the notices of claim himself.

Jaime's response brief does not address this basic deficiency. As with the other late-notice-of-claim factors, his brief is filled instead with vague, conclusory, and unsubstantiated claims, but devoid of any actual proof.

The City further explained in its brief (*see* App. Br. 34–35) that Jaime's attorney's conclusory, unsubstantiated claim that the start of the Covid-19 pandemic—nine, four, and two months *after* three of the five times Jaime claims he was assaulted (*see* R27, 34, 41)—does not excuse his client's delay, either. In any event, the State already accounted for the effects of the pandemic when it temporarily tolled statutory limitations period, including the 90-day claim period. *See* N.Y. Exec. Order 202.67 (Oct. 4, 2020). In fact, Jaime's attorney acknowledged that because of the toll, his client was still permitted to seek leave on his three earliest claims, which would have been time-barred otherwise (*see* R11). *See* GML § 50-e(5); *id.* § 50-i(1)(c). Conclusory claims aside, because Jaime has already benefited from pandemic-related tolling, he cannot rely on the pandemic as a further excuse for his substantial delay.

CONCLUSION

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

Dated: New York, New York
April 1, 2022

Respectfully submitted,

HON. SYLVIA O. HINDS-RADIX
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 3,025 words.