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SHORT FORM ORDER **INDEX NO. 13877/2010**

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

PRESENT:
Hon. Paul J. Baisley, Jr.

ROBIN BAUVER and STEVEN BAUVER,
as parents and natural guardians of DYLAN BAUVER,
an infant.

Plaintiffs,

-against-

COMMACK UNION FREE SCHOOL DISTRICT, JAMES A. FELTMAN as Superintendent and individually, SEBASTIAN DIRUBBA as Coach and individually, COMMACK SCHOOL DISTRICT BOARD OF EDUCATION, MARY JO MASCIELLO, as School Board President and individually, JOSEPH PENNACCHIO as School Board Vice President and individually, DEBORAH GUBER, as School Board Trustee and individually, ALLEN LEON as School Board Trustee and individually, and THOMAS L. TORNEE as School Board Trustee and individually.

Defendants.

ORIG. RETURN DATE: June 1, 2010
FINAL RETURN DATE: August 3, 2010
MTN. SEQ. #: 001-MD
CROSS MTN. SEQ. #. 002-MotD

PLTF'S ATTORNEY:
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DEFT'S ATTORNEY:
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Upon the following papers numbered 1 to 35 on this motion to dismiss and this cross motion for leave to file and serve a late notice of claim, etc.: Notice of Motion and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 28; Affirmation in Opposition/Support 29 - 31; Reply Affirmation 32 - 35; it is,

ORDERED that the motion (001) by the defendants[1] to dismiss pursuant to CPLR 3211(a)(7) for failure to comply with the provisions of Education Law §3813, GML § 50-e and GML §50-i is denied; and it is further

[1] The moving defendants are: Commack Union Free School District, James A. Feltman, as Superintendent and individually, Commack School District Board of Education, Mary Jo Masciello as School Board President and individually, Joseph Pennacchio as School Board Vice President and individually, Deborah Guber as School Board Trustee and individually, Allen Leon as School Board Trustee and individually and Thomas L. Tornee as School Board Trustee and individually. Hereinafter, these moving defendants shall be referred to collectively as the "District." The only named defendant not included among these moving defendants is Sebastian DiRubba as Coach and individually.

ORDERED that the cross motion (002) by the plaintiffs is decided as follows:

(1) The request for an order directing the removal of counsel for the District is denied;

(2) the request for leave to file a late Notice of Claim pursuant to Education Law §3813(2-a) is granted and the plaintiffs may serve a duly sworn and executed copy of the Notice of Claim as attached to their cross motion (Exhibit "H") upon the District within 20 days of service upon the plaintiffs by the District of a copy of this decision and order with notice of entry and such service shall be deemed timely service, nunc pro tunc, in accordance with Education Law §3813(1); and

(3) leave is granted to the plaintiffs to amend for the second time the already amended verified complaint to reflect compliance with this decision and order and with GML §50-i(1); service of said second amended complaint shall be made upon all District defendants in accordance with CPLR 2103 and upon the defendant Sebastian DiRubba by regular mail;

and it is further

ORDERED that parties appearing in this action are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on September 28, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.; said date allowing time for the service of the second amended complaint and responsive pleadings thereto.

This is an action arising out of an incident in which the infant plaintiff was allegedly struck in the face by his soccer coach, the defendant Sebastian DiRubba (hereinafter DiRubba).

The underlying incident occurred on September 10, 2009 and the action was commenced on April 13, 2010. About a week later, an amended summons and amended complaint were served. The amended complaint contained, inter alia, an allegation missing from the original complaint, to wit: "Plaintiffs sent notice of this claim via certified mail to Defendants on or about November 6, 2009" (paragraph 16; emphasis provided).

The District brings this motion to dismiss on the grounds that the plaintiffs never filed a formal Notice of Claim which is required by law before such an action may be commenced against them (*see* Education Law §3813[2]) and that the first amended complaint which was served omits allegations required by Education Law §3813(1), namely; that a "written verified claim" (as opposed to a "notice of this claim") was timely filed ("within three months"); and, that the District "neglected or refused to make an adjustment or payment" of said claim within 30 days.

The "written verified claim" is also known as a Notice of Claim and shall be referred to as such hereinafter. There is actually no dispute that a Notice of Claim as provided by law was not filed with the District at any time. Indeed, the amended complaint does not claim otherwise. Rather, the amended complaint states that a "notice of this claim" - as opposed to a "Notice of Claim" - was sent to the District on November 16, 2009 (well within three months of the incident which occurred on September 10, 2009).

There is also no dispute that the allegations required to be contained in a complaint with regard to the Notice of Claim are not contained within the amended complaint (*see* Education Law §3813[1]). On this basis alone, there is merit to the District's argument that the action should be dismissed as to it.

The plaintiffs, however, cross-move for leave to serve a late Notice of Claim (as well as for leave to serve a second amended complaint containing language in accordance with Education Law §3813[1] and for removal of the District's attorney due to a conflict of interest).

The Court will first consider the plaintiffs' application for leave to serve a late Notice of Claim.

Education Law §3813(2-a) provides that the court may grant an extension of time to file a late Notice of Claim upon consideration of various factors including: did the District acquire actual knowledge of the essential facts constituting the claim within the three month period to file the notice; was there a reasonable excuse for the delay in filing; and, was the District substantially prejudiced by the delay in terms of its maintaining a defense on the merits (*see Munro v Ossining Union Free School Dist.*, 55 AD3d 697, 866 NYS2d 687 [2d Dept 2008]; *Padovano v Massapequa Union Free School Dist.*, 31 AD3d 563, 818 NYS2d 274 [2d Dept 2006]). These factors are also included in the analogous section in the General Municipal Law (section 50-e[5]) and, indeed, Education Law §3813(2) makes specific reference to the General Municipal Law with regard to making and serving a claim (refers to GML §50-e) and the commencement of an action (refers to GML §50-i; one year and 90 days)

On this motion (001), the District focuses on the claimed notice by letter dated November 16, 2009. The District argues that not only is the subject letter not a Notice of Claim but that it lacks the content required in a Notice of Claim such as being sworn by or on behalf of the claimant and indicating the specifics of the claim and damages as opposed to the mere statement that a wrong occurred (*see* GML §50-e[2]; *cf Matter of Peterson v New York City Dept. of Envtl. Protection,* 66 AD3d 1027, 1030, 887 NYS2d 269 [2d Dept 2009]).

The plaintiffs, however, in support of this part of their cross motion, show that the letter of November 16, 2009 - as well as a letter two days later - does not represent the first contact with the Superintendent and the District. Indeed, through prior phone calls, emails and other correspondence (as evidenced by an affidavit from the infant plaintiff's father, copies of emails between the infant plaintiff's parents and the District's Superintendent, a letter from the District's attorney dated November 17, 2009 acknowledging that there will be an investigation of "your allegations," and receipts of regular and certified mailings). Based upon these submissions, it is clear that the District had ample actual notice of the incident, the essential facts and the underlying claims within three months of the incident. Indeed, the

Superintendent even wrote and emailed the parents with regard to the District investigating the matter and, because of the potential for legal action, having the District's attorney involved with regard to this specific matter.

Significantly, not only did the District undertake an investigation, but it admittedly had its attorney interview the parents and the infant plaintiff for the purposes of acquiring information and for possible testimony at an administrative hearing. Moreover, an administrative hearing was held resulting in the reassignment of DiRubba, followed by DiRubba's resignation.

Notwithstanding the lack of an actual Notice of Claim, it is hard to imagine a better example of a school district acquiring actual knowledge of the essential facts constituting the claim within three months of a given incident.

The District also contends that the plaintiffs provide no excuse for failing to timely serve an actual Notice of Claim but the Court notes that with regard to the analogous provisions in the General Municipal Law, the "absence or presence of any one factor under section 50-e [General Municipal Law] is not necessarily determinative [citation omitted]" (*Nayyar v Bd. of Educ. of the City of New York,* 169 AD2d 628, 629, 564 NYS2d 762, 763 [1st Dept 1991]); and, the absence of a reasonable excuse for the delay, standing alone, is not fatal to an application for leave to file a late Notice of Claim (*see LaMay v County of Oswego,* 49 AD3d 1351, 855 NYS2d 773 [4th Dept 2008], *lv denied* 10 NY3d 715, 862 NYS2d 335 [2008]*; Bertone Commissioning v City of New York,* 27 AD3d 222, 810 NYS2d 138 [1st Dept 2006]).

As for there being substantial prejudice to the District as the result of this delay, there is obviously none. The District was fully involved in looking into this incident including the involvement of the District's Superintendent, the Board of Education and the attorney for the District.

Under these circumstances, the court finds that the District received actual knowledge of the essential facts constituting this claim within three months of the incident and there is no substantial prejudice due to the delay (*see* Education Law §3813[2-a]). Accordingly, leave is granted to the plaintiffs to serve a late Notice of Claim as provided herein.

In view of this granting of leave to file a late Notice of Claim, leave is further granted to the plaintiffs to serve a second amended verified complaint, as provided herein, to reflect the serving of the late Notice of Claim and to contain the other allegations, if appropriate, required in accordance with Education Law §3813(1).

Based upon the granting of the plaintiffs' cross motion with regard to allowing service of a late Notice of Claim and the service of a second amended verified complaint, the District's motion for dismissal based upon the failure to file a timely Notice of Claim is denied as moot.

Turning now to the plaintiffs' remaining request to order the removal of counsel for the District, the Court finds this application to be without merit.

The plaintiffs claim that meeting with the District's attorney before they were represented by counsel and during the period the District was looking into the underlying incident somehow rose to the level of there being an attorney-client relationship between the parents and the District's attorney. The plaintiffs argue that the District's attorney was provided with privileged and confidential information which now creates a conflict of interest. The plaintiffs also claim that the District's attorney "may very well" be a witness but they fail to support this claim with any indication as to what exactly the attorney would testify to.

The Court is convinced by the submissions on this motion and cross motion, including an affidavit from the District's attorney, that said attorney was clearly counsel for the District at all times relevant to this matter and never held himself or his firm out as attorneys for the plaintiffs. At most, the relationship with the plaintiffs was one in which an attorney for another party (here, the District) prepares potential witnesses (here, the plaintiffs) for a hearing or trial.

To equate this involvement of the District's attorney with an actual attorney-client relationship between the plaintiff and said attorney strains logic. Moreover, the claim that privileged or confidential information was given to the District's attorney does not matter. When a person gives such information to an attorney representing another party, any such privilege is waived. In any event, the plaintiffs fail to inform the Court as to what exactly the purported confidential or privileged information was.

Accordingly, that part of the cross motion seeking removal of the District's attorney is denied.

This constitutes the decision and order of the court.

Dated: August 6, 2010

HON. PAUL J. BAISLEY, JR.

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