

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32613
Y/kmb

_____AD3d_____

Submitted - October 5, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-06698
2011-09332

DECISION & ORDER

In the Matter of Jonathan Day, etc., et al., petitioners-respondents, v Greenburgh Eleven Union Free School District, appellant, et al., respondents.

(Index No. 32786/09)

Gordon & Rees, LLP, New York, N.Y. (Robert Modica of counsel), for appellant.

Davis & Ferber, LLP, Islandia, N.Y. (Ian M. Sack of counsel), for petitioners-respondents.

In a proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim, Greenburgh Eleven Union Free School District appeals from an order of the Supreme Court, Suffolk County (Mayer, J.), dated June 7, 2010, which granted the petition. The appeal brings up for review so much of an order of the same court dated February 4, 2011, as, upon reargument, adhered to the original determination (*see* CPLR 5517[b]).

ORDERED that the appeal from the order dated June 7, 2010, is dismissed, as that order was superseded by the order dated February 4, 2011, made upon reargument; and it is further,

ORDERED that the order dated February 4, 2011, is affirmed insofar as reviewed; and it is further,

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FREE SCHOOL DISTRICT

ORDERED that one bill of costs is awarded to the petitioners.

The appellant contends that leave to serve a late notice of claim should have been denied because the claim is patently without merit. While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, leave should be denied where the proposed claim is patently without merit (*see Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179; *Matter of Gaeta v Incorporated Vil. of Garden City*, 72 AD3d 683, 684; *Matter of Chambers v Nassau County Health Care Corp.*, 50 AD3d 1134, 1135). In opposition to the petition, the appellant failed to demonstrate at this stage of the proceedings that the underlying claim was patently without merit (*see Matter of Billman v Town of Deerpark*, 73 AD3d 1039, 1040; *Burke v Incorporated Vil. of Hempstead*, 156 AD2d 630, 631). Accordingly, upon reargument, the Supreme Court properly rejected the appellant's contention and adhered to its original determination granting the petition (*see CPLR 2221[d]*).

DILLON, J.P., DICKERSON, LEVENTHAL, AUSTIN and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan

Clerk of the Court