

Thompson v Addison Cent. School Dist.

2008 NY Slip Op 31470(U)

May 29, 2008

Supreme Court, Steuben County

Docket Number: 0097214/2008

Judge: Marianne Furfure

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State of New York Supreme Court
County of Steuben

**THOMAS THOMPSON, an Infant by His
Mother and Natural Guardian, KERRY
PEOPLES and KERRY PEOPLES,
Individually,**

Plaintiffs,

vs.

ADDISON CENTRAL SCHOOL DISTRICT,

Defendant

DECISION

Index No. 97,214

Appearances: *FINKELSTEIN & PARTNERS, LLP, Newburgh (Andrew L. Spitz of counsel), for Plaintiffs*

COUGHLIN & GERHART, LLP, Binghamton (Keith A. O'Hara of counsel), for Defendant

This matter comes before the Court on plaintiffs' motion for permission to file a late Notice of Claim. Defendant opposes the application. Counsel for both parties appeared and argued the motion, after which the Court reserved decision.

This case arises out of an accident which allegedly occurred during recess on September 7, 2006, at Tuscarora Elementary School, a school owned and operated by Addison Central School District (School District). On that date, Thomas Thompson (Thomas) and other students were playing on a piece of playground equipment known as a "glider." While Thomas was suspended from the glider and being pushed by other students, he fell to the ground and fractured his right arm.

Plaintiffs brought this application on July 3, 2007. In their proposed Notice of Claim plaintiffs allege that the School District was negligent in failing to provide supervision during recess, allowing students to use the glider without supervision, and permitting the glider to remain on school grounds despite knowledge of previous accidents involving that piece of equipment.

General Municipal Law Section 50-e requires that, as a condition precedent to any tort case filed against a municipality, the claimant must file a Notice of Claim within 90 days after the claim arises. The purpose of this requirement is to afford the municipal defendant an opportunity to investigate the circumstances of the accident and evaluate the merits of the claim while information is available (*Matter of Light v. County of Nassau*, 187 AD2d 720 [2nd Dept. 1992]). Section 50-e[5] of the statute allows the Court to grant an extension of time in which to file a late notice of claim based upon consideration of various factors (*Williams v. Nassau County Med. Cent.*, 6 NY3d 531, 535 [2006]; *Lemma v. Off Track Betting Corporation*, 272 AD2d 669, 670 [3rd Dept. 2000]). In exercising that discretion, the Court should consider whether the claimant has shown a reasonable excuse for the delay in filing the notice, whether the municipality had actual or constructive notice of the essential facts constituting the claim within 90 days of its accrual or within a reasonable thereafter, and whether the municipality will suffer substantial prejudice in maintaining its defense on the merits as a result of plaintiffs' delay (*LeMieux v. Alden High School*, 1 AD3d 995, 996 [4th Dept. 2003]; *Williams v. City of Niagara Falls*,

244 AD2d 1006 [4th Dept. 1997]; *Hilton v. Town of Richland*, 216 AD2d 921 [4th Dept. 1995]). The presence or absence of any one factor is not dispositive of the issue (*Matter of Porcaro v. City of New York*, 20 AD3d 357, 358 [1st Dept. 2005]; *Matter of Esposito v. Carmel Cent. School Dist.*, 187 AD2d 854, 855 [3rd Dept. 1992]). However, neither infancy of the plaintiff nor ignorance of the law is a sufficient excuse for failure to file a timely Notice of Claim (*LeMieux v. Alden High School*, 1 AD3d 995, 996 [4th Dept. 2003]).

In this case, a Notice of Claim should have been filed no later than December 6, 2006. Plaintiffs made application for permission to file a late Notice of Claim almost ten months after the date of the accident and seven months after the 90-day time limit expired. Plaintiffs assert that, initially, the School District paid for Thomas' medical bills and they were not notified until January 10, 2007, that the School District would no longer pay these expenses. Thereafter, plaintiffs retained counsel on March 12, 2007. On July 3, 2007, they filed the instant motion. Plaintiffs claim that the delay between March 12, 2007, and July 3, 2007, was due to their attorney's need to conduct further investigation into the claims by way of a Freedom of Information Law (FOIL) request made to the school. Defendant argues that plaintiffs threatened to sue the School District as early as January 2, 2007, during a meeting between the School District and plaintiffs. Defendant claims that the ensuing seven-month delay in filing the application for late Notice of Claim is unexcused and, therefore, plaintiffs' application must be denied. Further, defendant argues that,

even if plaintiffs' delay in obtaining counsel is excused, the four-month delay between retention of counsel and the making of this application is unreasonable.

Courts have held that delays of several months, or years, can be reasonable depending on the facts of the case (*Matter of Hayes v. Peru Cent. School Dist.*, 281 AD2d 794, 795 [3rd Dept. 2001] - 54 day delay; *More v. General Brown Cent. School Dist.*, 262 AD2d 1030 [4th Dept. 1999] - five month delay; *Reed v. City of Lackawanna*, 221 AD2d 967, 968 [4th Dept. 1995] - six month delay; *Matter of Mahan v. Board of Educ. of Syracuse City School Dist.*, 269 AD2d 834, 835 [4th Dept. 2000] - four and one-half year delay). In this case, the month-long delay between the expiration date of the statutory time limit and the date plaintiffs received notice that the School District would no longer cover plaintiffs medical bills is reasonable and excusable (*Matter of Hayes v. Peru Cent. School Dist.*, 281 AD2d 794, 795 [3rd Dept. 2001]). However, plaintiffs have failed to offer adequate explanation for the two month delay in retaining counsel and counsel's four month delay in bringing this application. The claim that counsel needed to conduct discovery before bringing the application is without merit. Counsel has not offered adequate explanation why the information sought in the FOIL request was necessary to bring this application or why counsel waited another five weeks after receiving the information to file this motion. This six month delay is not reasonable (accord *Smith v. Otselic Valley Cent. School Dist.*, 302 AD2d 665 [3rd Dept. 2003]).

Plaintiffs' failure to offer an adequate explanation for the delay is not necessarily fatal to their application (*Matter of Lindstrom v. Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1303, 1304 [4th Dept. 2005]). The Court must also consider whether the School District had actual or constructive notice of the essential facts constituting the claim within 90 days or a reasonable time thereafter. The relevant inquiry is whether the School District had actual knowledge of the essential facts constituting the claim, as opposed to the legal theory upon which plaintiffs' claim is based (*Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]). It is important that the municipality have knowledge not only that an accident occurred, but the extent of the injuries suffered as a result (*Santana v. Western Regional Off-Track Betting Corp.*, 2 AD3d 1304 [4th Dept. 2003]). Knowledge of the essential facts of the claim is a factor that should be given "great weight" (*Matter of Riordan v. East Rochester Schools*, 291 AD2d 922, 923 [4th Dept. 2002]).

Plaintiffs claim that the School District had actual notice of the essential facts constituting the claim because, immediately after Thomas fell from the glider, he reported the accident to the school nurse who prepared an incident report. The School District processed a claim for medical reimbursement and Thomas' medical expenses were paid by or on behalf of the School District. Furthermore, the School District's general liability insurance carrier conducted an investigation into the accident prior to disclaiming further liability for payment of Thomas's medical

expenses in January of 2007. Defendant argues that, while the School District was generally aware of the accident, the School District had no notice of plaintiffs' claim of negligent supervision.

In this case, the School District was aware, based on Thomas' hospitalization and the bills that he incurred, that Thomas suffered a substantial injury as a result of the fall. The School District also knew that the accident occurred during recess and that Thomas reported the accident directly to the school nurse, rather than to a playground monitor or teacher. These facts are sufficient to establish that the School District had adequate knowledge of the facts underlying the accident. The fact that the School District was unaware that plaintiffs would claim negligent supervision is not the issue. Rather, it is whether the School District had sufficient knowledge of the facts which form the basis for the claim (*Williams v. Nassau County Med. Ctr.*, Id). Thomas' report of the accident to the school nurse and his subsequently diagnosed injuries should have alerted the School District to the advisability of conducting a thorough and immediate investigation into the incident. The insurance carrier had the opportunity to complete a more in depth investigation in January of 2007 before it disclaimed liability. The School District cannot forego the opportunity to investigate the incident and then claim that it had no knowledge that the injuries could have been the result of negligent supervision (*Matter of Bird v. Port Byron Cent. School Dist.*, 231 AD2d 916 [4th Dept. 1996]).

Plaintiff must also show that permission to file a late Notice of Claim will not prejudice the municipality in conducting its defense (*Matter of Spaulding v. Cobleskill Richmond Cent. School Dist.*, 289 AD2d 860, 861 [3rd Dept. 2001]). The length of the delay in serving notice and whether defendants had actual notice of the claim are important factors in considering whether the municipality has suffered substantial prejudice (*Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). Defendant argues that because plaintiffs waited until after school ended to file this application, the School District will be prejudiced in its ability to obtain meaningful statements from young student witnesses who may have seen what happened, or been involved in the incident. Further, the School District claims that it may be hampered in mounting a defense because some students may no longer attend Addison School.

The accident occurred during the first week of the 2006-2007 school year when all of the student witnesses and other school personnel were available to provide statements relevant to the event. The School District knew the facts of the incident and the injuries suffered by Thomas through the school nurse who was notified immediately. Further, Thomas' mother told school representatives as early as January, 2007, that she intended to file a lawsuit. As a result, the School District forwarded the matter to their general liability carrier for an investigation. The School District had the opportunity, within a reasonable time after expiration of the 90-day time limit, and well before school adjourned for the summer, to conduct an


investigation into the incident. Under these circumstances, the School District cannot claim substantial prejudice due to plaintiffs' delay (*Matter of Courtney Nicole R. v. Moravia Cent. School Dist.*, 28 AD3d 1134, 1135 [4th Dept. 2006]; *Matter of Trusso v. Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1302, 1304 [4th Dept. 2005]; *Matter of Hayes v. Peru Cent. School Dist.*, 281 AD2d 794 [3rd Dept. 2001]; *Matter of Bird v. Port Byron Cent. School Dist.*, 231 AD2d 916 [4th Dept. 1996]).

For the reasons stated above, plaintiffs' application to file a late Notice of Claim is granted.

Plaintiffs' attorney to submit order.

Dated: *May 29, 2008*

ENTER ,



Hon. Marianne Furfure
Acting Supreme Court Justice