

<b>National Cont. Ins. Co. v South Huntington Union Free School Dist.</b>
2007 NY Slip Op 31944(U)
June 26, 2007
Supreme Court, Suffolk County
Docket Number: 0005306/2007
Judge: Paul J. Baisley
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**SUPREME COURT - STATE OF NEW YORK**  
**DCM-J - SUFFOLK COUNTY**

**PRESENT:****Hon. Paul J. Baisley, Jr.**

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 NATIONAL CONTINENTAL INSURANCE  
 COMPANY a/s/o CARTIN TRUCKING, LLC.,

Plaintiffs,

-against-

SOUTH HUNTINGTON UNION FREE SCHOOL  
 DISTRICT,

Defendants,

**ORIG. RETURN DATE:** March 13, 2007**FINAL RETURN DATE:** April 10, 2007**MTN. SEQ. #:** 001-CASEDISP**PLTF'S ATTORNEY:**

Allen D. Werter, Esq.  
 215 East Main Street, Suite 203  
 Huntington, New York 11743

**DEFT'S ATTORNEY:**

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 50 Route 111  
 Smithtown, New York 11787

Upon the following papers numbered 1 to 13 read on this petition for leave to file and serve a late notice of claim: Notice of Petition and supporting papers 1 - 3; Affirmation in Opposition and supporting papers 4 - 10; Reply Affirmation 11 - 13; it is,

**ORDERED** that the petition (001) for leave to file and serve a late notice of claim pursuant to General Municipal Law §50-e(5) is granted; and it is further

**ORDERED** that the petitioner's notice of claim as attached to its petition shall be deemed served upon the respondent in accordance with the leave granted herein; and it is further

**ORDERED** that the petitioner's counsel shall serve a copy of this decision and order upon counsel for the respondent pursuant to CPLR 2103(b)(1), (2) or (3) within 30 days of the date hereof and thereafter file the proof of service with the Clerk of the Court.

This is a proceeding for leave to file a late notice of claim brought by the petitioner National Continental Insurance Company (hereinafter NCIC) as subrogee of its insured, Cartin Trucking, LLC, against the respondent South Huntington Union Free School District (hereinafter the school district) arising out of a motor vehicle accident resulting in property damage to the insured's vehicle.

The accident occurred on April 21, 2006 when a school bus belonging to the school district allegedly failed to yield the right of way and collided with the insured's vehicle.

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In support of this petition, NCIC submits the petition, an employee's affidavit and various documents. The employee's affidavit is from a "subrogation representative" working out of their Cleveland office whose job entails the preparation of notices of claims against various governmental entities including those within the state of New York. In this case, she states that on June 7, 2006 she prepared a "notice of claim" and served it by certified mail upon "NYSIR [New York Schools Insurance Reciprocal] which [she] believed to be the insurance company or claims administrator for the [school district]."

This mailing, admittedly not to the school district, was 47 days after the accident; well within the 90-day period required for the serving of a Notice of Claim pursuant to GML §50-e (1)(a).

In opposition to this petition, the school district submits an affidavit from the "claims examiner" for NYSIR who handled this file. She states that it was not a "Notice of Claim" which was sent by NCIC but a "formal notice of [NCIC's] subrogation rights." She states that she then sent, on June 14, 2006, a letter of rejection informing NCIC that the NCIC "letter . . . **does not meet the criteria of a formal notice of claim**, as required in the General Municipal Law of the State of New York, (rule 50-e) [sic]" (emphasis in original). This letter, attached as an exhibit to the school district's papers, is significant in that it indicates that the NCIC letter was rejected for its contents and/or form and not because it was sent to the wrong entity.

The NCIC representative states that there is no record of receiving such a letter from NYSIR and, consistent with that position, two follow-up calls were made to NYSIR as to the status of the claim; both calls were after the 90-day period.

In response to this statement, the NYSIR representative states that the same reply was given to both calls, to wit; refer to our rejection letter and consult with your attorneys.

The file on this case was referred to NCIC's counsel in early February of 2007 (a little over eleven months since the accident and eight months since the 90-day period expired). Upon the review of the file, counsel was concerned that the notice sent to NYSIR might be defective in that it should have been served upon the school district instead and, thus, brought this petition to file a late notice of claim.

General Municipal Law section 50-e provides what the form and content of a notice of claim should be (*see* GML §50-e[2]). This subdivision provides that the notice of claim shall be in writing, it may be signed on behalf of the claimant (such, presumably, as by a subrogee insurance company), it must include the name and address of the claimant, the nature of the claim, the time, place and manner of the occurrence and the items damaged (*Id.*) The document in question, which was timely sent, regardless of what it is labeled, contained all of this information.

Furthermore, GML 50-e(6) provides, inter alia, that any mistake or irregularity, made in good faith, may be disregarded (*see Butler v Town of Smithtown*, 293 AD2d 696, 742 NYS2d 324 [2d Dept 2002]). The court also notes that it has been held that the purpose and intent of the notice of claim provisions was to permit "honest claims to recover notwithstanding technical errors" (*Bronson v Westchester County*, 10 Misc 2d 293, 168 NYS2d 735 [SupCt, Westchester County 1957]). Indeed, the notice of claim provisions should "not be a sword to cut down honest claims but a shield to protect against spurious ones" (*Lomax v New York City Health & Hosp. Corp.*, 262 AD2d 2, 690 NYS2d 548 [1<sup>st</sup> Dept 1999]).

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In this case, there is no claim by the school district that the claim is without merit. Indeed, the allegations that the school bus entered a "T" intersection after it stopped at a stop sign and collided with the insured's vehicle, which had right of way, would clearly indicate merit on the part of the petitioner.

In short, the notice which was sent to NYSIR within 90 days of the accident (whatever it may be labeled<sup>1</sup>) was, in substance, in compliance with the requirements of GML §50-e(2). Thus, but for the matter of whether the document was sent to the proper party or not, the actual document was sufficient, as a matter of law, to satisfy the requirements for the contents of a notice of claim (*Id.*). Indeed, if it were not for the question of being sent to the proper party, this court would find that the document in question satisfied the legal requirements for such a notice.

As to the issue of service, GML §50-e(3)(a) clearly states that the notice "shall be served on the public corporation against which the claim is made . . . or . . . to an attorney regularly engaged in representing such public corporation." That was not done here. NYSIR is not the "public corporation" and is not its attorney.

NYSIR is, however, as indicated by its claims representative, the precise entity charged with the handling and investigation of such claims (just as the NCIC employee had "believed"). Moreover, the submission on this motion by the school district of NYSIR's "File Activity Sheet" shows that NYSIR received a report of this accident three days after it occurred, shows activities consistent with an investigation of the accident and shows receipt on June 14, 2006 (54 days after the accident) of a "Notice of Claim" (NYSIR's characterization). In addition, there are indications of payments for property damage to the bus and at least one potential claim on behalf of one of the student/passengers.

In considering a petition for leave to file a late notice of claim, the court should consider whether there was a reasonable excuse for the delay, whether the public corporation had actual knowledge of the occurrence within 90 days and whether the public corporation would suffer substantial prejudice from a late notice of claim (*see Padovano v Massapequa Union Free School Dist.*, 31 AD3d 563, 818 NYS2d 274 [2d Dept 2006]).

As a practical matter, although the school district itself was not served, the entity charged with handling such a claim and its investigation (i.e., NYSIR) was served directly with timely notification of the required elements in accordance with GML §50-e(2). This is not only substantiated by NCIC's submissions in this proceeding but also by NYSIR's submissions which clearly show it was informed of and received a report of the accident within days, received the notice from NCIC within 90 days of the accident, and undertook numerous other and related activities with regard to claims and potential claims which would have required a review or investigation of the facts. Indeed, if the school district had been served instead of NYSIR, it is apparent that it would have forwarded the information and notice to NYSIR directly for handling. Although NCIC through inadvertence or ignorance sent the notice to the wrong entity as far as the service provisions of GML §50-e(3)(a) are concerned, as a practical matter it resulted in this case in the party responsible for handling and investigating the matter being notified sooner than if the school had been sent the notice. Thus, as a practical matter, the school district (by the claims agent responsible for undertaking such investigations) is deemed to have received actual knowledge on behalf of the school district of the "essential facts constituting the claim" within 90 days and the school district cannot claim that the service upon NYSIR

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<sup>1</sup> Even if just a "letter," it would be acceptable if it contained the requisite information in accordance with GML § 50-e(2) (*see e.g., Weill v Liberty Lines Transit, Inc.*, 30 AD3d 153, 815 NYS2d 571 [1<sup>st</sup> Dept 2006]).

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“substantially prejudiced the public corporation in maintaining its defense on its merits” (see GML §50-e[5]; see also *Matter of Ricci v Harrison Central School Dist.*, 27 AD3d 653, 812 NYS2d 875 [2d Dept 2006]).

In addition, the initial timing of this petition - eleven months after the accident and eight months after the 90-day period expired - is not prejudicial in and of itself (see *Gilley v New York City Housing Authority*, 217 AD2d 493, 630 NYS2d 48 [1<sup>st</sup> Dept 1995][same time periods]).

Under these facts and circumstances, the erroneous service upon NYSIR rather than upon the school district, made in good faith, should be disregarded in this instance (see GML §50-e[6]; *Butler v Town of Smithtown*, 293 AD2d 696, 742 NYS2d 324 [2d Dept 2002] ) and the court finds that the petitioner, NCIC, has made a sufficient showing to support this petition for leave to file a late notice of claim (see *Lanphere v County of Washington*, 301 AD2d 936, 754 NYS2d 124 [3d Dept 2003]).

This decision constitutes the order of the court.

Dated: June 26, 2007

HON. PAUL J. BAISLEY, JR.  

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HON. PAUL J. BAISLEY, JR. J.S.C.