**SHORT FORM ORDER** **INDEX NO. 08525/2010**

**SUPREME COURT - STATE OF NEW YORK**
**DCM-J - SUFFOLK COUNTY**

**PRESENT:**
**Hon. Paul J. Baisley, Jr.**

VANESSA ZULUAGA, an infant under the age of fourteen years, by her Father and Natural Guardian, HOOBER ZULUAGA, and HOOBER ZULUAGA, individually.

Plaintiff(s),

-against-

TOWN OF ISLIP and TOWN OF ISLIP PARKS, RECREATION AND CULTURAL AFFAIRS.

Defendant(s).

**ORIG. RETURN DATE:** March 25, 2010
**FINAL RETURN DATE:** April 8, 2010
**MTN. SEQ. #:** 001-CASEDISP

**PLTF'S ATTORNEY:**
WOOSTER & WOOSTER, ESQS.
666 OLD COUNTRY ROAD
GARDEN CITY, NY 11530

**DEFT'S ATTORNEY:**
JAKUBOWSKI ROBERTSON MAFFEI
GOLDSMITH & TARTAGLIA, LLP.
969 JERICHO TPKE.
ST. JAMES, NY 11780

Upon the following papers numbered 1 to 12 read on this motion for leave to file and serve a late notice of claim: Notice of Motion and supporting papers 1 - 5; Affirmation in Opposition 6 - 8; Reply Affirmation 9 - 12; it is,

***ORDERED*** that this motion (001) for leave to file and serve a late notice of claim shall be treated as a special proceeding in accordance with CPLR 103(c), and as such, leave to file a late notice of claim pursuant to General Municipal Law §50-e(5) is granted and this special proceeding shall be marked "Disposed"; and it is further

***ORDERED*** that the claimant's notice of claim as attached to this deemed petition shall be deemed served nunc pro tunc upon the respondents, the Town of Islip and Town of Islip Parks, Recreation and Cultural Affairs, in accordance with the leave granted herein; and it is further

***ORDERED*** that any future action in this matter shall require an new index number, a new Request for Judicial Intervention and the payment of any applicable fees; and it is further

***ORDERED*** that the claimant's counsel shall serve a copy of this decision and order upon counsel for the deemed respondents pursuant to CPLR 2103 within 45 days of the date of entry hereof and thereafter file the proof of service with the Clerk of the Court.

Initially, the court notes that this application was brought by way of a notice of motion rather than by a special proceeding. However, in light of the opposing parties (hereinafter collectively referred to as the Town) posing no objection to this procedural defect and having been served and responded, this application will be treated as a special proceeding (*see* CPLR 103[c]; *Lewin v County of Suffolk*, 239 AD2d 345, 657 NYS2d 734 [2d Dept 1997]).

The underlying claim is for injuries suffered by the infant petitioner on July 16, 2009 while attending a summer camp session at the Brentwood Recreation Center. The infant petitioner, then 11 years old, was crawling through an opening in the bottom of the door to the ladies' locker room and suffered a "severe laceration" from a rusty nail on the door.

That very day, an Accident/Incident Report was filled out by one of the camp employees. The report, however, did not state that the infant petitioner received a laceration from a rusty nail and gave no indication of any potential negligence. The report merely stated that the infant petitioner "bumped" into the door and injured her left leg. It also stated that the injury was "about ½ inch wide, and already black and blue." This description, while consistent with a laceration, is also consistent with just a bruise. In any event, there is no mention of a "rusty nail" as the cause of the injury; just bumping into the door.

The statutory period to file a notice of claim against the Town lapsed on October 14, 2009 with no notice of claim being filed (*see* GML §50-e[1][a]). On March 2, 2010 - about seven and a half months after the incident; four and a half months from the time to file a notice of claim - this petition seeking leave to file a late notice of claim pursuant to GML §50-e was served upon the Town.

In considering such an application, GML §50-e(5) provides, inter alia, that:

> "[T]he court shall consider, in particular, whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within the time specified [90 days] or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, . . . whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations . . . ; whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits."

In addition, the court may consider whether there is a reasonable excuse for the delay (*see Nicaj v Town of Carmel,* 61 AD3d 654, 877 NYS2d 145 [2d Dept 2009]) although the lack of such an excuse is not fatal to such an application where the municipality had actual knowledge of the essential facts underlying the claim within 90 days of the incident and there is no compelling showing of prejudice due to the delay (*see LaMay v County of Oswego,* 49 AD3d 1351, 855 NYS2d 773 [4th Dept 2008], *lv denied* 10 NY3d 715, 862 NYS2d 335 [2008]). In this matter, the infant claimant's father states in a supporting affidavit that he was not aware of the 90-day filing requirement and that the Town never informed him of

such a requirement. The lack of awareness of the filing requirement is not an acceptable excuse (*see Matter of Catuosco v City of New York,* 62 AD3d 995, 880 NYS2d 142 [2d Dept 2009]). Nor is there is any obligation on the part of the municipality to bring the 90-day filing requirement to the attention of the claimant.

In support of this petition, the infant petitoner's father contends in his supporting affidavit that the Town had actual knowledge of the essential facts underlying the claim within 90 days of the incident from two sources, namely; the Accident/Incident Report and his communication with named Town employees beginning two weeks after the incident and continuing until six and a half months after the incident (as evidence by a letter to the father from an Assistant Town Attorney, dated February 1, 2010).

The father submits and refers to the February 1, 2010 letter as well as one other letter, also to him from the Assistant Town Attorney, dated November 30, 2009.

The November 30, 2009 letter (four and a half months after the incident) thanked the claimant's father for his "cooperation in connection with [his] claim" and indicated that the Town had looked into the matter and considered not only the information provided by the father but "also . . . reports of any other agencies or witnesses with the facts." The letter also noted that the Town had "not received prior written notice of any deficiencies in the Ladies locker room." The letter then ended with the statement that the Town is only obligated to pay "losses for which we are adjudged legally responsible" and the Town "deeply regret[s] that we must inform you that we do not feel we are liable and we must therefore, decline your claim."

Certain things are clear from this letter: The Town was aware of the facts underlying the claim before the date of the letter (November 30, 2009); that the Town investigated the matter; that the Town had no "prior written notices" and, thus, concludes that it was not liable for the incident. It is interesting to note that although a municipality may be liable in some instances even where it has no prior written notice, such as where it created the defect or hazard, the Town conveniently does not address that in its letter and, instead, implies that it had no liability simply based upon the lack of a prior written notice.

In the subsequent letter (dated February 1, 2010), the same Assistant Town Attorney wrote to the infant petitioner's father, again thanked him for his cooperation regarding the claim, and offered the following:

> "[W]e are suggesting that a compromise be reached in this case by the acceptance of our voluntary offer of settlement in the sum of $731.03 . . . ."

This letter clearly evidences settlement discussions between the Town and the father leading up to the February 1, 2010 letter. Moreover, the odd dollar amount is consistent with an amount for certain medical expenses rather than for a more global settlement. This qualifies as "settlement representations" under GML §50-e(5) (*see Matter of Zimmet v Huntington Union Free School Dist.,* 187 AD2d 436, 589

NYS2d 546 [2d Dept 1992]); *Matter of Tricou v Town of Duanesburg,* 23 AD2d 949, 260 NYS2d 162 [3d Dept 1965]).

The father also states in his affidavit that he first contacted specifically named individuals in the Town two weeks after the incident and had numerous communications with them with regard to the underlying claim.

In opposition to this application, the Town does not refute the father's contention of his initial contact with the Town only two weeks after the incident and his subsequent contacts with the named Town employees. Nor does the Town refute the father's contention that he was led to believe that he was only entitled to reimbursements for medical expenses.

The Town, however, claims that it had no actual knowledge of the essential facts within 90 days of the incident; that the infant claimant and her father have no reasonable excuse for failing to serve a timely notice of claim; and, that the Town is prejudiced by the delay since the door has been repaired since the time of the incident.

The Town's arguments are not only largely without merit but are disturbingly disingenuous.

For example, the Town refers to its own letter of November 30, 2009 as the first "documented" contact with the infant claimant's father and, thus, as proof that the Town did not receive timely notice of the essential facts underlying the claim. This contention flies in the face of logic when the letter itself acknowledged prior cooperation of the father and a prior investigation based upon information previously supplied by the father as well as from other sources. This letter, thus, was obviously written after prior contacts as well as a prior investigation into the claim. To contend that the November 30, 2009 letter is an indication of the first awareness of any facts regarding the claim is completely lacking in credibility.

The November 30, 2009 letter itself is also misleading when it suggests that the lack of a prior written notice is dispositive of the issue of liability when the Assistant Town Attorney would be expected to know that there can be other bases for liability (such as creating the hazard). To only provide an incomplete and self-serving legal explanation to a lay person in this manner is not only misleading but, at the very least, calls into question basic notions of fairness.

One last example of being disingenuous is the Town's argument that since the Town repaired the hole in the door, "the object that is supposed to have caused the injury is no longer present" and, therefore, the Town is prejudiced by the delay. While it is laudable that the Town cured the alleged problem, the Town was obviously in a position to have observed the alleged defect before making the repair and cannot now claim to be prejudiced when it was the agency which removed the evidence of the alleged negligence. In any event, having been informed of the essential facts underlying this claim as early as two weeks after the incident, the Town not only had ample opportunity to investigate the claim but, as evidenced by its subsequent letters, did, indeed, investigate the incident.

In conclusion, the court finds that the Town had actual notice of the essential facts underlying the claim within 90 days of the incident from sources other than the Accident/Incident Report (which itself was insufficient as a source of essential facts underlying the claim); that the Town was not denied the opportunity to conduct a timely investigation (*see Rose v Rocherster Hous. Auth.,* 52 AD3d 1268, 859 NYS2d 806 [4th Dept 2008]); that the claimant justifiably relied upon the Town's settlement representations in not seeking other remedies within 90 days; that the Town was not substantially prejudiced by this delay; although the excuse of lack of knowledge of the filing requirements is not a valid excuse, the reliance upon the settlement negotiations is (*see Crandall v Bd. of Educ., City of Mt. Vernon,* 96 NYS2d 519 [Supreme Court, Westchester County 1950]) and, in any event, as noted earlier, the lack of an excuse is not fatal to such an application (*see LaMay v County of Oswego,* 49 AD3d 1351, 855 NYS2d 773 [4th Dept 2008], *lv denied* 10 NY3d 715, 862 NYS2d 335 [2008]).

Accordingly, leave is granted to the petitioner to file a late notice of claim as provided herein.

This constitutes the decision and order of the court.

**Dated:** 4/21/10

**HON. PAUL J. BAISLEY, JR.**

**HON. PAUL J. BAISLEY, JR., J.S.C.**