Matter of Herskowitz v Great Neck Union Free School Dist.
2007 NY Slip Op 33919(U)
November 28, 2007
Supreme Court, Nassau County
Docket Number: 7231-07/
Judge: Daniel R. Palmieri

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART 50**

In the Matter of the Petition of

BENJAMIN HERSKOWITZ, an infant by his father, and natural guardian, JOEL HERSKOWITZ, and JOEL JERSKOWITZ, individually,

INDEX NO.: 017231/07

Petitioners,

MOTION DATE:11-12-07
SUBMIT DATE: 11-14-07
SEQ. NUMBER - 001

For an Order allowing Petitioners to serve and file a Late Notice of Claim, nunc pro tunc,

-against

GREAT NECK UNION FREE SCHOOL DISTRICT, GREAT NECK PUBLIC SCHOOLS, and GREAT NECK NORTH HIGH SCHOOL,

Respondents.

----------x

The following papers have been read on this motion:

Notice of Petition, dated 9-26-07.....1
Affirmation in Opposition, dated 11-2-07.....2
Reply Affirmation, dated 11-12-07.....3

Motion by the attorneys for the petitioners for an order pursuant to General Municipal Law § 50-e, subd. 5 and Education Law § 3813(2-a) granting petitioners leave to serve a notice of claim in the form annexed to the Notice of Petition and deeming said notice of claim timely served, *nunc pro tunc*, is granted.

The infant plaintiff (d.o.b. January 3, 1992) now age 15, and his father and natural guardian bring this proceeding for leave to file a late Notice of Claim.

At the outset, all counsel and the respective parties are admonished that the narration by the Court of the underlying alleged events which gave rise to the within claim should not be construed as an affirmance of the veracity of either sides' characterization of them. The sole issue under consideration is the procedural one of whether to permit the petitioners to file a late Notice of Claim.

During the school calendar year 2006-2007 the infant plaintiff was a freshman at Great Neck North High School, and a member of the school's varsity baseball team. The infant petitioner's affidavit in support of the within motion alleges that on April 17, 2007, while at team practice when it was his turn to take batting practice, the coach began throwing the baseball directly at him, rather than near the plate. The infant plaintiff alleges that the coach ". . . threw three successive pitches directly at me–the first struck me in the body, above my hip; the second came extremely high and inside, aimed at my head, but I was able to move forward and the pitch went behind me; the third, which was also thrown directly at my upper body and/or head, struck my left hand, which was holding the bat in a head-high position, and causing the injury to my left pinky, which is the subject o my claim. All of these pitches were thrown from a distance of approximately 30-40 feet (not from the pitching rubber) and without a windup. There were numerous witnesses to this incident." The coach in his affidavit annexed to the affirmation in opposition vehemently denies the incident ever taking place. The coach asserts "I have never thrown at a player and have never intentionally

attempted to hit a player with one of my pitches." He was not advised on April 17, 2007 that the infant plaintiff had injured a finger on a hand. The infant petitioner played in the game that was held on April 17, 2007. Respondents claim he played in several subsequent games including April 21, 2007 versus Clarke; April 28, 2007 versus Great Neck South; April 30, 2007 versus Seaford; May 3, 2007 versus Seaford; May 7, 2007 versus Island Trees and May 8, 2007 versus Island Trees. The coach claims that at no time during any of these games was he ever advised that the infant injured a finger or that he was the cause of the any injury. The coach indicates that at the end of the spring 2007 season, he was informed by other team members that the infant petitioner would not be participating in a summer baseball program which he had previously enrolled in due to a finger injury. The coach states at no time was he advised by anyone how or when the petitioner had sustained the subject injury. Moreover, he asserts it was not until the filing of the subject petition that the coach learned that a claim was being filed against the Great Neck Union Free School District based upon allegations that he injured the infant petitioner by intentionally throwing pitches at him and that the School District may be liable due to its alleged negligence in hiring and retaining him as the varsity baseball coach.

The athletic director at Great Neck North High School in his affidavit accompanying the affirmation in opposition states that he held his position since July 1, 2007. On or just after July 3, 2007, the District Superintendent directed the athletic director to investigate certain allegations made by a June 2007 graduate of Great Neck North High School who was a former member of the varsity baseball team regarding the subject incident alleged by the

infant petitioner. The athletic director states it was not until the School District received the within petition for leave to file a late notice of claim that it became aware of the allegations that the School District was negligent in its hiring and retaining the coach of the varsity baseball team.

Timely service of a notice of claim is a condition precedent to the commencement of an action, founded on a common-law tort against a school district. *See* Education Law § 3813(2); General Municipal Law § 50-i(1). In determining whether to permit the service of a late notice of claim, the court will generally consider several factors including whether the petitioner has a reasonable excuse for his failure to timely serve a notice of claim; whether the school district acquired actual notice of the essential facts of the claim within 90 days after the claim arose, or a reasonable time thereafter; and whether the delay would substantially prejudice the school district in its defense." *Scolo v Central Islip Union Free School District*, 40 AD3d 1104 (2d Dept. 2007); *see Matter of Doyle v Elwood Union Free School Dist.*, 39 AD3d 544 (2d Dept. 2007); *Mater of Padovano v Massapequa Union Free School Dist.*, 31 AD3d 563 (2d Dept. 2006); *Matter of Conroy v Smithtown Cent. School Dist.*, 3 AD3d 492 (2d Dept. 2004); *Matter of Bordan v Mamaroneck School Dist.*, 230 AD2d 792 (2d Dept. 1996); *Matter of Sica v Board of Educ. of City of N.Y.*, 226 AD2d 542 (2d 1996). Further, if there is a nexus between a petitioner's infancy and the delay, it may be considered. *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 538 (2006). No one factor should be determinative. *Matter of Morris v. County of Suffolk*, 88 AD2d 956 (2d Dept. 1982), *affd* 58 NY2d 767 (1982); *see also*, *Bay Terrace Coop. Section IV v New York State Employees' Retirement Sys. Policemen's & Firemen's Retirement Sys*, 55 NY2d 979,

981 (1982).

Petitioners contend the respondents had actual knowledge of the claim within 90 days despite their failure to serve a timely notice, pointing to: (1) the July 3, 2007 meeting the superintendent of schools had with another student and his parents at which the alleged incident involving the infant petitioner and the coach was supposedly discussed and (2) the allegation that the coach and assistant coach were present and witnessed the alleged incident. The respondent denies the existence of an internal written accident report, and the petitioners present no evidence to refute the denial.

Even though the petitioners allege the district received verbal notice of the April 17, 2007 incident on July 3, 2007 from another player on the team, it was never apprised until the present application that a claim would be made for negligent supervision or training. Based upon the credible evidence it is determined that the District did not acquire actual knowledge of the essential facts of petitioner's claims as contemplated by Municipal Law § 50-e. *Conroy v Smithtown Central School District, supra*; *Rusiecki v Clarkstown Central School Dist.*, 227 AD2d 493 (2d Dept. 1996); *Morrison v New York City Health & Hospitals Corp.*, 244 AD2d 487 (2d Dept. 1997). As noted, however, this alone is not determinative.

The Court finds that the infant petitioner's claim that the importance of getting along and surviving at his high school (which he still attends), and with the coach, as well as the concern about his athletic future, are products of his infancy, and are related to the delay in seeking legal advice and making a claim. Further, the infant petitioner initially saw a physician on April 30, 2007. On May 14, 2007 he saw a hand specialist. He was treated by another hand specialist on August 10, 2007 and advised that the previous MRIs and CT scans

were insufficient to present a clear and complete picture of the injury and further imaging studies were required. However, the petitioner learned from the third examining doctor on August 13, 2007, after the 90-day period had passed, that the injury was more serious than earlier contemplated. Petitioners then decided to commence legal proceedings. In light of the infant petitioner's and his parent's concerns, as set forth above, the decision to press a claim only after learning of the serious nature of the injury is found to be reasonable.

It should be noted that medical records in support of the foregoing were submitted for the first time with the Reply Affirmation. However, petitioners consented to an adjournment of the return date of the Notice of Petition and submission by the respondents of a sur-reply addressed solely to the issue of petitioner's medical proof as an excuse for delay. Where material is introduced for the first time in reply, consideration of material may be proper where the respondents were given the opportunity to file a sur-reply. *Hayden v County of Nassau*, 16 AD3d 415 (2d Dept. 2005); *Ioele v Wal-Mart Stores, Inc.*, 290 AD2d 614 (3rd Dept. 2002); *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477 (2d Dept. 2001). In this case, however, no sur-reply was submitted.

Finally, the Court cannot find prejudice to the respondents' ability to defend a law suit. The subject incident allegedly occurred on April 17, 2007. The athletic director stated that at the direction of the district superintendent he started an investigation on July 3, 2007. Since it was the summer recess and school was not in session, he claims his investigation was hampered due to the unavailability of anyone with knowledge of the allegations. By implication, even if the School District were timely served by mid July 2007, he would not have been able to interview the witnesses until September, 2007 because school was not in

session. The coach is still employed by the School District. The assistant coach who allegedly witnessed the incident is also still employed. Respondents do not deny that members of the baseball team at the time of the alleged incident may still be students at the school. Accordingly, there is no indication in the record that the respondents will be prejudiced by the late filing of the Notice of Claim.

After weighing all the relevant factors, including the infancy of the petitioner, the reasonableness of the excuse, the short delay in serving the claim (46 days after the expiration of the 90-day period, and 4 ½ months after the alleged incident) and the absence of prejudice to the respondents, the petitioners are granted leave to file a late notice of claim. The notice annexed to the moving papers is deemed timely served five days after service of a copy of this order with notice of entry upon the respondents. The respondent school district shall have its full rights to a General Municipal Law § 50-h hearing and all other discovery prior to the commencement of any action. The commencement of a subsequent personal injury action against respondents requires the commencement of a plenary action, including the purchase of a new index number.

This special proceeding is concluded. All proceedings under index no. 017231/07 are terminated.

This shall constitute the Decision and Order of this Court.

ENTERED

DATED: November 28, 2007

NOV 30 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Shayne, Dachs, Corker, Sauer & Dachs**
By: Jonathan A. Dachs, Esq.
114 Old Country Road, Ste. 410
Mineola, NY 11501

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger
Christine Gibbons, Esq.
333 Earle Ovington Blvd., Ste. 502
Uniondale, NY 11553

Great Neck Union Free School District
Great Neck Public School
c/0 Diana O'Connell, District Clerk
Phipps Administration Building
345 Lakeville Road
Great Neck, NY 11020

Dr. Ronald L. Friedman
Superintendent of Schools
Phipps Administration Building
345 Lakeville Road
Great Neck, NY 11020

Great Neck North High School
Bernard Kaplan, Principal
35 Polo Road
Great Neck, NY 11023