

Brooks v City of New York

2006 NY Slip Op 30788(U)

July 6, 2006

Supreme Court, New York County

Docket Number: 110307/2005

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 62

Curtis Brooks Individually and as a Parent and Natural Guardian of Hashim Wright, a Minor Child,

Plaintiff,

INDEX NO. 110307/2005

MOTION DATE _____

MOTION SEQ. NO. 001

For an Order Pursuant to CPLR 3215 to Vacate the Judgment on Default, and Pursuant to GML 50-i to Permit Plaintiff to Serve an Amended Notice of Claim, or Deem the Proposed Amended Notice of Claim Timely Served

- against -

The City of New York, and the Department of Education of the City of New York,

Defendants.

FILED

JUL 17 2006

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3, were read on this motion:

PAPERS NUMBERED

Notice of Motion—Affirmation—Exhibits 1

Affirmation in Opposition 2

Affirmation in Reply—Exhibits 3

Cross-Motion: Yes No

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Upon the foregoing papers, it is ordered that Plaintiff's motion to serve a late Notice of Claim on behalf of her son is granted, and Plaintiff's motion to serve a late Notice of Claim on behalf of herself, individually, is denied.

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Plaintiff, Curtis Brooks, moves for an Order, pursuant to General Municipal Law §50-e, for leave to serve late Notices of Claim upon defendants for two causes of action. First, Plaintiff brings a cause of action on behalf of her minor son for his injuries sustained on September 28, 2004. Second, Plaintiff individually claims loss of consortium as a result of her son's injuries. Notices of Claim were served by mail upon defendants on December 28, 2004, one day after the expiration of the 90-day due date. Plaintiff alleges that between the time the Notices of Claim were served and December 28, 2005, the date the Statute of Limitations expired, neither party asserted the lateness of the claim and the Defendants engaged in preliminary proceedings. Plaintiff argues that according to *Bender v New York City Health and Hospitals Corporation*, (38 NY2d 662, 664 [1976]), Defendants should be equitably estopped from asserting the Statute of Limitations since the Plaintiff was lulled into thinking that the defendants had waived their right to assert this defense and she relied on this belief to her detriment.

Concerning the first cause of action on behalf of Plaintiff's son, the Court of Appeals has held that GML §50-i(1) "has generally been regarded as a Statute of Limitations subject to the tolls for infancy and insanity provided in CPLR 208." (*Cohen v Pearl Union Free School District*, 51 NY2d 256, 257 [1980]). In *Cohen*, the infant petitioner sustained an injury to his foot while participating in a school soccer game. Two years later, when the infant's father requested leave to serve a late Notice of Claim upon the school district, the Court of Appeals found that GML 50-e clearly affirmed that the period during which a court may grant an extension of the time within which to serve a Notice of Claim is tolled during the infancy of the claimant in accordance with CPLR 208. (*id.*) However, the court acknowledged that the toll does not mandate an extension be granted. The decision to grant or deny an extension under GML 50-e

(5) is still a discretionary one, and must take into account the relevant factors pursuant to statute. (*id.* at 262). Furthermore, the Appellate Division First Department holds, “Although a causal nexus between infancy and late filing need no longer be shown...neither infancy alone nor ignorance of the law provides a sufficient excuse for failure to file a timely notice of claim.” (*Harris v City of New York*, 297 AD2d 473 [1st Dep’t 2002]).

On these facts, granting leave to serve a late Notice of Claim on behalf of Hashim Wright will not prejudice Defendants. Defendants have already served an Answer, engaged in discovery, and held a 50-H hearing and settlement discussions. Defendants also had actual knowledge of the underlying facts and circumstances of the claim within the 90 days since the injury occurred on school property and the gym supervisor took the infant to the nurse’s office after the accident occurred. Moreover, the Notice of Claim was served shortly after the 90-day period expired. Although ignorance of the law does not excuse failure to timely file a Notice of Claim, Plaintiff contends that Defendants appeared by their conduct to have waived the “inconsequential lateness.” (Aff. ¶20.) Moreover, absence of an acceptable excuse for the delay is not fatal to an application to serve a late notice of claim (*Harris*, 297 AD2d at 473). Therefore, in accordance with GML 50-e(5) and the tolling provision of CPLR 208, Plaintiff is granted leave to serve a late Notice of Claim on behalf of her son, Hashim Wright.

Concerning the second cause of action, any claim by Plaintiff, individually, is time-barred since the toll provided in CPLR 208 does not apply to her rights under GML 50-e(5). (*See Cohen*, 51 NY2d at 258). However, Plaintiff does argue that Defendants should be equitably estopped from asserting the Statute of Limitations since they had waived their right to assert this defense and she relied on this belief to her detriment.

The Court of Appeals clearly states that the court lacks the authority to grant the service of a late Notice of Claim when the Statute of Limitations has expired and no facts have been demonstrated to show that the defendant waived its right to raise the defense of failure to timely file a Notice of Claim. (*Hochberg v City of New York*, 63 NY2d 665 [1984]). Generally, the doctrine of equitable estoppel is not applicable to municipalities acting in a government capacity. (*Hochberg*, 63 N.Y.2d at 665). An exception to this rule arises when a municipality engages in improper conduct that induces reliance by the other party to his or her detriment. (*Bender*, 38 NY2d at 662). However, the Court of Appeals has held that a defendant's participation in preliminary proceedings is "not sufficient to overcome the clear statutory mandate of subdivision 5 of section 50-e of the General Municipal Law" (*Hochberg*, 63 NY2d at 665). The defendants' failure to notify plaintiff of the untimeliness of the Notice of Claim does not constitute wrongful conduct to warrant a departure from the general rule or justify the finding of estoppel. (*Rodriguez v City of New York*, 169 AD2d 532 [1st Dep't 1991]).

Therefore, pursuant to General Municipal Law 50-e, Plaintiff's motion on behalf of herself, individually, for leave to serve a late Notice of Claim is denied; and the motion to serve a late Notice of Claim on behalf of Hashim Wright, her minor son, is granted. Movant shall serve Notice of Claim within 30 days of the date of this decision.

This reflects the decision and order of this Court.

Dated: 7/6/06

HON. NAELYN SHAFER, JSC
J.S.C.

Check one: FINAL DISPOSITION [] NON-FINAL DISPOSITION

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JUL 17 2006
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