

<b>Levantini v Farmingdale Union Free School District</b>
2007 NY Slip Op 34237(U)
December 14, 2007
Supreme Court, Nassau County
Docket Number: 0973-07/
Judge: William R. LaMarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA  
Justice

Scan

NEIL LEVANTINI, an infant by his mother and  
Natural Guardian, DONNA LEVANTINI and  
DONNA LEVANTINI, Individually,

Motion Sequence # 001, # 2  
Submitted September 13, 2007

Plaintiffs,

-against-

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FARMINGDALE UNION FREE SCHOOL DISTRICT,  
STANLEY D. SALTZMAN EAST MEMORIAL SCHOOL,  
JENNIFER DRAIN and "JANE" FABIOLA-ESTRADA,  
(first name being fictitious and unknown),

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Affirmation in Opposition to Cross-Motion and in Reply.....	3
Reply Affirmation in Support of Cross-Motion.....	4

Requested Relief

Defendants, FARMINGDALE UNION FREE SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT"), STANLEY D. SALTZMAN EAST MEMORIAL SCHOOL, (hereinafter referred to as the "SCHOOL"), JENNIFER DRAIN and "JANE" FABIOLA-ESTRADA (first name being fictitious and unknown), move for an order, pursuant to CPLR

§3211(a)(5), General Municipal Law (GML) §50(e) and (l), and Education Law §3813, granting them summary judgment dismissing the complaint on the ground that plaintiffs, NEIL LEVANTINI, an infant by his mother and natural guardian, DONNA LEVANTINI and DONNA LEVANTINI, individually, have failed to satisfy certain conditions precedent to the commencement of an action. The plaintiffs oppose the motion and cross-move for an order, pursuant to GML §50(e), to amend the Notice of Claim or, in the alternative, to permit the filing of a late Notice of Claim. The motion and cross-motion are determined as follows:

### **Background**

This matter arises from an accident that occurred on September 25, 2006 at approximately 2:30 P.M. when NEIL LEVANTIN fell from the monkey bars in the SCHOOL playground and fractured his left wrist. It is alleged that NEIL, then four (4) years old, was attending a pre-kindergarten program at the SCHOOL in the subject DISTRICT and, at the time of the accident, was in the playground area with the teacher and aide, JENNIFER DRAIN and "JANE" FABIOLA-ESTRADA, respectively. It is further alleged that the surface under the equipment was deteriorated and crumbling and inadequate to protect the infant plaintiff from injury and that neither of the supervisory personnel prevented the infant plaintiff from climbing on the equipment which is claimed to be prohibited for pre-kindergarten use.

On the motion to dismiss, counsel for defendants relate that a §50-h hearing was held on February 15, 2007, at which the plaintiff mother gave testimony, but that counsel was advised "that the child would not be produced for a hearing". Counsel states that he advised the plaintiffs' attorney that defendants did not waive their right to conduct a 50-h

hearing of the infant and that the child was to be produced prior to the commencement of a lawsuit. Counsel for defendants points out that the action was commenced on June 22, 2007, with the filing of the summons and complaint, but that the infant has not been produced for a 50-h hearing. The defendants urge that the action be dismissed for failure to comply with the condition precedent required under GML §50-h— that a claimant submit to an examination prior to commencement of an action against a school district- and that non-compliance requires dismissal of the complaint.

Moreover, defendants point out that the Notice of Claim, sworn to December 1, 2006 and served on December 6, 2006, which the Court notes clearly describes the incident and claims of plaintiffs, only names the DISTRICT as a respondent and was only served upon the DISTRICT. It is the defendants' position that the failure to name and serve the SCHOOL and the two (2) individual employees of the DISTRICT within the 90-day time period prescribed by the statutes are the basis for dismissal against said defendants.

By way of explanation, counsel for plaintiffs asserts that he never refused to produce the infant but, rather, notified counsel for defendants, by letter dated February 16, 2007, that the child, who had recently turned five (5), could not be sworn, as a matter of law, but that he would be produced before a Justice of the Supreme Court for a determination of whether NEIL had the capacity to be sworn for the hearing. Counsel states that he waited for more than four (4) months to commence the action and that defendants never sought judicial intervention to determine if the infant plaintiff could be sworn. Counsel for plaintiffs urges that he had complied with all conditions precedent to commencing the action and that the motion to dismiss should be denied. He states that he stands ready to produce

the infant at a §50-h hearing if the Supreme Court determines that the child has capacity to provide sworn testimony.

Additionally, counsel for plaintiffs' states that it is acknowledged that the Notice of Claim was timely served upon the District, in which it is alleged that the accident was caused by the negligence of the DISTRICT, "its agents, servants, and/or employees . . .", but that the names of the individuals who were negligent in the supervision of the infant plaintiff were mistakenly omitted from the Notice of Claim. It is plaintiff's position that the cross-motion, to amend the Notice of Claim, or, in the alternative, to permit service of a late Notice of Claim, should be granted because no prejudice can be shown in that the DISTRICT was apprised of the incident within 90 days of its occurrence, investigated the matter and spoke to both individuals about the incident, who were well aware of the claims. Counsel for plaintiffs points out that the action will proceed against the DISTRICT under any circumstance, and the addition of the individuals will not prejudice the defendants since the DISTRICT will bear the ultimate responsibility for any negligence of the individuals who were acting in their individual capacity.

#### **The Law**

General Municipal Law (GML) § 50-e requires that before a plaintiff may sue a municipality, a Notice of Claim must be filed within ninety (90) days after the claim arises. Service of the Notice of Claim is a condition precedent to the commencement of an action or special proceeding. GML § 50-e. The statutory pre-condition serves "to enable municipalities to pass upon the merits of a claim before the initiation of a law suit and thereby forestall unnecessary law suits". *Alford v City of New York*, 115 AD2d 420, 496

NYS2d 224 (1<sup>st</sup> Dept. 1985) *affd* 67NY2d 1019, 503 NYS2d 324, 494 NE2d 455 (C.A. 1986). Plaintiffs' failure to file a Notice of Claim within 90 days of accrual of the cause of action, and the failure to seek leave to file a late Notice of Claim prior to the expiration of the one year ninety (90) day period to commence an action against the municipality requires that the Complaint be dismissed. *Hardie v New York City Health and Hospital Corp.*, 278 AD2d 453, 719 NYS2d 256 (2<sup>nd</sup> Dept. 2000). The Court has no discretion to extend the time past the one year ninety (90) day period. See, *Hall v City of New York*, AD3d 254, 768 NYS2d 2 (1<sup>st</sup> Dept. 2003).

Additionally, GML §50-h(5) directs that, where a hearing has been demanded, no action shall be commenced until the claimant has complied with the demand for examination. "If such examination is not conducted within ninety days of service of the demand, claimant may commence the action. The action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, [the DISTRICT] shall reschedule the hearing for the earliest possible date available".

"It is well settled that in determining whether to permit service of a late notice under General Municipal Law §50-e, a court should consider all relevant facts and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the public corporations

defense would be substantially prejudiced by the delay". *Matarrese v New York City Health and Hospital Corporation*, 215 AD2d 7, 633 NYS2d 837 (2<sup>nd</sup> Dept. 1995); *Acosta v City of New York*, 283 AD2d 489, 725 NYS2d 208 (2<sup>nd</sup> Dept. 2001); GML §50 (e)(5).

While all of the above noted factors are relevant, a petitioner is not required to demonstrate that all four factors weigh in petitioners favor. Even where there is no reasonable excuse for petitioners delay, that does not compel denial of the application where respondent fails to prove that the delay was prejudicial to its defense particularly when it had actual knowledge of the facts within ninety (90) days of the alleged incident. *Cf. Sloan v County of Westchester*, 175 AD2d 838, 573 NYS2d 310 (2<sup>nd</sup> Dept 1991).

### **Discussion**

After a careful reading of the submissions and consideration of all the relevant facts and circumstances herein, it is the judgment of the Court that dismissal of the action is not appropriate in that it appears that the failure to produce the infant child at a §50-h hearing was not willful or contumacious. Indeed, the hearing was scheduled by defendants to be held at the SCHOOL, rather than the Court, where the competency of the child to be sworn and to testify could not be determined. It is the view of the Court that simply bringing the child to a scheduled hearing without first determining if the infant can testify under oath, as required by statute, is not productive. Now that the statute of limitations is quickly approaching, the Court finds that, while defendants are entitled to an examination of the child if he is found to have the capacity to be sworn (*see, Gehl v Bachmann-Bechtel Brewing Co.*, 156 AD51, 141 NYS2d 133 (2<sup>nd</sup> Dept. 1913), the way to resolve the issue is to have the child brought before the Court for determination of his capacity and, thereafter,

to hold the §50-h hearing if he is found to be capable. (*C.f.*, *Hur v City of Poughkeepsie*, 71 AD2d 1014, 420 NYS2d 414 (2<sup>nd</sup> Dept. 1979); *People of the State of New York v Page*, 150 Misc2d 627, 569 NYS2d 875 (Criminal Ct. NY Co. 1991).

Additionally, the Court finds that the DISTRICT had notice of the accident within 90 days after it occurred and had the opportunity to conduct its investigation from that time forward. No prejudice has been demonstrated and the Court finds, after consideration of the factors relevant to granting permission to file a late Notice of Claim, that plaintiffs are entitled to file a late Notice of Claim. *Matarrese v New York City Health and Hospital Corporation, supra*. Accordingly, it is hereby

**ORDERED**, that defendants motion to dismiss the action is denied; and it is further

**ORDERED**, that DONNA LEVANTINI, mother of the infant plaintiff, NEIL LEVANTINI, is directed to produce the child before the Court on January 22, 2008, at 9:30 A.M., where the child will be questioned in camera, to determine if he is capable of being sworn to testify at a §50-h hearing, and if found to be capable, that the hearing then and there proceed in the Courthouse; and it is further

**ORDERED**, that the plaintiffs' cross-motion to file a late Notice of Claim is granted, and the proposed Amended Notice of Claim, dated August 8, 2007, a copy of which is annexed to the cross-motion, is deemed to be filed, *nunc pro tunc*; and it is further

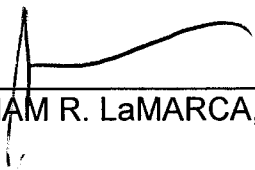
**ORDERED**, that the parties shall appear for a Preliminary Conference on March 25, 2008, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be**

**no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 14, 2007

  
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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**

DEC 20 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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