

Matter of Young v County of Suffolk

2008 NY Slip Op 31033(U)

March 31, 2008

Supreme Court, Suffolk County

Docket Number: 0027555/2007

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 27555/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

MELISSA YOUNG, EMMALEE YOUNG and
CECELIA YOUNG, Infants by their father and
natural guardian, RAYMOND L. YOUNG and
RAYMOND L. YOUNG, Individually,

Petitioners,

for permission to serve a late Notice of Claim
upon the

COUNTY OF SUFFOLK, SUFFOLK
COUNTY DEPARTMENT OF SOCIAL
SERVICES, CHILD PROTECTIVE
SERVICES UNIT OF THE SUFFOLK
COUNTY DEPARTMENT OF SOCIAL
SERVICES and SUFFOLK COUNTY POLICE
DEPARTMENT,

Respondents.

ORIG. RETURN DATE: OCTOBER 11, 2007
FINAL SUBMISSION DATE: JANUARY 24, 2008
MTN. SEQ. #: 002(001)
MOTION: MG

PLTF'S/PET'S ATTORNEY:
DELL & LITTLE, LLP
1274 REXCORP PLAZA
UNIONDALE, NEW YORK 11556
516-512-7700

DEFT'S/RESP ATTORNEY:
CHRISTINE MALAFI, ESQ.
SUFFOLK COUNTY ATTORNEY
BY: MARCIA J. LYNN, ESQ.
ASSISTANT COUNTY ATTORNEY
H. LEE DENNISON BUILDING
100 VETERANS MEMORIAL HIGHWAY
P.O. BOX 6100
HAUPPAUGE, NEW YORK 11788-0099
631-853-4049

Upon the following papers numbered 1 to 5 read on this motion _____
FOR LEAVE TO SERVE LATE NOTICE OF CLAIM _____.

Order to Show Cause and supporting papers 1-3 ; Affirmation in Opposition and supporting
papers 4 ; Replying Affirmation and supporting papers 5 ; it is,

ORDERED that this application by petitioners for an Order, pursuant
to General Municipal Law § 50-e(5), granting leave to serve a late notice of claim
upon respondents, and/or deeming the notice of claim served upon respondents
on or about May 21, 2007 timely, is hereby **GRANTED** as provided hereinafter.

Petitioner RAYMOND L. YOUNG ("petitioner") is the father, and non-party Deborah Young, is the mother of the three infant petitioners ("infants") herein. Petitioner informs the Court that petitioner and Ms. Young are divorced, and that on or about October 31, 2006, Ms. Young was granted sole legal custody of the infants. Thereafter, Ms. Young and the infants resided together at the premises commonly known as 239 Nevada Street, Lindenhurst, New York. Petitioner and his father hold title to the property. Petitioner alleges that in or about January of 2007, he became concerned that Ms. Young was not properly caring for their children. Petitioner alleges, among other things, that Ms. Young failed to maintain heat and hot water at the residence during the winter months. Petitioner alleges that he reported such concerns to respondent SUFFOLK COUNTY POLICE DEPARTMENT ("POLICE DEPARTMENT") via 911 on February 8, 2007. After allegedly receiving no response from the POLICE DEPARTMENT, he again called 911 on February 12, 2007. On February 14, 2007, petitioner reported the same concerns to the emergency hotline of respondent CHILD PROTECTIVE SERVICES UNIT OF THE SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES ("CPS"), including a concern that Ms. Young and the infants were spending hours at a time in an idling car outside the residence. Petitioner contends that CPS failed to gain entry into the residence to investigate. As such, petitioner alleges that on or about February 21, 2007, he "gained access" to the home and discovered that the residence had become "littered with hundreds of bottles of urine, feces, dead and distressed animals, soiled toilet tissue paper piled several feet high, and other waste and garbage." Petitioner alerts the Court that the infants were removed from the home by CPS that same day, and remain in its custody to date.

Petitioner seeks to assert claims on behalf of the infants and himself individually for monetary damage against respondent POLICE DEPARTMENT as a result of its alleged failure to timely investigate the abuse and maltreatment of the infants by their mother as reported by petitioner on or about February 8, 2007 and February 12, 2007. Petitioner further seeks to assert claims on behalf of the infants and himself individually for monetary damage against respondents COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, and CPS as a result of their alleged willful misconduct, gross negligence and lack of good faith in failing to timely investigate the abuse and maltreatment of the infants by their mother as reported by petitioner to CPS on February 14, 2007 via its emergency hotline.

On or about May 21, 2007, petitioner's prior counsel served a notice of claim upon respondents. By correspondence dated June 12, 2007, the Suffolk County Attorney rejected the notice of claim for the reason that it was not served within the time limit established by the General Municipal Law. Petitioner has now filed the instant application for leave to serve a late notice of claim or to deem the notice of claim served upon respondents timely.

In determining whether to grant leave to serve a late notice of claim, a court should consider the following factors: (1) whether the petitioner has demonstrated a reasonable excuse for the failure to serve a timely notice of claim; (2) whether the municipality acquired actual notice of the essential facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter; and (3) whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (see General Municipal Law § 50-e[5]; *Matter of White v New York City Hous. Auth.*, 38 AD3d 675 [2007]; *Welch v N.Y. City Hous. Auth.*, 7 AD3d 805 [2004]; *Pruden v New York City Board of Education*, 235 AD2d 426 [1971]). General Municipal Law § 50-e(5) enumerates these factors, but it sets one apart from all the others: whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the ninety (90) day period or within a reasonable time thereafter (see General Municipal Law § 50-e[5]; *Casias v City of New York*, 39 AD3d 681 [2007]; *Matter of Narcisse v Incorporated Vil. of Cent. Islip*, 36 AD3d 920 [2007]).

With respect to the infants' claims, infancy automatically tolls the statutory period for commencing an action against a municipality (see General Municipal Law § 50-i; CPLR 208; *Henry v City of New York*, 94 NY2d 275 [1999]). However, the Court notes that the infancy of an injured claimant does not, by itself, compel the granting of a petition for leave to serve a late notice of claim (see *Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256 [1980]; *Matter of Knightner v City of New York*, 269 AD2d 397 [2000]; *Matter of Russ v New York City Hous. Auth.*, 198 AD2d 361 [1993]).

The Court must balance the aforementioned factors of General Municipal Law § 50-e(5), with particular emphasis on the "actual knowledge" factor. With respect to a reasonable excuse for failing to serve a timely notice of claim, petitioner alleges that prior counsel incorrectly calculated the ninety (90) day period as commencing on February 21, 2007, the date of discovery by petitioner. However, courts have held that law office failure is not an acceptable excuse for the failure to timely comply with the provisions of General Municipal

Law § 50-e(5) (*Matter of Roland v Nassau County Dept. of Social Services*, 35 AD3d 477 [2006]; *Belenky v Nassau Cmty. College*, 4 AD3d 422 [2004]; *Valestil v City of New York*, 295 AD2d 619 [2002]). Notwithstanding the foregoing, it appears that by the service of petitioner's notice of claim on May 21, 2007, respondents had actual notice of the essential facts constituting the claim within a reasonable time after the ninety (90) day periods had expired. The notice of claim was served merely twelve days late with respect to the claim based upon the first report to the POLICE DEPARTMENT on February 8, 2007, and eight days late with respect to the claim based upon the second report to the POLICE DEPARTMENT on February 12, 2007. With respect to the claim against CPS stemming from the February 14, 2007 call to the CPS emergency hotline, the notice of claim was served six days late. Respondents have not presented evidence that the minimal delay in service of the notice of claim substantially prejudiced respondents in maintaining their defense on the merits. Further, the notice of claim served sets forth the nature of the claims, a detailed recitation of the facts upon which the claims are based, and the items of damages and injuries claimed.

Respondents have proffered various arguments in opposition which relate to the merits of petitioner's underlying claims. However, it has been repeatedly held that the merits of a petitioner's claims are not a factor to be considered in determining an application for leave to serve a late notice of claim (*Metzger v Town of Warwick*, 294 AD2d 503 [2002]; *Matter of Fritsch v Westchester County Dept. of Transp.*, 170 AD2d 602 [1991]; *Tatum v City of New York*, 161 AD2d 580 [1990]).

Therefore, in balancing the factors under General Municipal Law § 50-e(5), this petition is **GRANTED**. The notice of claim dated May 17, 2007 and received by respondents on May 21, 2007, annexed to petitioner's moving papers as Exhibit "A," is deemed timely served upon respondents.

The foregoing constitutes the decision and Order of the Court.

Dated: March 31, 2008



HON. JOSEPH FARNETI
Acting Justice Supreme Court