

97CV00231-ILG-MO

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ANDREW M. ROHMAN

Plaintiff,

-against-

MEMORANDUM & ORDER  
97-CV-0231(ILG)

THE NEW YORK CITY TRANSIT  
AUTHORITY and CARMEN J. BIANCO

Defendants  
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GLASSER, United States District Judge:

**BACKGROUND**

Plaintiff Andrew M. Rohman ("Rohman") was employed by defendant New York City Transit Authority ("NYCTA") from May 2, 1966 until his retirement in August 1995. For the last nine years of his employment, plaintiff held the position of Manager of Rapid Transit Investigations, Division of Field Operations, Office of Systems Safety. Plaintiff's immediate supervisor was Charles Neil Yongue ("Yongue") who, in turn, reported to defendant Carmen J. Bianco ("Bianco"), Assistant Vice President of the Office of System Safety.

Rohman's position required him to conduct rail accident investigations whenever they occurred. His supervisor described Rohman's job requirements as follows: "The nature of Mr. Rohman's position requires him to be in an 'on call' status 24 hours a day, 7 days a week, to coordinate the response to all rapid transit derailments, collisions and major incidents. This responsibility is very substantial and is limited to a very few Authority employees." Pl. 56.1 Statement, Ex. E. In order to facilitate his investigation of transit accidents, Rohman had been assigned a NYCTA vehicle since 1986.

Throughout Rohman's employment he consistently received positive reviews for his job performance. In 1994, plaintiff's direct supervisor, Yongue, had given plaintiff a "good" rating on plaintiff's Managerial Performance Review ("MPR"). However, Rohman alleges that defendant Bianco "pressured, harassed, coerced and forced Yongue" to change this "Good" rating to a rating of "Marginal", which deprived Rohman of a merit salary increase. Pl. Rule 56.1 Statement, Rohman Aff. ¶ 8. Rohman appealed his "marginal" rating but this appeal was denied by Bianco. Rohman continued the appeal process and the Appeals Board, after interviewing Bianco, Yongue, and Rohman, unanimously concluded that Rohman's marginal rating should be replaced with a rating of "good." The Appeals Board of the NYCTA wrote, in a Memorandum dated March 17, 1995, that "Mr. Rohman did not receive any written or oral warnings to indicate that his performance was marginal. Moreover, there is no documentation to support his drastic change in performance. All his previous reviews have been excellent." Pl. Rule 56.1 Statement, Ex. R.

After the appeal was concluded, Bianco took away Rohman's NYCTA assigned car. After Yongue attempted to persuade Bianco not to restrict Rohman's car use, Bianco demoted Yongue and assigned Ronald Alexander to replace him. When Rohman complained to Alexander about the restrictions on his car use, Rohman alleges that:

[Alexander's] quote to me was, "[Bianco is] after you," . . . . "Take the car. Take the car home. Don't put it on the mileage sheet that you're taking the car to Rockaway." Subsequently, that is why there is discrepancies between the mileage sheet and the token usage.

(Rohman Dep. at 92).

At the end of July of 1995, Bianco commenced a review of the mileage and token

sheets for a four-month period. Apparently this investigation uncovered eight dates where Rohman's accounting of token use was questioned. This information was reported to the Kings County District Attorney and on August 3, 1995, Rohman was arrested when he reported to work. On December 19, 1995, the charges against Rohman were dropped when the District Attorney was unable to corroborate anything in the complaint. Administrative charges were also filed against Rohman on August 3, 1995. In response to these charges, Rohman signed a stipulation whereby he retired and agreed never to seek employment with any division, subdivision, or authority of the MTA under threat that the charges would be reopened and his pension would be forfeited.

Rohman then commenced the present action in the Supreme Court of the State of New York, Kings County. It was subsequently removed to this Court by defendant. Because the complaint is so poorly drafted,<sup>1</sup> it is difficult to discern exactly what causes of action are alleged. Nevertheless, the parties appear to have agreed that the complaint comprises the following: violation of 42 U.S.C. § 1983; malicious prosecution; false imprisonment; and wrongful termination. Defendants now move to dismiss the complaint pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

## **DISCUSSION**

### **I. Motion to Dismiss/Summary Judgment**

Given that all the parties have presented matters outside the pleadings that the Court has not excluded from its consideration, the Court, in an exercise of its discretion, will

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<sup>1</sup>The law firm that drafted the original complaint was replaced by present counsel for plaintiff.

treat the NYCTA's motion to dismiss as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Bennett v. Morgan Stanley & Co., 1997 WL 749364 (S.D.N.Y. Dec. 4, 1997); Rabin v. United States Dep't of State, 980 F.Supp 116 (E.D.N.Y. 1997).

Summary judgment under Rule 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such motion. United States v. All Funds, 832 F.Supp. 542, 550-51 (E.D.N.Y. 1993).

A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The nonmoving party, however, "must do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324.

## II. Section 1983 Claim

### A. Defendant NYCTA

Defendant argues that plaintiff's claim under 42 U.S.C. § 1983 must be dismissed because plaintiff has not established that there was an official policy or practice of the NYCTA

that caused the deprivation of the plaintiff's constitutional rights. Rather, plaintiff merely alleged events that were unique to plaintiff. Def. Mem. of Law at 10-11.

In response, plaintiff contends that “[t]he manner in which ROHMAN was treated from the date BIANCO first interfered with the fair managerial performance process through the date when the criminal charges against ROHMAN were finally dismissed, evidence [a] custom insofar as it was applied to ROHMAN. The ROHMAN situation does not involve a single event. . . . Rather, the evidence shows a consistent pattern of activity demonstrative of a custom within the NYCTA which served to deprive ROHMAN of his civil rights.” In support of this argument, plaintiff cites the following actions:

1. Bianco, in his capacity as Assistant Vice President, improperly coerced Yongue to change Rohman's performance review.
2. When Bianco realized there was no evidence to support a “marginal” rating for Rohman, he harassed Yongue to come forth with evidence that did not exist.
3. Bianco arbitrarily restricted Rohman's use of a NYCTA vehicle.
4. Bianco used “the same improper practice of making unsubstantiated criticism with respect to the performance review he gave to ROHMAN's supervisor.”
5. No one at NYCTA gave any warning to Rohman or ask him for an explanation as to why he might be misusing tokens.
6. The manner in which Rohman's situation regarding the discrepancy in token usage was inconsistent with how a much more serious matter was handled.
7. “Having ROHMAN first arrested and criminally charged and then mailing administrative charges which required ROHMAN to submit proof at a hearing which he could not possibly do because of the gag order enforced by the NYCTA and because he would have to forfeit his right against self-incrimination effectively forced ROHMAN to resign in order to spare his pension benefits that had accumulated as a result of his twenty-nine year service to the NYCTA. . . . The arrest was BIANCO's idea.”

8. NYCTA “exacted improper pressure and coercion upon its employees” in order to, *ex post facto*, obtain evidence that would support the unsubstantiated charges that had been filed with the police department.

9. All of Bianco’s actions were performed while he was acting in his official capacity as an executive member of the NYCTA and with consent and knowledge of the NYCTA.

Pl. Mem. Opp’n Def. Mot. to Dismiss at 15-17.

Defendant NYCTA is correct that the claims of plaintiff against it must be dismissed. The Supreme Court in Monell v. Dep’t of Social Services, 436 U.S. 658, 694 (1978) held that a municipal defendant may be liable on a Section 1983 claim only “when execution of a government’s policy or custom . . . inflicts the injury.” The Second Circuit, in turn, has construed Monell to require that the plaintiff “plead and prove” three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right. See Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983); Clark v. New York City Police Dep’t, 927 F.Supp. 61, 61 (E.D.N.Y. 1996).

Although plaintiff attempts to assert a “custom”, he has instead established that Bianco’s treatment of Rohman was an anomaly and contrary to the practices of the NYCTA. For example, Rohman in his affidavit states: “[a]t this time the NYCTA was supposed to have a policy and procedure, both oral and written, whereby the performance of managerial employees, such as myself was to be reviewed so that compliments, constructive criticism or warnings could be recorded and merit salary increases given. . . . Previously, when proper policies and procedures were enforced by the NYCTA, I always attained the highest ratings. . . . Such acts and conduct first became apparent when BIANCO circumvented, abused and violated the NYCTA policy and procedure for the annual review of NYCTA employees . . . .” Pl. Rule 56.1

Statement, Rohman Aff. ¶¶ 4, 5, 7. See also ¶¶ 9, 10. Indeed, using the NYCTA's appeals process, Rohman was able to have his poor review reversed and the rating of "good" reinstated. Furthermore, the NYCTA Human Resources Department directed Bianco to implement a constructive program with regard to Rohman's performance, but contravening NYCTA policy, Bianco did not do so. It is also noted by plaintiff in his Memorandum of Law that "[t]he outrageous treatment afforded to ROHMAN with regard to the de minimis discrepancies in token usage is entirely inconsistent with the manner in which BIANCO and the NYCTA handled the matter involving the multi-million dollar stock trading that was being done on NYCTA computers during NYCTA time." Pl. Mem. at 16. All of this suggests that Bianco was contravening established NYCTA policy and custom.

1. The Constitutional Rights Deprivation

Plaintiff alleges that when he was criminally charged—at the defendants' direction—for the same acts that were alleged in the subsequent disciplinary proceeding he was forced to forfeit his Fifth Amendment rights. Pl. Mem. at 20. Plaintiff's argument does not persuade this Court. Plaintiff avers that:

[he] was advised by the defendant NYCTA that if he did not proceed with his disciplinary conference on August 18, 1995 and the hearing set for August 21, 1995 (where he would have to testify in order to defend himself), the hearing would proceed in his absence resulting in a finding automatically terminating his 29 years of employment with the NYCTA and the consequential loss of all retirement benefits including his pension which was worth approximately \$700,000.

Pl. Mem. at 20. However, the letter to Rohman from the NYCTA regarding the administrative hearing states only that "[t]he failure of you or your representative or attorney to appear at the hearing may result in a declaration of default, and a waiver of your right to a hearing or other

disposition against you.” Pl. Rule 56.1 Statement, Ex. DD (emphasis added).

Thus, there is no evidence that Rohman would have automatically lost his job and pension benefits had he appeared at the administrative hearing and asserted his Fifth Amendment rights. In fact, the evidence presented shows only that a default may have been entered if Rohman or a representative did not appear at the hearing. Although it is true that “[t]he Supreme Court has long held that the protection against self-incrimination may be asserted ‘in any proceeding civil or criminal,’” Rockwood Computer Corp. v. Morris, 94 F.R.D. 64, 66 (E.D.N.Y. 1982) (quoting Kastigar v. United States, 406 U.S. 441, 444 (1972)), and that “the imposition of any sanction which makes assertion of the Fifth Amendment privilege ‘costly’” is prohibited, id. (quoting Spevack v. Klein, 385 U.S. 511 (1967)), “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). Accordingly, simply holding an administrative hearing during the time a criminal action is pending did not violate Rohman’s constitutional rights.

B. Defendant Bianco

On September 11, 1998, plaintiff filed an amended complaint containing an assertion of a claim under § 1983 against Bianco in his individual capacity. The defendant responds that Rohman’s claim should be dismissed by way of summary judgment on the basis of Bianco’s qualified immunity. Def. Supplemental Mem. at 1. Bianco’s qualified immunity shields him from liability if his actions did not “violate clearly established statutory or constitutional rights of which a reasonable person would have known,” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), or insofar as it was objectively reasonable for him to believe that his

acts did not violate those rights.” Velardi v. Walsh, 40 F.3d 569, 573 (2d Cir. 1994) (citations omitted).

Rohman argues, *inter alia*, that Bianco violated his civil rights by causing his malicious prosecution and false arrest. Amended Compl. ¶ 6. Despite Bianco’s statements to the contrary, see Def. Supplemental Mem. at 2-3, the right that plaintiff relies on is the right to be free from malicious prosecution, a clearly established constitutional right of which a reasonable person would know. See, e.g., Posr v. Doherty, 944 F.2d 91 (2d Cir. 1991); Day v. Morgenthau, 909 F.2d 75 (2d Cir. 1990). If Rohman can allege a *prima facie* case of malicious prosecution, he will also demonstrate that Bianco violated a known constitutional right and, accordingly, he will overcome Bianco’s qualified immunity defense.

A cause of action for malicious prosecution in New York has four elements (1) the initiation of an action by the defendant against the plaintiff, (2) begun with malice, (3) without probable cause to believe it can succeed, (4) that ends in failure or, in other words, terminates in the favor of the plaintiff. O’Brien v. Alexander, 101 F.3d 1479 (2d Cir. 1996). In order for Rohman to survive defendant’s motion for summary judgment on this issue, he must show that there is a genuine issue of fact as to whether Bianco’s conduct amounted to malicious prosecution. Each element of the tort is addressed in turn.

First, Rohman has alleged in his complaint, accompanying affidavit and other materials that Bianco initiated the criminal charges against him. See, e.g., Pl. Rule 56.1 Statement, Ex. WW (police report stating “[t]his case was initiated at the request of AVP Carmen Bianco. . .”). Clearly, a jury could find that the first element of the tort is satisfied.

Second, the facts in this case are replete with evidence of friction between Bianco

and Rohman. See, e.g., Pl. Rule 56.1 Statement, Ex.s F, K, U. As such, this Court summarily finds that a jury could conclude that Bianco's actions were motivated by malice.

On the issue of probable cause, Bianco and Rohman, of course, disagree as to whether any existed. Resolving all doubts in Rohman's favor, this Court must decide whether there is a genuine issue as to material fact. See Fed.R.Civ.P. 56(c). Any credible evidence contrary to Bianco's version of events will defeat the summary judgment motion on this issue.

The New York Police Department Documents indicate that Bianco witnessed the alleged events underlying Rohman's theft of tokens. See Pl. Rule 56.1 Statement, Ex. PP. However, Rohman avers that there were no witnesses to any token misuse. Pl. Mem. at 26. Rohman's claim is supported by the fact that the District Attorney dismissed the case for inability to corroborate anything in the complaint.

A lack of probable cause may also be demonstrated by showing the failure to make further inquiries before instigating a prosecution. Fowler v. Robinson 1996 WL 67994 (N.D.N.Y. Feb. 15, 1996); Jenkins v. City of New York, 1992 WL 147647 (S.D.N.Y. June 15, 1992); see also Rosario v. Amalgamated Ladies' Garment Cutters' Union, 605 F.2d 1228, 1248 (2d Cir. 1979) ("[E]ven assuming *arguendo* that the police had probable cause to make an arrest, [the defendant] would not necessarily be relieved of liability if he instigated the arrest and knew that there was no probable cause."). Bianco admits that he never spoke to Rohman to explain his allegedly improper use of the tokens. Turret Aff. at 15; see Bianco Dep. at 363-66. On the record evidence, this Court is persuaded that there are genuine issues of material fact for the jury to decide with regard to the probable cause element of Rohman's malicious prosecution claim.

Finally, Rohman must demonstrate that the criminal charges in his case were

terminated in his favor. See Russell v. Smith, 68 F.3d 33 (2d Cir. 1995). The Second Circuit recently wrote, for the purposes of a malicious prosecution claim, “[w]here the prosecution did not result in an acquittal, it is deemed to have ended in favor of the accused . . . only when its final disposition is such to indicate the innocence of the accused.” Murphy v. Lynn, 118 F.3d 938, 948 (2d Cir. 1997). See also Restatement § 660 comment a; Halberstadt v. New York Life Ins. Co., 194 N.Y. 1, 10-11, 86 N.E. 801, 803-04 (1909); Hollender v. Trump Village Cooperative, Inc., 58 N.Y.2d 420, 426, 461 N.Y.S.2d 765, 768, 448 N.E.2d 432 (1983) (quoting Restatement § 660 comment a); MacFawn v. Kresler, 88 N.Y.2d 859, 860, 644 N.Y.S.2d 486, 486, 666 N.E.2d 1359 (1996) (mem.) (whether “the final disposition of the proceeding involves the merits and indicates the accused’s innocence: (citing Hollender)); O’Brien v. Alexander, 101 F.3d 1479, 1486-87 (2d Cir. 1996) (discussing cases); Russell v. Smith, 68 F.3d at 36 (“In the absence of a decision on the merits, the plaintiff must show that the final disposition is indicative of innocence.”).

In this case, it is undisputed that the criminal charges against Rohman were dismissed pursuant to New York Criminal Procedure Law § 160.50. Pl. Rule 56.1 Statement, Ex. CC (“Certificate of Disposition”). It is also undisputed that the case was dropped because the District Attorney’s office could not corroborate Bianco’s complaint. Pl. Supplemental Mem. at 5; June 12, 1998 Hearing Tr. at 7.

Here, the dispositive issue is whether the decision to dismiss the complaint based on the lack of evidence is indicative of Rohman’s innocence. See Murphy, 118 F.3d at 948 (“The answer to whether the termination is indicative of innocence depends on the nature and circumstances of the termination; the dispositive inquiry is whether the failure to proceed

“impl[ies] a lack of reasonable grounds for the prosecution.” (citing Loeb v. Teitelbaum, 432 N.Y.S.2d 487, 494 (2<sup>nd</sup> Dep’t 1980)). The “prevailing view is that if the abandonment of the prosecution was the result of a compromise to which the accused agreed, or an act of mercy requested or accepted by the accused, or misconduct by the accused, it is not a termination in favor of the accused for purposes of a malicious prosecution claim.” Murphy, 118 F.3d at 938. In this case, however, the abandonment was not the result of any compromise between Rohman and the prosecutor. It was based purely on a lack of evidence. New York courts faced with these circumstances have found that the criminal proceedings were favorably terminated in favor of the accused.

For example, in Melito v. City of Utica, 620 N.Y.S.2d 648 (4<sup>th</sup> Dep’t 1994), a prosecutor dismissed a complaint because he did not have a witness who could make an identification of the accused. The court found this amounted to a dismissal for insufficiency and held that the dismissal, for the purposes of the accused’s malicious prosecution claim, was terminated in favor of the accused.

Likewise, in Campo v. Wolosin, 622 N.Y.S.2d 291 (2<sup>nd</sup> Dep’t 1995), the court found that a dismissal for failure to prosecute because the defendants had lost interest in prosecuting the charges was indicative of the plaintiff’s innocence of the charges. Similarly, in Lenehan v. Familo, 436 N.Y.S.2d 473 (4<sup>th</sup> Dep’t 1981), the criminal charge was dismissed on the unopposed motion of plaintiff. The Court wrote, “[o]rdinarily, where the termination of a criminal prosecution has been procured by the accused, an action for malicious prosecution will not lie. That rule is not applicable, however, where the termination was brought about as a matter of right and without fraud, deception or other misconduct on the part of the accused.” Id.

at 475 (citations omitted); see also Callan v. State, 521 N.Y.S.2d 923 (4<sup>th</sup> Dep't 1987) (court found that termination of criminal proceeding against defendant due to inability of police to produce vital evidence constituted determination in favor of accused and met the threshold requirement for malicious prosecution suit) rev'd on other grounds 535 N.Y.S.2d 590 (1988); Chmielewski v. Smith, 425 N.Y.S.2d 419 (4<sup>th</sup> Dep't 1980) (dismissal of misdemeanor proceeding on ground that there was insufficient information to support the charge is favorable termination).

On reviewing the record in this case and the applicable case law, this Court is inclined to adopt the method used by Judge Briant, who, when facing this issue, stated the following:

Every lawyer in this room, including the Court, knows what happened here, and it doesn't really show on the official record, but the point is that there was no enthusiasm on the part of the District Attorney's Office to prosecute this case, and that was known to everybody all along . . . . You know it and I know they didn't prosecute it because they had no enthusiasm for the case. . . . So I'm making a ruling that he has proved a prima facie case on [the favorable termination] element, but you can rebut it if someone comes here . . . and testif[ies] under oath the reason the case was dismissed was because he lost a file, or I didn't realize it was scheduled, or the witnesses had all left town or some legitimate reason . . . . You are free to do that.

Murphy, 118 F.3d at 951 (citing Trial Transcript, February 23, 1996, at 161).

Accordingly, for the purposes of this proceeding, Rohman makes out a prima facie case for malicious prosecution and, as such, successfully alleges that Bianco violated his constitutional rights thereby defeating Bianco's qualified immunity defense.

### III. Bianco as Policy Maker

Plaintiff, in his Amended Complaint, asserts that Bianco was a policy maker of the NYCTA in connection with his decision to turn over NYCTA documents to law enforcement

officials. See Amend. Compl. ¶ 78. At oral argument before this Court on October 23, 1998, defendant's withdrew their opposition to this claim on procedural grounds, but maintain their substantive challenge.

Municipal liability under 42 U.S.C. § 1983 may attach only if Bianco was acting in his official capacity as a policy maker of the NYCTA in connection with his decision to turn over NYCTA documents and information to the police and District Attorney's office. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Despite Rohman's unsubstantiated allegations to the contrary, see Supplemental Mem. at 6, in this case, the record evidence demonstrates that Bianco was not a final policy maker with respect to reporting thefts to the police. See Agritelley Dec. ¶¶ 11, 12.

Bianco's actions may also be attributed to the NYCTA if his superiors were "authorized policymakers" who approved his decision and the basis for it. See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988). Although Roman asserts that the NYCTA condoned Bianco's action, he fails to cite any evidence in the record to demonstrate that fact. Accordingly, his claim against defendants for any actions taken by Bianco in his official capacity are dismissed. See Section I, *supra*, (summary judgment legal standard).

#### IV. State Law Claims

##### A. Malicious Prosecution

For the reasons annunciated in "Part II, B" above, plaintiff will be allowed to proceed with his state law claim of malicious prosecution only as it applies to defendant Bianco.

##### B. Wrongful Termination and False Imprisonment

Defendant argues that Rohman's wrongful termination and false imprisonment

claims are time-barred. Def. Mem. at 19, 27. First, Bianco argues that New York's Public Authorities Law § 1212(2) requires that any tort claims against the Transit Authority ("TA") (and its employees), must first be presented to the TA via a "notice of claim," within "the time limited . . . ." Id. Here, the time limit afforded Rohman was ninety days. General Municipal Law § 50-e(1)(a). Because Rohman filed for retirement on August 21, 1995 and did not file the notice of claim until March 8, 1996—200 days later—defendant argues Rohman's tort claim must be dismissed. Def. Mem. at 20.

Plaintiff responds that the time for filing a notice of claim and for commencing the lawsuit with regard to his termination should begin on December 19, 1995, the date his criminal charges were concluded. Pl. Mem. Opp'n at 29.

New York's General Municipal Law sections 50-e and 50-i require that plaintiffs asserting state tort law claims against a municipal entity or its employees acting in the scope of employment must (1) file a notice of claim within ninety days after the incident giving rise to the claim, and (2) commence the action within a year and ninety days from the date on which the cause of action accrues. See N.Y. Gen. Mun. Law §§ 50-e and 50-i. These provisions have been strictly construed by both state and federal courts. See Phillips v. Village of Frankfort, 220 N.Y.S.2d 171 (Sup. Ct. 1961); Shakur v. McGrath, 517 F.2d 983, 985 (2d Cir. 1975); see also Bailey v. Tricolla, 1996 WL 733078 (E.D.N.Y. Dec. 11, 1996)(dismissing state claim in § 1983 action pursuant to N.Y. Gen Mun. Law § 50(i)).

In this case, plaintiff points to no authority that would authorize this Court to extend the start date of the ninety-day statute of limitations period from the date of Rohman's termination to the date that his criminal charges were dismissed. Here, service of notice of claim

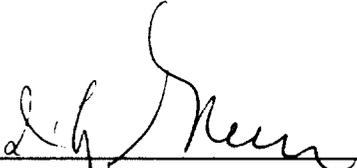
against the TA was a condition precedent to plaintiff's tort action. Ferrick v. City of New York, 489 N.Y.S.2d 491, 492 (1<sup>st</sup> Dep't 1985). Moreover, the plaintiff never availed himself of his right to make an application for leave to serve a late notice as provided for by New York General Municipal Law § 50-e 5.<sup>2</sup> Accordingly, plaintiff's wrongful termination and false imprisonment claims are dismissed for failure to timely file a notice of claim or an application to serve a late notice as required by New York Law.

### **Conclusion**

For the reasons above, plaintiff's motion for summary judgment is granted in part and denied in part. All of plaintiff's claims as to defendant NYCTA are dismissed. Plaintiff's claim for malicious prosecution as to defendant Bianco survives

SO ORDERED.

Dated: Brooklyn, New York  
October 30, 1998

  
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I. Leo Glasser, U.S.D.J.

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<sup>2</sup>Plaintiff may not now make an application to serve a late notice of claim as the statute of limitations for the underlying action has run. See New York Gen. Mun. Law § 50-e 5.

A copy of the foregoing Memorandum and Order was this day sent to:

David Turret, Esq.  
Sanocki Newman & Turret, LLP  
20 Vesey Street – Suite 200  
New York, NY 10007

Richard Schoolman, Esq.  
Office of the General Counsel  
New York City Transit Authority  
130 Livingston Street  
Brooklyn, NY 11201