COUNTY OF ERIE

MICHAEL SIRAGUSA
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MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

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SECOND ASSISTANT COUNTY ATTORNEY

January 13, 2015

Ms. Karen McCarthy, Clerk
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Dear Ms. McCarthy:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Dieter Harster vs County of Erie*
Document Received:	Order to Show Cause
Name of Claimant:	Dieter Harster P.O. Box 5371 Vienna, West Virginia 26105
Claimant's Attorney:	Steven M. Cohen, Esq. 2410 North Forest Road, Suite 301 Amherst, New York 14068

Should you have any questions, please call.

Very truly yours,

MICHAEL SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP/crb
Enc.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie, Part 33, in the City of Buffalo, on the 6 day of ~~December~~ January, 2015.

Present: HON. DEBORAH A. CHIMES, J.S.C.
Hon. _____, J.S.C.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

Application for Leave to Serve a Late Notice of Claim on Behalf of:

DIETER HARSTER
P.O. Box 5371
Vienna, West Virginia 26105

Claimant,

-vs-

COUNTY OF ERIE
95 Franklin Street
Buffalo, New York 14202

Respondent.

ORDER TO SHOW CAUSE

Index No.: 814476/2014

This paper received at the Erie County Attorney's Office from Caroline Sauer on the 12th day of Jan, 2015 at 3:13 a.m./p.m.

Assistant County Attorney

Upon reviewing the annexed affirmation of Steven M. Cohen, Esq., dated the 17 day of December, 2014, including Exhibits "A" through "E" attached thereto; it is

ORDERED, that the Respondents appear at a Special Term of this Court to be held before the assigned Justice of the Supreme Court at 50 Delaware Avenue, Part 33, Buffalo, New York 14202 at 10:00 o'clock in the fore noon on ~~December~~ January 22, 2014, or as soon thereafter as counsel can be heard, to SHOW CAUSE WHY the within application made pursuant to General Municipal Law §50-e(5) should not be granted; and it is further

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ORDERED, that service of a copy of this Order and the papers on which it is granted by PERSONAL DELIVERY to COUNTY OF ERIE, at 95 Franklin Street, Buffalo, New York 14202, shall be deemed good and sufficient service of both this Order, Attorney Affirmation and exhibits. Service on the County of Erie is to be completed no later than January 13, 2015, and it is further

ORDERED, that any and all responding papers are due to the Court and opposing counsel by January ~~9th~~ 20th, 2015.

~~Dated: December __, 2014~~

Deborah A. Chimes

HON.
HON. DEBORAH A. CHIMES, J.S.C.

GRANTED

JAN 07 2015

BY Mary Pazik
MARY PAZIK
COURT CLERK

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

Application for Leave to Serve a
Late Notice of Claim on Behalf of:

DIETER HARSTER

Claimant,

-vs-

COUNTY OF ERIE

Respondent.

ATTORNEY AFFIRMATION

Index No.

Steven M. Cohen, Esq., an attorney duly admitted to practice law in the Courts of the State of New York, affirms the following statement to be true under the penalties of perjury pursuant to CPLR Section 2106:

1. I am an attorney at law, admitted to practice in the State of New York, and I am associated with the law firm HOGANWILLIG, PLLC, attorneys for the Claimant, Dieter Harster ("Claimant"). As such, I am fully familiar with the facts and circumstances addressed below.

2. This affirmation is submitted in support of Claimant's application for an Order permitting him to serve Respondent County of Erie with a Late Notice of Claim pursuant to General Municipal Law §50-e(5).

3. This is an action for recovery of damages due to personal injuries sustained by the Claimant caused solely by the assault, battery, intentional infliction of emotional distress, civil rights violations, and negligent hiring and training of its police officers and other employees, and other tortious acts of Respondent COUNTY OF ERIE by and through its agents, servants, officers and employees of the Erie County Sheriff's Department which occurred on or about January 20, 2014 at approximately 11:00 p.m.

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4. Pursuant to New York General Municipal Law §50-e(7), annexed hereto as **Exhibit A** is the proposed late Notice of Claim for Respondent County of Erie.

BACKGROUND

5. Upon information and belief, on or about January 20, 2014, at approximately 11:00 p.m. claimant was arrested at 10220 Main Street in the Town of Clarence by the Erie County Sheriff's Department for various driving while intoxicated infractions. Annexed hereto as **Exhibit B** are true and accurate copies of the tickets claimant was issued.

6. Upon information and belief, shortly his arrest, claimant was assaulted, battered and/or otherwise injured by Erie County Sheriff Deputy Simon Biegasiewicz and Deputy Brandon Stott.

7. As a result of the tortious conduct of Deputy Biegasiewicz and Deputy Stott and other unknown deputies at this time, claimant was transported by Twin City EMS from 10220 Main Street to Erie County Medical Center. At Erie County Medical Center, claimant was diagnosed with a head injury; skin abrasions; nasal fracture; orbital contusion; swelling on the left nose, left cheek, left inferior periorbital area and left inferior preseptal space. Annexed hereto as **Exhibit C** are true and accurate copies of claimant's medical records from Erie County Medical Center.

8. Claimant's criminal charges were partially resolved through a bench trial in the Town of Clarence Justice Court on December 5, 2014.

9. Claimant's attorneys served a omnibus discovery motion in the accompanying criminal case on or about February 21, 2014. Annexed hereto as **Exhibit D** is a true and accurate copy of claimant's omnibus discovery motion.

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10. Among claimant's discovery demands upon the Erie County District Attorney's Office were request for "any and all police reports filed" with respect to this action. **Exhibit D.**

11. The Erie County District Attorney's office refused to produce said documents under the pretense the documents were considered *Rosario* material and did not produce said reports until December 5, 2014. Annexed hereto as **Exhibit E** is a true and accurate copy of claimant's *Rosario* file.

12. Among the documents produced in the *Rosario* file were police reports and use of force reports filed by Erie County Sheriff Deputies. **Exhibit E.**

ARGUMENT

13. Pursuant to New York General Municipal Law §50-e, "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation...the notice of claim shall comply with and be served in accordance with the provisions within ninety (90) days after the claim arises." (NY General Municipal Law §50-e[1][a]).

14. Claimant has a one (1) year and ninety (90) day period in which leave for permission to file the late Notice of Claim may be entertained (New York General Municipal Law §50-i [NY CLS 2008]; *see also Hochberg v. New York*, 63 N.Y.2d 665 [1984]).

15. In deciding wheter to permit the service of a late Notice of Claim, a court will generally consider three (3) factors: (1) whether the petitioner demonstrated a reasonable excuse for the delay; (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety (90) days after the claim arose or a reasonable time thereafter; and (3) whether the delay in serving the notice of claim substantially prejudiced the

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public corporation's opportunity to investigate and defend against the claim (*see* General Municipal Law §50-e [5] [emphasis added]; *Matter of Jasinski v. HB Ward Tech. School*, 306 A.D.2d 347 [2d Dep't 2003]; *Matter of Lorseille v. New York City Hous. Auth.*, 295 A.D.2d 612 [2d Dep't 2002]; *Matter of Lyerly v. City of New York*, 283 A.D.2d 647 [2d Dep't 2001]).

16. "The presence or absence of any one of the foregoing factors is not determinative...and the absence of a reasonable excuse is not, standing alone, fatal to the application." *Bertone Commissioning v. City of New York*, 27 A.D.3d 222, 223 (1st Dep't 2006).

17. The determination as to whether to grant leave to serve late notice of claim is a question committed to the sound discretion of the court (*see Matter of Plantin v. New York City Hous. Auth.*, 203 A.D.2d 579 [2d Dep't 1994]). Furthermore, the Court must exercise its discretion after consideration of all the factors and circumstances relevant to an application pursuant to General Municipal Law §50-e(5) (*Matter of Jordan v. City of New York*, 38 A.D.3d 336, 339 [1st Dep't 2007]).

18. In *Wetzel v. Town of Amherst*, the Fourth Department acknowledged a claimant does not need to offer an excuse for failing to timely file a notice of claim within the 90-day period when the claimant can make a persuasive showing that the defendant acquired actual knowledge of the essential facts constituting the claim. 207 A.D.2d 965 (4th Dep't 1994).

19. Pursuant to New York's General Municipal Law, Respondent County of Erie is entitled to a notice of claim.

20. More than ninety (90) days have elapsed from the date of the incident, January 20, 2014, and claimant must therefore receive the Court's approval prior to serving a late notice of claim on Respondent.

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21. Further, as the underlying incident occurred on January 20, 2014, claimant brings this suit less than one year following the incident giving rise to the claim.

22. Among the criteria for serving a late notice of claim is whether claimant can demonstrate a reasonable excuse for the delay in timely filing the claim. *Matter of Jasinski, supra.*

23. Here, claimant offers the court the reasonable excuse that his criminal charges in the Town of Clarence were not resolved until December 5, 2014 and that he is no longer a resident of the Erie County.

24. Further, as a reasonable excuse for the delay in commencing this action, claimant demanded "any and all police reports filed in respect to this criminal action" on or about February 21, 2014 upon the Erie County District Attorney's office. **Exhibit D.**

25. Claimant was not provided with any police reports, including the use of force reports, until his attorneys were handed his *Rosario* file minutes before his bench trial in the Town of Clarence Justice Court on or about December 5, 2014.

26. Respondent provided claimant with extremely limited information relating to this incident prior to December 5, 2014. Prior to this date, Respondent had provided only the standard DWI Bill of Particulars; claimant's driving abstract; and Deputy Biegasiewicz's medical records.

ACTUAL KNOWLEDGE OF THE ESSENTIAL FACTS

27. Another of the factors that should be accorded great weight is whether the respondents received actual knowledge of facts constituting the claim in a timely manner (*See Matter of Canty v. City of New York*, 273 A.D.2d 467 [2d Dep't 2000]).

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28. A relevant consideration for the trial court before exercising its discretion to grant leave to serve a late notice of claim is whether the respondent had individuals present at the scene of the incident. *De Groff v. Bethlehem Cent. School Dist.*, 92 A.D.2d 702 (3rd Dep't 1983).

29. As a result of the incident alleged in the Notice of Claim, Respondent's employees, agents, and/or servants, including Deputy Simon Biegasiewicz, called for medical assistance for himself and for claimant and claimant was transported to Erie County Medical Center by Twin City EMS following his arrest. **Exhibit E.**

30. At Erie County Medical Center, claimant was diagnosed with numerous injuries, including, but not limited to, a broken nose and an orbital contusion.

31. Claimant was subsequently transferred to the Erie County Holding Center by Erie County Sheriff's Department officers.

32. Upon information and belief, the Erie County District Attorney's Office was aware, or should have been aware, claimant was transported to the hospital and treated for significant injuries at the time it received the case, including police reports compiled by Deputy Biegasiewicz and Deputy Stott were in the possession of the Erie County District Attorney's Office. **Exhibit E.**

33. In fact, two members of the Erie County Sheriff's Department filed use of force reports as a result of the incident alleged in the Notice of Claim. **Exhibit E.**

34. Respondent and its employees, agents, and servants created extensive reports with respect to this matter, including the use of force reports referenced above.

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35. As such, claimant respectfully requests this Court determine Respondent had actual knowledge of the essential facts of this claim well-within the ninety days provided by statute.

SUBSTANTIAL PREJUDICE TO DEFENDING CLAIM

36. The inquiry here is whether the respondent can make a '*compelling* showing of prejudice' if the application to serve a Late Notice of Claim is granted. *Henderson v. Town of Van Buren*, 281 A.D.2d 872, 874 (4th Dep't 2001)(emphasis added).

37. Based on the foregoing, it is respectfully submitted Respondent cannot make any showing of prejudice whatsoever given their actual knowledge of the essential facts within hours of the accrual of the cause of action. *See Lindstrom*, 24 A.D.3d at 1303 ("Respondent *thus* [i.e., because it had timely actual knowledge of the essential facts] *was not substantially prejudiced* as a result of claimant's delay in serving the notice of claim…[citations omitted]"). (emphasis added).

38. Claimant has brought this petition seeking to file late Notice of Claim within the one (1) year and ninety (90) day statute of limitations set by General Municipal Law §50-i, and can timely file suit against Respondent following the service of claim and demand for adjustment time period.

39. Further, less than thirty (30) days after this action, and well within ninety (90) days of the instant action, claimant demanded Erie County District Attorney's Office preserve any and all physical evidence with respect to this action, including, but not limited to, any handwritten notes and drafts and video tape recordings (including but not limited to 911 and police dispatch tapes) and other electronic media relative to the stop, frisk, detention,

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investigation and observation, and any and all police reports filed relating to this criminal action. **Exhibit D.**

40. As such, Respondent cannot assert prejudice, as claimant has already demanded all physical evidence remain preserved and all witnesses are identified in said records.

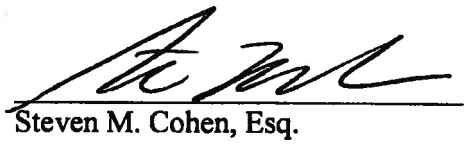
41. Consequently, claimant respectfully requests this Court enter an Order granting claimant leave to file late Notice of Claim against Respondent County of Erie.

42. No previous application for the relief requested herein has been made.

WHEREFORE, it is respectfully requested this Court enter an Order, pursuant to General Municipal Law §50-e(5), permitting Claimant to serve a late Notice of Claim on the Respondent named herein; and granting such other and further relief as the Court may deem just and proper.

Dated: Amherst, New York
December 11, 2014

HOGANWILLIG, PLLC



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