

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1463

CA 09-00673

PRESENT: SMITH, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF KYLE O. TROTMAN,
CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

LAW OFFICE OF RICK S. GEIGER, LLC, PITTSFORD (RICK S. GEIGER OF
COUNSEL), FOR CLAIMANT-APPELLANT.

CHARLES G. JOHNSON, ROCHESTER (CARA M. BRIGGS OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered January 17, 2009. The order denied claimant's application for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the application is granted and the notice of claim is deemed timely served nunc pro tunc.

Memorandum: We conclude that Supreme Court abused its discretion in denying claimant's application for leave to serve a late notice of claim. Although claimant failed to offer a reasonable excuse for the delay in serving a notice of claim, that delay is not fatal inasmuch as respondent had actual notice of the facts underlying the claim and was not substantially prejudiced by the delay (*see Matter of Lindstrom v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1303; *Hale v Webster Cent. School Dist.*, 12 AD3d 1052). Claimant, a student in respondent school district, alleged in support of his motion that he was sexually abused by one of respondent's employees, and that the alleged abuse occurred between February 2006 and July 2006. The record establishes that the respondent acquired actual knowledge of the abuse no later than January 2007, when the employee in question was arrested on criminal charges and was suspended without pay. There is no support for the conclusory assertions of respondent that the delay in filing the notice of claim impeded its ability to investigate the incident or to interview witnesses (*see Matter of Gilbert v Eden Cent. School Dist.*, 306 AD2d 925, 926-927). Once respondent was advised of the criminal charges asserted against its employee, respondent should have conducted a prompt investigation of the incidents underlying the charges (*see Matter of Bird v Port Byron Cent. School Dist.*, 231 AD2d 916). " 'Having failed to do so,

respondent cannot now be heard to complain that the late filing of [the] claim will prejudice its preparation of a defense' " (*id.*; see *Matter of Courtney Nicole R. v Moravia Cent. School Dist.* [appeal No. 2], 28 AD3d 1134, 1135).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court