

Matter of Garcia v Board of Educ. of the City of N.Y.
2010 NY Slip Op 31337(U)
May 11, 2010
Sup Ct, NY County
Docket Number: 104673/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
Kern J.S.C.
Justice

PART 52

DYLAN GARCIA
- v -

NYC BOARD OF EDUCATION

INDEX NO. 104673/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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 is decided in accordance with the attached decision.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/11/10

CK
CYNTHIA S. KERN J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----x
In the Matter of the Application of

DYLAN GARCIA, an infant under the age of
14 years, by his mother and natural guardian,
GAYLE GARCIA, and GAYLE GARCIA,
Individually,

Plaintiffs,

Index No. 104673/10

-against-

DECISION/ORDER

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

Defendants.

-----x
HON. CYNTHIA S. KERN, J.S.C.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the recitation of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Plaintiffs seek leave to file a late Notice of Claim for their action to recover for injuries that the infant plaintiff allegedly sustained in an assault in the cafeteria at the TAG School for Young Scholars (M012) on May 28, 2009. For the reasons set forth below, plaintiffs' motion is granted.

The relevant facts are as follows. On May 28, 2009, there was an altercation in the cafeteria at the TAG School for Young Scholars, which the infant plaintiff attended. The infant plaintiff was allegedly assaulted and injured by another student. His mother immediately filed a NYC Department of Education Comprehensive Injury Report and, one month later, a Police Department Incident Information Slip. She also engaged in weekly conversations with the school principal and assistant principal where she repeatedly requested information about the procedures necessary to sue the school, the Board of Education or the New York City Department of Education (collectively, defendants or “City”) for her son’s injuries. Plaintiffs now seek leave to file a late Notice of Claim pursuant to General Municipal Law §50-e.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to G.M.L. §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the municipality acquired “actual knowledge of the essential facts constituting the claim” within ninety days after the claim arose or within a reasonable time thereafter and whether the delay prejudiced the municipality’s defense. *See* Gen. Mun. Law §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993). It is plaintiff’s burden to prove each of these elements, including lack of prejudice to the defendant. *See Delgado v City of New York*, 39 A.D.3d 387 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See*

Justiniano v New York City Housing Authority Police, 191 A.D.2d 252 (1st Dept 1993).

Considering all the above factors together, plaintiffs' motion to serve a late notice of claim is granted. The City correctly argues that ignorance of the statutory filing requirement is not a reasonable excuse for failing to serve a timely Notice of Claim. *See Turkenitz v. City of New York*, 213 A.D.2d 266 (1st Dept 1995); *see also Gaudio v. City of New York*, 235 A.D.2d 228 (1st Dept 1997). However, the lack of a reasonable excuse is not by itself fatal to an application for leave to file a late Notice of Claim. *See Ansong v. City of New York*, 308 A.D.2d 333 (1st Dept 2003); *see also Porcaro v. City of New York*, 20 A.D.3d 357 (1st Dept 2005).

The City had actual knowledge of the facts forming the basis of the claim. In addition to reporting the incident to school authorities and the NYC Department of Education, plaintiff Gayle Garcia repeatedly informed the school principal and assistant principal that she planned to file a claim within the first ninety days following the incident. While the City argues that reports generated by the police or other City agency do not provide sufficient actual knowledge for the purpose of the notice of claim requirement, the plaintiff in this case did not merely file reports. She engaged in multiple discussions with school authorities where she stated her intent to file a claim, thereby providing actual, direct notice to employees of the City agency that she was planning to sue. These discussions provided the City with knowledge that a legal claim had arisen and not merely an incident in the school lunch room. *See Liberty Group Holdings, Inc. v. City of New York*, 5 A.D.3d 148 (1st Dept 2004). Furthermore, the City has not been prejudiced by the delay in filing the Notice of Claim. Because the City had actual knowledge of the claim, it had the opportunity to conduct an investigation of the incident in a timely manner.

Accordingly, claimant's motion to serve a late notice of claim is granted. This constitutes

