

<b>Dume v City of New York</b>
2009 NY Slip Op 33429(U)
May 20, 2009
Supreme Court, New York County
Docket Number: 115407/05
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
AXELL DUME, an infant by his mother and natural  
guardian, SANTA ORTIZ, and SANTA ORTIZ,  
individually

Plaintiffs,

- against -

**FILED**  
MAY 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Index No.  
115407/05

**DECISION  
/ORDER**  
Mot. Seq.  
#002

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

Defendants.  
-----X

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for injuries allegedly sustained when infant plaintiff, then thirteen, "suffered a fracture to his right hand while participating in his regularly scheduled Physical Education class." Specifically, plaintiff was hit on the hand with a ball while playing "kickball." The alleged injury occurred at infant plaintiff's school, J.H.S. 117, located at 1865 Morris Avenue in the County of Bronx State of New York on December 10, 2004. Infant plaintiff's mother, Santa Ortiz, brings the action on infant plaintiff's behalf and individually. Defendants the City of New York and Board of Education of the City of New York ("City") move to dismiss the action pursuant to CPLR 3211(a)(7), or in the alternative, pursuant to CPLR 3212. Plaintiffs oppose and cross-move for an order granting them leave to serve a late notice of claim pursuant to General Municipal Law ("GML") 50-e(5). City opposes plaintiffs' cross motion.

City, in support of its motion, argues that plaintiffs' action should be dismissed because they failed to file a timely notice of claim. Specifically, infant plaintiff was injured on December 10, 2004 and plaintiffs did not file their claim until March 24,

2005, fourteen days after the ninety day deadline. Further, City asserts that Santa Ortiz was not listed as a claimant in the notice of claim. Rather the claim lists infant plaintiff and “Sobeida Ortiz” under “claimants.” However, Santa Ortiz signs and verifies the notice of claim on behalf of herself, individually, and on behalf of her infant child. Finally, City argues that plaintiffs cannot move now to file a late notice because it is beyond the one year and ninety day statute of limitations period within which to file.

Plaintiffs, in opposition and in support of their cross-motion, argue that the court has discretion to consider its application because the period for which it was required to file a claim was tolled by infancy. Further, plaintiffs argue that the City would not be prejudiced by a late filing as the notice was only filed fourteen days late and less than four months after infant plaintiff’s accident.

CPLR 3211 states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action

A notice of claim must be filed within 90 days of when the claim arose.(General Municipal Law 50-e(1)(a)). The court has discretion to grant leave to file a late notice of claim within one year and ninety days of accrual. (General Municipal Law 50-e(5)). Key factors to be considered include whether the petitioner has demonstrated a reasonable excuse for failing to file such notice timely, whether the public corporation acquired actual notice of the essential facts within 90 days after the claim arose or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in defending on the merits. No one of these factors is determinative. (*Nieves v. New York Health and Hospitals Corp*, 34 AD3d 336 [1<sup>st</sup> Dept. 2006]).The burden to prove lack of prejudice rests with petitioner. (*Williams v. Nassau County Medical Center*, 6 NY3d 531 [2006]).

Initially, the time within which infant plaintiff had to file his notice of claim was tolled due to his infancy. The court in *Cohen v. Pearl River Union Free School District*, 51 NY2d 256[1980]), held that “where the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time

during which late notice of claim may be served.” (*Id.* at 263). CPLR 208 states, in relevant part:

If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues . . . and . . . the time otherwise limited is less than three years . . . the time shall be extended by the period of disability . . .

Here, plaintiff was thirteen years old when his accident occurred. Thus, he was considered an infant under CPLR §208, and the applicable toll applies to both the limitations period for bringing an action and to the time period within which he was required to file his notice of claim. However, Santa Ortiz does not get the benefit of such a toll, and the court is without discretion to grant leave to file a late notice of claim as to her.

As to the merits of plaintiffs cross-motion, “whether to grant leave to serve a late notice of claim rests within the sound discretion of the Supreme Court.” (*Jordan v. City of New York*, 38 AD3d 336[1st Dept. 2007]). The purpose of a notice of claim is to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence. (*Lomax v. New York City Health and Hospitals Corp.*, 262 AD2d 2[1st Dept. 1999]). Here, infant plaintiff testifies that the accident in question occurred while he was playing kickball under the watch of two physical education teachers. After he was hit with the ball, he told one of those teachers that he was going to see the nurse. The nurse gave him an ice pack for his hand and sent him home. Subsequently, his mother took him to the emergency room, where his injuries were documented. Thus, the “school district acquired actual knowledge of the essential facts constituting the claim immediately after the accident.”(*Pepe v. Somers Cent. School Dist.*, 108 AD2d 799[2nd Dept. 1985] internal citations omitted) (where the court found that the application for leave to file a late notice of claim should have been granted where infant plaintiff was injured during gym class and his gym teacher sent him to the nurse). Significantly, plaintiffs’ notice of claim was delayed by a mere fourteen days after the ninety day statutory limit. Such a minimal delay did not prejudice City’s opportunity to investigate the claim. (see, *Silva v. City of New York*, 246 AD2d 465[1st Dept. 1998]).

Wherefore it is hereby

ORDERED that the motion is granted to the extent of dismissing plaintiffs' derivative cause of action on behalf of Santa Ortiz, individually; and it is further

ORDERED that plaintiffs' cross-motion for leave to file a late notice of claim is granted to the extent that the notice of claim filed on March 25, 2005 shall be deemed timely served *nunc pro tunc*, as to claimant Axell Dume only, upon petitioner's service of a copy of this decision with notice of entry on respondent.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 20, 2009

  
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EILEEN A. RAKOWER, J.S.C.

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