

**Matter of Felice v Eastport/South Manor Central  
School District**

2006 NY Slip Op 30346(U)

December 1, 2006

Supreme Court, Suffolk County

Docket Number: 0019945/2006

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY**

copy

PRESENT:

Hon. MELVYN TANENBAUM  
Justice

MOTION #001-MG \_\_\_\_\_  
R/D: 081506  
S/D 092506

In the Matter of the Application of REBECCA FELICE,  
an infant by her mother and natural guardian, MARIA  
FELICE, and MARIA FELICE, Individually

PLTF'S/PET'S ATTY:  
AMIDEO NICHOLAS GUZZONE, ESQ.  
2450 Middle Country Road  
Centereach, New York 11720

Plaintiff,

- against -

EASTPORT/SOUTH MANOR CENTRAL SCHOOL  
DISTRICT,

DEFT'S/RESP'S ATTY:  
CONGDON, FLAHERTY, O'CALLAGHAN,  
REID, DONLON, TRAVIS & FISHLINGER, ESQS.  
333 Earle Ovington Blvd., Suite 502  
Uniondale, New York 11533

Defendants.

Upon the following papers numbered 1 to 10 read on this motion for an order pursuant to CPLR §

\_\_\_\_\_ Notice of  
Motion/Order to Show Cause and supporting papers 1-6 ; Notice of Cross Motion and supporting papers 9-8 Answering  
Affidavits and supporting papers 9-10 Replying Affidavits and supporting papers \_\_\_\_\_ Other \_\_\_\_\_  
\_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by petitioner/claimant Rebecca Felice, an infant by her mother and natural guardian Maria Felice, and Maria Felice, Individually brought on by Order to Show Cause (Mayer, J.) seeking an order granting leave to serve a late notice of claim pursuant to General Municipal Law §50-e & Education Law §3813 (2-a) is granted.

On December 15, 2005 the infant claimant injured her right foot while practicing cheerleading in respondent Eastport/South Manor Central School District's gymnasium. The tenth grade student was taken by ambulance to Brookhaven Memorial Hospital and was treated for a displaced fracture of the tallus bone. Surgery was performed approximately one week later and "Felice's" foot was placed in a cast for three months requiring her to use a wheel chair and crutches.

Petitioner's application seeks an order permitting "Felice" to file a late notice of claim against the respondent School District. In support petitioner submits affidavits from the infant claimant and her mother and two affirmations of counsel and claims that no prejudice will result if petitioner is permitted to file a late notice of claim since the School District acquired knowledge of the facts underlying "Felice's" claim immediately after the accident occurred. Petitioner claims the School District had actual notice of the incident since an ambulance arrived to take the infant to the hospital immediately after she sustained her injury. Petitioner asserts that the claim form prepared by the School District's insurance carrier contained

a statement from the cheerleading coach who supervised the practice and who was present when the incident occurred. Petitioner also claims that no prejudice will result to respondent's ability to investigate the incident since all the individuals involved in the incident are still employed or still attend the school.

In opposition respondent submits an affidavit from the School District's athletic director and an attorney's affirmation and claims that petitioner's application must be denied since no legal basis exists to justify granting claimant an extension to file a late notice of claim. Respondent claims that the School District will be substantially prejudiced by the delay because respondent had no prior notice that a claim would be made for negligent supervision. It is respondent's position that although the District was aware that a student had been injured it had no knowledge of the essential facts surrounding petitioner's claim of negligent supervision and therefore this application should be denied. Respondent asserts that if the application is granted the School District will be prejudiced in its ability to investigate and defend petitioners claims.

Education Law §3813 provides:

“Presentation of claims against the governing body of any school district or certain state supported schools.

1. No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property or property of schools provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four or claim against the district or any such school, or involving the rights or interests of any district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services, school provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four or any officer of a school district, board of education, board of cooperative educational services, or school provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded and presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. In the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.

2-a. Upon application, the court, in its discretion, may extend the time to serve a notice of claim. The extension shall not exceed the time limited for the commencement of an action by the claimant against any district or any such school. In determining whether to grant the extension, the court shall

consider, in particular, whether the district or school or its attorney or its insurance carrier or other agent acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the district or school or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the district or school against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the district or school in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the district or school.”

General Municipal Law §50-e(5) provides:

“Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.”

The record shows that the respondent “School District” received actual notice of the essential facts underlying petitioner’s claims since the injured student was immediately transported by ambulance and treated at the local hospital for her injuries. Under such circumstances the “School District” cannot be substantially prejudiced in its ability to investigate the cause of the incident since School employees were

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aware that the infant “Felice” sustained severe injuries while practicing cheerleading on December 15, 2005. Petitioner’s motion seeking leave to serve and file a late notice of claim must therefore be granted (Mahoney v. Town of Oyster Bay, 71AD2d 879, 419 NYS2d 652 (2d Dept., 1979); Zimmet v. Huntington Union Free School District, 187 AD2d 436, 589 NYS2d 546 (2d Dept., 1992). Accordingly, it is

**ORDERED** that petitioner’s motion for an order pursuant to the Education Law §3813 & GML §50-e (5) is granted. Petitioner is directed to serve a notice of claim in the form annexed to the moving papers upon respondent within twenty days of the date of entry of this order.

Dated: December 1, 2006

**MELVYN TANENBAUM**

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J.S.C.

NON-FINAL DISPOSITION