

<b>Matter of Billman v Port Jervis School Dist.</b>
2010 NY Slip Op 30310(U)
February 17, 2010
Supreme Court, Orange County
Docket Number: 10246-2009
Judge: Lewis Jay Lubell
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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF ORANGE**

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In The Matter Of The Application Of

DENISE BILLMAN as Administratrix of the Estate of LINDSEY BILLMAN,

Petitioner,

-against -

For Leave To File A Late Notice of Claim Against

THE PORT JERVIS SCHOOL DISTRICT and THE TOWN OF DEERPARK,

Respondents.

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**LUBELL, J.**

**DECISION/ORDER**

Index No. 10246-2009

Motion Date:12/11/09

The following papers were considered in connection with **(I)** this motion by petitioner Denise Billman as Administratrix of the Estate of Lindsey Billman for an Order a) granting leave to file a late notice of claim against The Port Jervis School District and the Town of Deerpark pursuant to CPLR 50-e(5) and deeming such notice of claim filed upon entry of said Order, b) deeming petitioner's filing of the notice of claim in accord with such Order to be timely, *nunc pro tunc*, and c) deeming all conditions precedent to the filing of petitioner's summons and complaint thereupon fulfilled and **(II)** the motion by respondent Port Jervis City School District for an Order dismissing the petition for Leave to File a Late Notice of Claim:

<b>PAPERS</b>	<b>NUMBERED</b>
Notice of Petition/Petition/Exhibits 1-10	1
Memorandum of Law	2
Affirmation in Opposition	3
Motion/Affirmation/Exhibits A-F	4
Memorandum of Law	5
Affirmation of Corey Stark, Esq.	6
Memorandum of Law	7
Reply Memorandum of Law	8

On January 26, 2008, Lindsay Billman ("Lindsay"), then fifteen years old, tragically died from injuries sustained that day from a fall through a skylight situated on the roof of the Port Jervis High School (the "School District"), which is situated in the Town of Deerpark (the "Town"). This action for, among other things, wrongful death based on negligence and attractive nuisance is brought against the School District and the Town by Denise Billman as Administratrix of the Estate of Lindsay Billman, her late daughter, and by Lindsay's father, Peter, for loss of Lindsay's services.

A notice of claim dated February 18, 2008 (the "Original Notice of Claim") was served upon the School District on or about March 28, 2008 wherein by way of caption and content Denise Billman and Peter Billman are the only named claimants. In addition to identifying the claimants as such, the Original Notice of Claim includes the individuals involved, the nature of the claim, the approximate time and location of the incident, the manner in which the incident occurred, and the damages claimed (see, General Municipal Law §50-e[2]). No mention is made of Lindsay's estate, although the "items of damage or injuries claimed" section of the Original Notice of Claim includes the words: "*personal injuries and wrongful death to Lindsay Billman and loss of services sustained by her parents and natural guardians, Denise Billman and Peter Billman [emphasis added].*" It would not be until April 18, 2008 that a petition for limited letters of administration would be made to the Orange County Surrogate by Denise Billman and not until June 2, 2008 that limited letters of administration would issue.

In response to service of the Original Notice of Claim, on April 3, 2008, the School District served upon the claimants named therein an April 3, 2008 Notice of Hearing pursuant to General Municipal Law §50-h setting forth a hearing date of May 12, 2008. By letter dated May 1, 2008, School District counsel made a request for duly issued HIPAA authorizations (Health Insurance Portability and Accountability Act, 42 USC §1320d et seq.) for the release of records maintained by the Office of the Orange County Medical Examiner. A responsive HIPAA authorization dated May 5, 2008, executed by Denise Conklin-Billman, "Mother of Patient (Decedent)" was forwarded to defense counsel by cover letter of May 6, 2008. At claimants' request, the 50-h hearing was adjourned and rescheduled for June 10, 2008. Thereafter, it was adjourned for various other reasons as are more fully set forth in this Court's Decision & Order of May 19, 2009.

Claimants prepared a summons and verified complaint, verified on July 1, 2008, which was filed with the Orange County Clerk on July 8, 2008. In contrast to the Original Notice of Claim wherein

the named claimants are Denise Billman and Peter Billman, the plaintiffs in the summons and verified complaint are identified as Denise Billman as Executrix (sic) of the Estate of Lindsay Billman and Peter Billman. On August 12, 2008, issue was joined upon the School District's service of its answer wherein, as its sixth affirmative defense, the School District alleges plaintiffs failure to comply with General Municipal Law §50(e).

The application currently before the Court by the Estate for leave to file a late notice of claim against the School District and the Town pursuant to CPLR 50-e(5) and the corresponding cross-motion follows, among other things, this Court's Decision & Order of May 19, 2009 wherein the Court: granted plaintiffs' motion for an Order dismissing the School District's Sixth Affirmative Defense pursuant to CPLR §3211(b) to the extent that it relates to the claims advanced in the Verified Complaint by Peter Billman; granted the motion of defendant School District for an Order pursuant to CPLR §3211 dismissing the Verified Complaint as against it due to plaintiffs' failure to comply with the conditions precedent to the commencement of suit pursuant to General Municipal Law §§50-e to the extent that it relates to the claims brought by Denise Billman as the Executrix (sic) of the Estate of Lindsay Billman; and, denied the motion of defendant School District for an Order pursuant to CPLR §3211 dismissing the Verified Complaint due to plaintiffs' failure to comply with General Municipal Law §50-h to the extent that it relates to plaintiff Peter Billman.

Upon ruling as it did, the Court answered in the negative the question as to whether a notice of claim served in the names of two individual claimants, here Denise Billman and Peter Billman, constitutes service of a notice of claim on behalf of an estate, here Lindsay's estate, where an estate representative had yet to be appointed. The Court also found that the failure to hold a 50-h hearing could not be attributed to claimants.

This application by the Estate also follows the Court's Decision & Order of February 9, 2009 wherein "Denise Billman as the Executrix [sic] of the Estate of Lindsay Billman, and Peter Billman", as originally captioned, were granted leave to file a late Notice of Claim against the Town upon this Court's finding that petitioners therein had demonstrated, among other things, a reasonable excuse for their tardiness, the absence of prejudice to the Town, and the timeliness of the application.

As the current motion relates to the Town, the petitioner herein, the Estate, asserts that "[t]here is error in the caption of the original petition for late notice of claim as against Deepark [the Town] and the Original Deepark Notice of Claim [dated February 18, 2009]. These documents reflect that [Denise Billman] is the Executrix of Lindsay's estate, when [she is] actually the Administratrix." Otherwise, petitioners continue, the body of the

proposed Notice of Claim is exactly the same. This, however, is not so.

Although the petition underlying the Court's February 9, 2009 Decision & Order and proposed Notice of Claim (and correspondingly, the ensuing Decision & Order), incorrectly makes reference to Denise Billman as being the "Executrix" of Lindsay's Estate instead of the "Administratrix", nowhere in then proposed Notice of Claim is there any reference to Denise Billman's representative capacity. The October 6, 2008 proposed notice of claim in connection with which late service was (mistakenly) sought and granted is captioned in Denise Billman's individual name, is executed in her individual capacity, and is verified as such.

### **The Estate's Application: The School District**

Petitioners' application as to the School District is granted to the extent that it relates to the claim for wrongful death, but is denied as to the claim for conscious pain and suffering.

#### **Conscious Pain and Suffering:**

Section 50-e(1) (a) of the General Municipal Law provides, in relevant part:

[A notice of claim must be served] within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

Since this September 10, 2009 application for leave to serve a file late notice of claim against the School District was not made by the Estate after the expiration of one year and 90 days of the January 26, 2008 accident, the Estate's application must be denied as time-barred to the extent that it relates to a claim for conscious pain and suffering (see, Miller v. County of Sullivan, 36 AD3d 994 [3d Dept., 2007] citing Jae Woo Yoo v New York City Health & Hosps. Corp., 239 AD2d 267, 267-268 [3d Dept., 1997]; Gibbons v City of Troy, 91 AD2d 707, 707-708 [3d Dept., 1982]). Such tardy applications render the Court powerless to grant such relief (Pierson v. City of New York, 56 NY2d 950 [1982]; Ellman v. Village of Rhinebeck, 27 A.D.3d 414 [2d Dept., 2006]). The Court lacks the discretion in this regard.

Petitioners' reliance on CPLR 205(a) is misplaced.

Under section 50-i of the General Municipal Law, a notice of claim in compliance with section 50-e is made a condition

precedent to the commencement of an action founded in negligence against a [municipal body]. A condition precedent is not a time limitation, and CPLR 205 does not apply to conditions precedent (Matter of Howard v. Robinson, 32 A.D.2d 837, 302 N.Y.S.2d 347; Lewis v. State of New York, 69 Misc.2d 1031, 332 N.Y.S.2d 292).

(Glamm v. City of Amsterdam, 67 A.D.2d 1056, 1057-1958 [3d Dept., 1979] aff'd 49 NY2d 714 [1980] reargument denied 49 NY2d 918 [1980]).

#### Wrongful Death:

In contrast to actions by an estate for conscious pain and suffering, actions for wrongful death enjoy the benefit of section 50-i(1)(c) of the General Municipal Law which provides:

[T]he action . . . shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

Accordingly, the Court finds that the Estate's application for leave to file a late notice of claim as to the wrongful death cause of action is timely, having been made on September 10, 2009 which is well within two years of the underlying January 26, 2008 incident.

Section 50-e(f), entitled "Application for leave to serve a late notice", provides in relevant part:

. . . 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 delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

The Original Notice of Claim, which is in the individual names of Lindsay's parents, was served on March 28, 2008, sixty days after the underlying incident. Although it was deemed ineffective as to the Estate, the Court is nonetheless satisfied that it served its intended purpose of protecting the School District against unfounded claims, and allowed the School District an adequate opportunity to explore the merits of the claim while information was still readily available (see Camacho v. City of New York, 187 A.D.2d 262, 263 [1st Dept., 1992] citing Teresta v. City of New York, 304 N.Y. 440, 443 [1952]). The Court further finds that the School District will not be substantially prejudiced in maintaining its defense on the merits were the Court to allow the application.

The Court finds that this determination is fair and proper, especially upon consideration of the remedial nature of GML §50-e[5], the fact that the statutory mandate should not be used to defeat the rights of those with legitimate claims and the liberal construction to be accorded section 50-e (Camacho, 187 A.D.2d at 263, citing Matter of Santana v. City of New York, 183 A.D.2d 665 [1st Dept 1992]).

### **The Estate's Application: The Town**

#### **Conscious Pain and Suffering:**

That aspect of the Estate's application to file a late notice of claim as against the Town on its cause of action for conscious pain and suffering is denied, upon movant's admission that the application is untimely (see, Footnote "1" to Memorandum of Law in Further Support dated November 25, 2010).

#### **Wrongful Death:**

As with the Estate's application for leave to file late notice of claim against the School District and for the reasons therein stated, the application is timely as it relates to the Town (see, GML §50-i[1][c]).

In its Decision & Order of February 9, 2009, the Court granted petitioners therein, "Denise Billman as Executrix [sic] of the Estate of Lindsey Billman, and Peter Billman" leave to serve a late notice of claim against the Town. Nonetheless, the notice of claim attached to the application and that which was served or deemed served upon the Town identifies the claimants as "Denise Billman and Peter Billman."

Through the current application, the Estate seeks to amend the caption to read: "*Denise Billman as Administratrix of the Estate of Lindsey Billman, and Peter Billman*"

Among other things, upon rendering the February 9, 2009 determination, the Court concluded that:

. . . petitioners ha[d] demonstrated a reasonable excuse for their tardiness . . . there [was] no dispute that the Deerpark Police Department responded to the scene immediately after the incident, interviewed persons at the scene, located Lindsay (and another child who had fallen through the skylight), and, among other things, summoned emergency medical services as appears in the January 26, 2008 Deerpark Town Police Department Incident Report dated January 26, 2008 . . .<sup>1</sup>[and, in] any event, given the relative brief period of delay in the filing of the Notice of Claim against the Town of Deerpark, the Court [was] not persuaded that the Town has suffered such prejudice as would warrant the denial of the application (see, General Municipal Law 50-e[5]) . . .

Given the background of this case, the Court views the Estate's application as one which simply seeks to correct what should otherwise appear to be an obvious administrative error in the notice of claim dated October 6, 2008. The underlying petition was clearly made on behalf of the Estate, be it through an Administratrix or an Executrix. Therefore, the Court sees no prejudice in allowing this administrative/clerical error to be corrected, nunc pro tunc.

Based upon the forgoing, it is hereby

ORDERED, that the motion is granted as to the Port Jervis School District and the Town of Deerpark to the extent that it relates to causes of action for wrongful death and is otherwise denied, and the cross-motion is decided accordingly.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

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<sup>1</sup> Therein, the Court expressly recognized that the existence of the Deerpark Police at the scene and the preparation and filing of the Incident Report were not, in and of themselves, determinative of the issue of whether the Town of Deerpark "acquired actual knowledge of the essential facts constituting the claim within [ninety (90) days after the claim arose] or within a reasonable time thereafter" (GML §50-e[5];), but that same was "pertinent" to the Court's consideration.

Dated: Goshen, New York  
February 17, 2010

S/ \_\_\_\_\_  
**HON. LEWIS J. LUBELL, J.S.C.**

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