Matter of Muter v Nassau County Dept. of Social Servs.

2009 NY Slip Op 31184(U)

May 13, 2009

Supreme Court, Nassau County

Docket Number: 1485-09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

In the matter of the Claim of JOSEPH MUTER, Claimant, - against - NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES, MONIQUE CHARLES, NASSAU COUNTY POLICE DEPARTMENT P.O. FRANCES BYRNE, SGT,. JOHN C. LEZAMIZ, EAST MEADOW UNION FREE SCHOOL DISTRICT, and JOHN DOE and JANE DOE, as yet unidentified employees of defendant EAST MEADOW UNION FREE SCHOOL DISTRICT, Respondents.	TRIAL / IAS PART 31 NASSAU COUNTY Index No. 1485/09 Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1
Answering Affidavits	2
Replying Affidavits	
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The claimant seeks leave pursuant to General Municipal Law § 50-e (5) to serve a late notice of claim. The County of Nassau opposes the motion. The attorney for the defendant East Meadow Union Free School District states, in an affirmation dated February 13, 2009, the East Meadow Union Free School District waives any objection to

the manner in which the notice of claim was served by the claimant. The attorney for the defendant East Meadow Union Free School District notes, notwithstanding service upon the East Meadow Union Free School District was not made in compliance with General Municipal Law 50-e (3) (a), the East Meadow Union Free School District did receive the purported notice of claim, and had an opportunity to conduct a municipal hearing on January 20, 2009, in accord with General Municipal Law 50-h. The attorney for the defendant East Meadow Union Free School District cites CPLR 50-e [3] [c] as the basis for the East Meadow Union Free School District's position. However, the attorney for the defendant East Meadow Union Free School District states the East Meadow Union Free School District does not waive any objections to claims outside of the 90 day statutory period set forth in General Municipal Law § 50-e (1) (a)

The claimant states, in a supporting affidavit dated January 20, 2009, the basis for the underlying action which seeks damages for various claims arising from a string of alleged occurrences taking place over several months beginning on about June 13, 2008. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to these motions, and all of the factors enumerated in General Municipal Law 50-e (5).

General Municipal Law 50-e (3) (a) provides:

> The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be

> delivered, or to an attorney regularly engaged in representing such public corporation.

However, General Municipal Law 50-e (5) provides, in pertinent part:

> Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

The Second Department held:

> Timely service of a notice of claim is a condition precedent to a lawsuit sounding in tort and commenced against a municipality (***see*** General Municipal Law § 50-e[1][a]; ***Davidson v. Bronx Mun. Hosp.***, 64 N.Y.2d 59, 61, 484 N.Y.S.2d 533, 473 N.E.2d 761; ***O'Brien v. City of Syracuse***, 54 N.Y.2d 353, 358, 445 N.Y.S.2d 687, 429 N.E.2d 1158). In deciding whether to permit service of a late notice of claim, the court will consider whether the municipality acquired actual notice of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the petitioner has a reasonable excuse for the failure to serve a timely notice of claim, and whether the delay would substantially prejudice the municipality in its defense on the merits (***see*** General Municipal Law § 50-e[5]; ***Matter of White v. New York City Hous. Auth.***, 38 A.D.3d 675, 831 N.Y.S.2d 515; ***Matter of James v. City of NY.***

> ***Dept. of Envtl. Protection***, 37 A.D.3d 832, 830 N.Y.S.2d 593; ***Matter of Narcisse v. Incorporated Vil. of Cent. Islip***, 36 A.D.3d 920, 921, 829 N.Y.S.2d 578).

National Grange Mut. Ins. Co. v. Town of Eastchester, 48 A.D.3d 467, 851 N.Y.S.2d 632 [2nd Dept., 2008]; ***see also Power Cooling, Inc. v. Board of Educ. of City of New York***, 48 A.D.3d 536, 537, 852 N.Y.S.2d 214 [2nd Dept., 2008].

The Second Department stated:

> The presence or absence of any one of these factors is not necessarily determinative (***see Matter of Dell'Italia v. Long Is. R.R. Corp.***, 31 A.D.3d 758, 759, 820 N.Y.S.2d 81; ***Salvaggio v. Western Regional Off-Track Betting Corp.***, 203 A.D.2d 938, 939, 612 N.Y.S.2d 94), and the absence of a reasonable excuse is not necessarily fatal (***see Jordan v. City of New York***, 41 A.D.3d 658, 659, 838 N.Y.S.2d 624; ***Matter of March v. Town of Wappinger***, 29 A.D.3d 998, 999, 816 N.Y.S.2d 534). "However, whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim is seen as 'a factor which should be accorded great weight'" (***Matter of Dell'Italia v. Long Is. R.R. Corp.***, 31 A.D.3d 758, 759, 820 N.Y.S.2d 81, ***quoting Matter of Morris v. County of Suffolk***, 88 A.D.2d 956, 956, 451 N.Y.S.2d 448, affd. 58 N.Y.2d 767, 459 N.Y.S.2d 38, 445 N.E.2d 214; ***see Matter of Battle v. City of New York***, 261 A.D.2d 614, 615, 690 N.Y.S.2d 698)

Leeds v. Port Washington Union Free School Dist., 55 A.D.3d 734, 734-735, 865 N.Y.S.2d 349 [2nd Dept., 2008].

The Second Department found:

> The first factor, we believe, is the most important, based on its placement in the statute and its relation to other relevant factors (***cf. Matter of Battle v. City of New York***, 261 A.D.2d 614, 615, 690 N.Y.S.2d 698 [giving 'great weight" to that factor]). We have consistently held that a public corporation's knowledge of the accident and the injury, without more, does not constitute "actual knowledge of the essential facts constituting the claim" (General Municipal Law § 50-e[5]; ***see Weber v. County of Suffolk***, 208 A.D.2d 527, 528, 616 N.Y.S.2d 807), at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable. In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the

> facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves

Felice v. Eastport/South Manor Cent. School Dist., 50 A.D.3d 138, 147-148, 851 N.Y.S.2d 218 [2nd Dept., 2008]).

The Second Department added:

> General Municipal Law § 50-e (5), however, does not permit us to end our analysis here (***see Matter of McHugh v. City of New York***, 293 A.D.2d 478, 739 N.Y.S.2d 449; ***Matter of DeMolfetto v. City of New York***, 216 A.D.2d 295, 296, 627 N.Y.S.2d 448). We next consider whether the petitioners had a reasonable excuse for not serving a timely notice of claim. The statute does not expressly enumerate this factor. All relevant factors and circumstances must be considered, and, in numerous cases construing the statute, courts have considered whether the claimant had a reasonable excuse for not serving a timely notice (***see Bridgeview at Babylon Cove Homeowners Assn., Inc. v. Incorporated Vil. of Babylon***, 41 A.D.3d at 404, 837 N.Y.S.2d 330; ***Casias v. City of New York***, 39 A.D.3d 681, 683, 833 N.Y.S.2d 662; ***Matter of Corvera v. Nassau County Health Care Corp.***, 38 A.D.3d 775, 776-777, 833 N.Y.S.2d 537; ***Matter of Narcisse v. Incorporated Vil. of Cent. Islip***, 36 A.D.3d 920, 921- 922, 829 N.Y.S.2d 578; ***Matter of Carpenter v. City of New York***, 30 A.D.3d 594, 595, 817 N.Y.S.2d 155; ***De Jesus v. County of Albany***, 267 A.D.2d 649, 651, 699 N.Y.S.2d 563)

Felice v. Eastport/South Manor Cent. School Dist., 50 A.D.3d, supra, at 150).

The claimant's attorney states, in a supporting affirmation dated January 27, 2009, the notice of claim was duly served. The claimant's attorney asserts the claimant has demonstrated the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim shortly after the incidents. The claimant's attorney points out on or about September 11, 2008, separate notices of claim were sent to each respondent by regular United States mail, and the Nassau County Attorney's office acknowledged actual notice of the claim. The claimant's attorney notes

the original notices of claim were returned to the claimant's attorney on or about October 1, 2008, with a cover letter from a representative of the Nassau County Attorney's office advising the claimant's attorney the notice were rejected for lack of personal service. The claimant's attorney states the basis for the rejection by the Nassau County Attorney's office is not required by under the statute. The claimant's attorney avers the respondent East Meadow Union Free School District acknowledged the service of the notice of claim, and 50-h hearing was conducted on January 20, 2009. The claimant's attorney contends, since each respondent acknowledged receipt of the notices of claim, it is impossible for a respondent to demonstrate any substantial prejudice for granting the relief sought here.

The Deputy County Attorney points out, in an opposing affirmation dated February 11, 2009, the claimant's notices of claim were served by ordinary mail, so the notice to the County of Nassau was rejected on September 29, 2008, by a letter from the Bureau Chief, General Litigation Bureau, Office of the County Attorney, Nassau County, pursuant to the prerequisites of General Municipal Law 50-e (3) (a). The Deputy County Attorney notes the claimant made no further contact with the County of Nassau until service of the instant application approximately five months after the mailing of the notices of claim, and six to seven months after the happening of the events upon which the claims are based. The Deputy County Attorney asserts, according to the claimant's affidavit submitted in support of the instant application, all criminal charges brought

against him, although unspecified, were dismissed, and the claimant is appealing the finding of the New York State Office of Children and Family Services which found the report of child abuse made against the claimant to be indicated. The Deputy County Attorney maintains the claimant fails to set forth any excuse for the failure to timely comply with the service provisions of General Municipal Law 50-e (3) (a), or for the four month delay in making this application after notice by the County of Nassau of the improper service. The Deputy County Attorney avers the claimant's only argument is the County of Nassau will not be prejudiced as it acquired actual knowledge of the essential facts constituting the claim by virtue of its receipt of the improperly served notices, and it will not be able to demonstrate any substantial prejudice. The Deputy County Attorney submits the claims against the Nassau County Department of Social Services should not be allowed as the claims are facially insufficient. The Deputy County Attorney asserts any records of the charges would be sealed since the charges were dismissed, and the claimant would have to consent to an unsealing order for the records to be released to Office of the County Attorney, Nassau County to be investigated. The Deputy County Attorney states the notice of claim was received in the Office of the County Attorney, Nassau County more than 90 days after the date of the alleged wrongdoing, and the claimant did not attempt to re-serve nor respond to the rejection by the Nassau County for improper service. The Deputy County Attorney contends, under those circumstances, Nassau County had no reason to seek an unsealing order to investigate the claims since

the claimant apparently elected not to pursue those claims, hence an investigation by Nassau County since been set back by months, and substantial prejudice can be inferred from such delay. The Deputy County Attorney avers the notice of claim against the Nassau County Department of Social Services alleges on July 25, 2008, it conducted an improper investigation of the abuse claims which led to the claimant's wrongful arrest and prosecution, however the arrest took place on June 13, 2008, according to the petitioner's other notice of claim. The Deputy County Attorney states, based upon the claimant's assertions, any claim against the Nassau County Department of Social Services should not be allowed. The Deputy County Attorney adds the claimant should not be permitted to pursue his allegations against the Nassau County Department of Social Services because its employees are statutorily entitled pursuant to Social Services Law § 419 to qualified immunity for their official acts, and the claimant fails to allege gross negligence in the notice of claim.

The Court determines the claimant has met his burden with respect to the issue of leave pursuant to General Municipal Law § 50-e (5) to serve a late notice of claim (***see generally Gelish v. Dix Hills Water Dist.***, 58 A.D.3d 841, 842, 872 N.Y.S.2d 486 [2nd Dept., 2009]). There is no evidence here the County of Nassau is substantially prejudiced by the additional delay. Moreover, the absence of an acceptable excuse is not necessarily fatal to this application (***see Lewin v. County of Suffolk***, 239 A.D.2d 345, 657 N.Y.S.2d 734 [2 Dept., 1997]; ***DiNotte v. Westchester County***, 115 A.D.2d 585, 496 N.Y.S.2d 247

[2nd Dept., 1985]); ***see also Figgs v. County of Suffolk***, 2007 WL 6143349 [N.Y. Sup. Jun 27, 2007]). The issues of whether there is a triable issue of fact while raised here as assertions with respect to this motion for leave to serve a late notice of claim would properly be addressed in appropriate legal process for those contentions.

Accordingly, the motion is granted.

So ordered.

Dated: **May 13, 2009**

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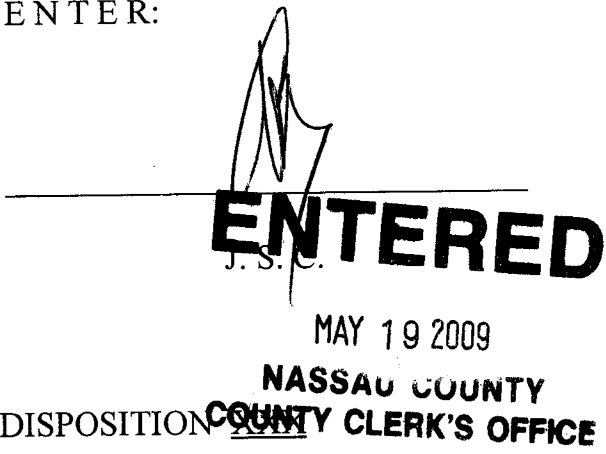

J. S. C.

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