

Lam v City of New York

2010 NY Slip Op 32422(U)

August 20, 2010

Sup Ct, NY County

Docket Number: 107995/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 52

Index Number : 107995/2010

INDEX NO. 107995/10

LAM, FATOU

MOTION DATE _____

vs

CITY OF NEW YORK

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

LEAVE SERVE LATE NOT. OF CLAIM

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

FILED

SEP. 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/20/10

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
FATOU LAM, an infant by her mother and natural guardian,
NAFISSATOU DIOP, and NAFISSATOU DIOP, Individually,

Petitioners,

Index No. 107995/10

-against-

DECISION/ORDER

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

FILED

Respondent(s).

SEP 07 2010

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

NEW YORK
COUNTY CLERKS OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review 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>

Petitioners seek leave to file a late Notice of Claim on respondents City of New York (the "City") and The Board/Department of Education of the City of New York (the "DOE") for their action to recover for injuries that the infant petitioner allegedly sustained when she tripped and fell in the schoolyard at PS 123 on September 29, 2009. For the reasons set forth below, petitioners' motion is granted.

The relevant facts are as follows. On September 29, 2009, the infant petitioner Fatou Lam allegedly tripped and fell in a hole on her way into the schoolyard after exiting the building

during her lunch period. School aide Ms. Green took the infant petitioner to the school nurse, Ms. Bell, who contacted petitioner Nafissatou Diop, the infant petitioner's mother. Petitioner Nafissatou Diop spoke with Ms. Bell as well as the school principal, Beverly Louis, approximately one week after the incident. The infant petitioner Fatou Lam showed school aide Ms. Green the specific hole where she tripped and fell after returning to school. On March 3, 2010, petitioners retained counsel to represent them in the instant matter. Petitioners 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 petitioners had a reasonable excuse for their 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, petitioners' motion to serve a late notice of

claim is granted. Petitioners have not provided any excuse for their failure to serve a timely Notice of Claim. 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).

Respondents acquired actual knowledge of the facts forming the basis of the claim within the statutory period or shortly thereafter. After her accident, the infant petitioner received assistance from two school employees, Ms. Green and Ms. Bell. Approximately one week later, petitioner Nafissatou Diop spoke with school principal Beverly Louis as well as Ms. Bell regarding the incident. After returning to school, the infant petitioner showed Ms. Green the hole that caused her to fall. While respondents argue that knowledge of the accident and injury is not knowledge of the claim and that the communications between the school and the petitioner do not provide sufficient actual knowledge for the purpose of the notice of claim requirement, petitioner Fatou Lam's pointing out of the hole specifically alerted the DOE to the fact forming the basis of her claim: the existence of a defective condition on school property that caused her to be injured. Moreover, petitioners brought their petition approximately 6 months after the expiration of the statutory period, which is a reasonable time thereafter. *See GML §50-(e)(5)*; *see also March v. Wappinger*, 29 A.D.3d 998 (2nd Dept 2006) (delay of 11 months was held to be a reasonable time after expiration of 90 day period).

Furthermore, respondents have not been prejudiced by the delay in filing the Notice of Claim. Because the DOE had actual knowledge of the claim, it had the opportunity to conduct an investigation of the incident in a timely manner. Moreover, the fact that petitioner moved for leave to file a late Notice of Claim only 6 months late and that the alleged defect was not

transitory makes it unlikely that respondents were prejudiced by the delay. *See Silva v City of New York*, 246 A.D.465 (1st Dept 1998).

Accordingly, petitioners' motion to serve a late notice of claim is granted. This constitutes the decision and order of the court.

Dated: 8/20/10

Enter: CK
 J.S.C.
CYNTHIA S. KERN
 J.S.C.

FILED
SEP. 07 2010
NEW YORK
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