

<b>Matter of Jaeger v Board of Educ. of the City of N.Y.</b>
2009 NY Slip Op 31991(U)
August 28, 2009
Supreme Court, New York County
Docket Number: 107066/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
Justice

IA PART 16  
PART 16

*Elyse Jaeger*

INDEX NO. 107064/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

- v -

*Bd. of Education of the City of NY*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: AUG 28 2009  
AUG 26 2009

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COUNTY OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 16

-----X

In the Matter of the Application of,

ELYSE JAEGER,

Petitioner,

- against -

THE BOARD OF EDUCATION OF THE CITY OF  
NEW YORK and THE COMPTROLLER OF  
THE CITY OF NEW YORK,

Respondents.

-----X

**SCHLESINGER, J.**

Petitioner Elyse Jaeger, a teacher of special education in the New York City public school system, has commenced this proceeding seeking leave to serve a late notice of claim, pursuant to General Municipal Law § 50-e, subd. 5. Respondents the Board of Education of the City of New York and the Comptroller (the City) have opposed the petition, contending that petitioner has failed to satisfy the statutory criteria.

Background Facts

The incidents underlying this proceeding are a series of alleged assaults on Ms. Jaeger by a ninth grade male student in her special education class. According to Ms. Jaeger, she reported each and every assault to her supervisor. In addition, she repeatedly requested that the student, who reportedly suffers from severe mental retardation, be removed from her class.<sup>1</sup>

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<sup>1</sup>These facts are alleged in Ms. Jaeger's Affidavit in Support (Aff.) and Reply Affidavit (Reply). The Exhibits attached thereto are medical records and other documents which confirm the allegations.

The first assault occurred on November 25, 2008 during class, when the student grabbed Ms. Jaeger's arms and twisted her wrists and dug his fingernails into her skin, drawing blood. Ms. Jaeger promptly reported the incident to her supervisor, who prepared an incident report. The incident report was accompanied by a statement from Ms. Jaeger and a statement from a witness Frances Benitez. The principal reviewed and signed the incident report. (Aff, Exh 2). In addition, Ms. Jaeger sought treatment from the school nurse.

Still feeling discomfort, Ms. Jaeger went the following day to her examining physician, Lawrence Adler, M.D. Dr. Adler took x-rays and ruled out a fracture or dislocation. (Reply, Exh 3). The medical examiner for the Department of Education also examined Ms. Jaeger and authorized her return to work. (Reply, Exh 4). In light of this report, Ms. Jaeger did not immediately bring suit, believing the injuries to be temporary and insignificant.

Repeated assaults by the student occurred on December 16 and 17, 2008, January 8, 12 and 21, 2009, and February 4, 5 and 6, 2009. In response, Ms. Jaeger sought additional medical treatment. In December 2008, Dr. Salvatore R. Lenzo of the NYU School of Medicine injected Celestone and Lidocaine into her wrist and provided ongoing care and treatment. (Reply, Exh. 5). On January 5, 2009, Ms. Jaeger came under the care of Dr. Stephen J. Nicholas, who diagnosed the injury as a "right wrist triangular fibrocartilage complex 1B (TFCC) tear". (Reply, Exh. 6). On January 19, Ms. Jaeger was seen by James E. Henry, D.O., who diagnosed a "right wrist sprain" and referred her to physiotherapy. (Reply, Exh. 7).

Showing no signs of improvement, and having been subjected to repeated assaults and continuing injuries, Ms. Jaeger was referred by Dr. Nicholas to a hand surgeon, Dr. Lee, on February 12, 2009. (Reply, Exh. 8). Dr. Adler cleared her for surgery. (Reply, Exh. 9). On March 6, 2009, Dr. Lee performed arthroscopic surgery under general anesthesia at Lenox Hill Hospital to repair the tear in Ms. Jaeger's right wrist. (Reply, Exh. 10). Ms. Jaeger then underwent physical therapy. (Reply, Exh. 11). She saw Dr. Lee to follow up on March 12 and 30, April 8 and May 5, 2009. Her return to work was authorized with restrictions. (Reply, Exh. 12).

In early May 2009, Dr. Lee advised Ms. Jaeger that the injury caused by the November 25 assault and the aggravation of that injury caused by the subsequent assaults could be permanent, and that the prognosis for full recovery was guarded. It was then that Ms. Jaeger decided to bring suit. At or about the same time, the medical examiner from the Department of Education examined Ms. Jaeger and found that she was not fit to return to work. (Reply, Exh. 13).

#### Rules Governing a Late Notice of Claim

General Municipal Law § 50-e, subd. 1, requires that, in a personal injury action such as this one against an agency like the Board of Education, a notice of claim must be filed "within ninety days after the claim arises." Subdivision 5 of the statute allows the court discretion to grant an application for an extension of time to serve a notice of claim, if the application is filed within one year and ninety days after the claim arose. Measuring that time in this case from the first assault on November 25, 2008, this application is timely.

The statutory criteria which the court must consider were aptly summarized by the Appellate Division in *Dubowy v City of New York*, 305 AD2d 320, 321 (1<sup>st</sup> Dep't 2003):

The key factors which the court must consider in determining if leave should be granted are whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality 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 municipality in its defense.

Applying those criteria to the facts in the case at bar, this Court in its discretion grants the application for leave to file a late notice of claim.

#### Petitioner Offers a Reasonable Excuse for Delay

Petitioner asserts that she delayed in filing suit because her medical providers did not advise her until recently that her injury is most likely a permanent one with a poor prognosis, notwithstanding the recent surgery. Petitioner detailed the progression of her injury and amply documented it with medical records in her Reply Affidavit (incorrectly denominated as a Sur-Reply) which was submitted with the permission of the Court following oral argument.

"The statute [providing for a late notice of claim] is remedial in nature and, therefore, should be liberally construed ..." *Porcaro v City of New York*, 20 AD2d 357-58 (1<sup>st</sup> Dep't 2005)(citations omitted). In this context, the Court finds that Ms. Jaeger's excuse is reasonable.

In any event, “the presence or absence of any one of the statutory factors is not determinative ... and the absence of a reasonable excuse is not, standing alone, fatal to the application ...” *Id.* (citations omitted). Thus, in *Porcaro*, the Appellate Division reversed the trial court and granted petitioner leave to file a late notice of claim where the party had delayed until the injury had been confirmed, explaining:

As we have previously held, petitioner should not be penalized for waiting to see if his symptoms, which resembled a cold or the flu, would resolve themselves. To hold otherwise would encourage preemptive filing of notices of claim by claimants who have no good-faith basis for believing that they were actually injured.

That same rationale applies here in petitioner’s favor, particularly in light of the ample medical evidence provided by petitioner to document her efforts to confirm her illness. *Cf., Dubowy*, 305 AD2d at 321 (submission of medical records bolstered claim that delay was caused by illness).

#### Respondents Had Notice of the Essential Facts

Petitioner has amply demonstrated herein that respondents had notice of the essential facts constituting the claim so as to justify the late filing. The intent underlying the notice requirement is “to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity ‘to explore the merits of the claim while information is still readily available.’” *Porcaro*, 20 AD2d at 358, quoting *Teresta v City of New York*, 304 NY 440, 443 (1952). “The statute, however, is not intended to operate as a device to frustrate the rights of individuals with legitimate claims ...” *Id.* (citations omitted).

Mindful of this policy, this Court finds that respondents had adequate notice of the facts. There is no dispute that petitioner promptly reported the initial incident and completed extensive paperwork, which the principal reviewed. In addition, petitioner went to the school nurse and was examined by a physician from the Board of Education who completed a report. Coupled with petitioner's request to have the student removed from the classroom, which was not acted upon, and the repeated subsequent assaults by the same student, these facts suffice to constitute notice of the incident and the claimed negligence. Any failure of the respondent to further inquire is not attributable to the late filing of the notice of claim. *See, e.g., Apgar v Waverly Central School District*, 36 AD23d 1113 (3<sup>rd</sup> Dep't 2007)(filing of incident report reviewed by principal and visit to school nurse constituted notice); *Young v Board of Educ. of City of New York*, 1 AD3d 194 (1<sup>st</sup> Dep't 2003)(affidavit from principal that he had been made aware of an incident of sexual abuse within days of occurrence created issue whether respondent had acquired actual notice); *Cicio v. City of New York*, 98 A.D.2d 38 (2<sup>nd</sup> Dep't 1983) (municipality had notice of the facts constituting the claim based on an employee's timely filing of an accident report); *Tortorici v. East Rockaway Public School Dist. No. 19*, 191 A.D.2d 495 (2<sup>nd</sup> Dep't 1993)(principal's review of school nurse's report sufficed as notice); *Strevell v. South Colonie Cent. School Dist.*, 144 A.D.2d 733 (3<sup>rd</sup> Dep't 1988))(principal's review of school accident report sufficed); *Urban v. Waterford-Halfmoon Union Free School Dist.*, 105 A.D.2d 1022 (3<sup>rd</sup> Dep't 1984)(conversation between plaintiff's father and principal sufficed).

The City cites *Caselli v. City of New York*, 105 A.D.2d 251(2<sup>nd</sup> Dep't 1984), a case involving a pedestrian injury on a public roadway, for the proposition that a

municipal employee's awareness of the facts of a claim does not, in itself, impute knowledge to the municipality. *Caselli* is readily distinguishable on two grounds. First, the police report lacked sufficient detail, such as the nature and precise location of the roadway defect, to enable the City to investigate. Further, considering the large number of incident reports which the police regularly file, the court declined to find that such reports constituted notice to the City. As demonstrated above, school incidents are treated differently, and the notice provided to the school district here was sufficient.

#### Respondents have Not Demonstrated Prejudice caused by the Delay

Respondents assert that petitioner has failed to demonstrate that they will not be prejudiced by the late filing of the notice of claim. However, petitioner has no such burden. Rather, "by demonstrating that [respondents] acquired timely knowledge of the essential facts of the claim, the petitioner met [her] initial burden of establishing a lack of substantial prejudice to [respondents] should late service of the notice of claim be allowed ..." *Leeds v Port Washington Union Free School Dist.*, 55 AD3d 734, 735-36 (2<sup>nd</sup> Dep't 2008)(citations omitted)(notice established where employees witnessed accident and prepared a report reviewed by principal, and school district failed to establish prejudice from delay). Where, as here, respondents have offered no evidence to substantiate their conclusory claim of prejudice, the late notice of claim should be allowed. *Giannicos v Bellevue Hospital Medical Center*, 42 AD3d 379 (1<sup>st</sup> Dep't 2007).

#### Conclusion

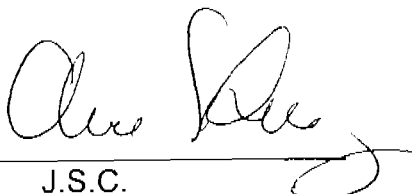
Petitioner Jaeger has established the requirements for leave to file a late notice of claim under General Municipal Law § 50-e, subd. 5. Accordingly, it is hereby

\*9]  
ORDERED AND ADJUDGED that the petition is granted, and the notice of claim is deemed timely served in the proposed form annexed to the petition upon petitioner's service on respondents' counsel of a copy of this decision with notice of entry.

This constitutes the decision and judgment of this Court.

Dated: August 28, 2009

**AUG 28 2009**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**