

Schneider v Smithtown Cent. School Dist.

2009 NY Slip Op 32808(U)

November 23, 2009

Supreme Court, Suffolk County

Docket Number: 12586/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 12586/2009

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

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

KELLY SCHNEIDER, a minor over the age of
 14 years by her father and natural guardian,
 GEORGE SCHNEIDER, and GEORGE
 SCHNEIDER, individually,

Plaintiffs,

-against-

SMITHTOWN CENTRAL SCHOOL
 DISTRICT,

Defendant.

ORIG. RETURN DATE: APRIL 15, 2009
 FINAL SUBMISSION DATE: MAY 21, 2009
 MTN. SEQ. #: 001
 MOTION: MD

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

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

ORDERED that this application by plaintiffs for an Order, pursuant to
 General Municipal Law § 50-e, granting plaintiffs leave to serve a late notice of
 claim upon defendant, is hereby **DENIED** for the reasons set forth hereinafter.
 The Court has received an affirmation in opposition to the instant application from
 defendant.

Initially, the Court notes that as no previously-commenced action
 was pending against SMITHTOWN CENTRAL SCHOOL DISTRICT, this
 application for leave to file a late notice of claim was improperly brought as a
 motion (see *Lennon v Roosevelt Union Free Sch. Dist.*, 6 AD3d 713 [2004];
Rogers v New York City Housing Authority, 169 AD2d 763 [1991]; *Matter of Eso v*

County of Westchester, 141 AD2d 542 [1988]). However, a denial of the motion is not mandated, where, as here, the Court has obtained jurisdiction over the defendant by service of process pursuant to CPLR 311. In such a case, the Court shall not dismiss an action for lack of proper form, but must “make whatever order is required to its proper prosecution” (CPLR 103 [c]; see *Matter of Kovarsky v Housing and Dev. Admin. of City of N.Y.*, 31 NY2d 184 [1972]; *Sullivan v Lindenhurst Union Free School Dist. No. 4*, 178 AD2d 603 [1991]). Thus, the Court shall treat plaintiffs’ application as a special proceeding.

Plaintiffs seek to recover damages for personal injuries allegedly sustained by the infant plaintiff, KELLY SCHNEIDER (“infant” or “infant plaintiff”), as a result of an accident that occurred on January 9, 2008, while the infant plaintiff was practicing with her cheerleading squad in the gymnasium of Smithtown High School East. On that date, the infant was a “backer” during a stunt known as a “scorpion double,” which plaintiffs allege was inappropriate for the skill and size of the “flyer” performing the stunt. As such, plaintiffs allege that the “oversized” and “ill-trained” flyer came down on the infant’s ear, tearing the ear in half, requiring plastic surgery to repair. Plaintiffs allege that the aforementioned accident occurred as a result of defendant’s negligence, including the negligent hiring and training of its cheerleading coach, who is no longer employed by defendant.

In support of the instant application, plaintiffs allege that defendant received actual notice of the claim within ninety (90) days thereof, as an accident report was filled out on January 11, 2008, by the principal and the school nurse. Further, plaintiffs indicate that defendant paid the infant’s medical bills relative to the subject accident. In addition, plaintiffs assert that pursuant to General Municipal Law § 50-e, a Court may consider whether a claimant is an infant, which may toll the applicable one year and ninety (90) day statute of limitations for commencement of an action (see General Municipal Law § 50-e; § 50-i; CPLR 208). Moreover, plaintiffs argue that defendant will not be prejudiced by a late notice of claim as the accident happened on its premises, and the instant application was filed prior to the expiration of the statute of limitations.

Defendant has filed opposition to the instant application, alleging that although defendant may have had actual knowledge of the accident, defendant did not have actual knowledge of the facts underlying the legal theories on which liability is predicated in the notice of claim, to wit: negligent hiring and negligent training of the cheerleading coach. Defendant argues that the accident report

filled out by school officials makes no mention that the coach was negligently hired or trained, or that she lacked experience, or that the flyer was oversized and untrained. Further, defendant claims that infancy does not provide a reasonable excuse for the failure to timely serve a notice of claim, in that the toll is discretionary, and such extension may be denied in the interest of fairness to the potentially liable public corporation and if the delay was unrelated to infancy. Finally, defendant alleges that it would suffer prejudice if the instant application was granted because: (1) the coach is no longer employed by defendant; and (2) its investigation would be hampered as over fifteen months have passed and witness' memories have faded.

In determining whether to grant leave to serve a late notice of claim, a court should consider the following key factors: whether the petitioner has demonstrated a reasonable excuse for the failure to serve a timely notice of claim; 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 whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (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]). In determining whether to permit the filing of the late notice of claim, the presence or absence of any one factor is not determinative (*Porcaro v City of New York*, 20 AD3d 357 [2005]; *Dubowy v City of New York*, 305 AD2d 320 [2003]; *Chatterqoon v New York City Housing Authority*, 197 AD2d 397 [1993]). In *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138 (2008), a case almost factually identical to the case at bar, the Second Department emphasized that a municipality must have acquired actual knowledge of the essential facts constituting the claim, not merely knowledge of the accident. "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" (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 148).

The Court must now balance the aforementioned factors of General Municipal Law § 50-e (5) with respect to defendant. It is undisputed that the accident occurred on defendant's premises on January 9, 2008; as such, plaintiffs were required to serve a notice of claim upon defendant no later than April 9,


2008, and to commence an action thereupon no later than April 9, 2009 (see General Municipal Law § 50-e; § 50-i). Defendant failed to do either, but instead filed the instant application on April 1, 2009, just prior to the expiration of the statute of limitations to commence an action. Plaintiffs rely on the infant plaintiff's infancy to toll the statute of limitations. However, lack of a connection between infancy and the failure to serve a notice of claim is a factor militating against leave; "[i]t all goes into the mix" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 538 [2006]; see *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, *supra*; *Matter of Plantin v New York City Hous. Auth.*, 203 AD2d 579 [1994]). Plaintiffs have not alleged any connection between the infant plaintiff's infancy and the failure to serve a timely notice on her behalf. Notably, the infant herein was fifteen years old at the time, and therefore was able to communicate the facts and circumstances of the accident to an attorney or other person investigating the accident. The Court notes that plaintiffs waited over a year to retain counsel in connection with this matter, without explanation. Moreover, the infant's father is not an infant, so infancy cannot be the basis for excusing the tardiness of the father's derivative claim (see *Matter of Andrew T.B. v Brewster Cent. School Dist.*, 18 AD3d 745 [2005]; *Tanco v New York City Hous. Auth.*, 84 AD2d 501 [1981]). Thus, the Court finds that plaintiffs have failed to demonstrate a reasonable excuse for the failure to timely serve a notice of claim.

Next, with respect to actual knowledge, an accident report was filled out on January 11, 2008 and signed by the school's principal. However, the accident report does not contain facts that would support causes of action for negligent hiring and negligent training of the cheerleading coach, as asserted in plaintiffs' proposed notice of claim. Plaintiffs also rely on the fact that defendant paid the infant's medical bills. However, the medical bills similarly do not contain facts to support the aforementioned causes of action, and, in any event, the statement submitted to the Court is dated November 18, 2008, over ten months after the subject accident. Accordingly, the accident report and medical bills do not satisfy plaintiffs' burden of demonstrating that defendant acquired actual knowledge of the essential facts constituting the claims sought to be interposed by plaintiffs within ninety (90) days from their accrual or a reasonable time thereafter. The Court finds that defendant did not receive actual knowledge of the essential facts until the service of the instant application on April 3, 2009, some fifteen months after the accident, and defendant has claimed prejudice as a result thereof as outlined hereinabove.

Therefore, after balancing the factors under General Municipal Law § 50-e (5), this application is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: November 23, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court