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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Justice

KENNEDY, VINCENT

-v-

CITY OF NEW YORK et al

INDEX NO. 111257/10

MOTION DATE 1/18/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 15

The following papers, numbered 1 to 3 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ... Pet	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/14/11

FEB 14 2011

BARBARA JAFFE J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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KENNEDY, VINCENT, as Parent and Natural Guardian of SAVION KENNEDY and VINCENT KENNEDY, Individually,

Petitioners,

-against-

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

Respondents.

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Index No. 111257/10

Motion Date: 1/18/11
Motion Seq. No.: 001
Calendar No.: 15

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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By notice of petition dated August 20, 2010, petitioners move pursuant to General Municipal Law § 50-e(5) for an order granting leave to serve a late notice of claim. On January 18, 2011, petitioners withdrew the action as against City. Respondents New York City Board of Education and New York City Department of Education (collectively, DOE) oppose.

I. FACTS AND PERTINENT PROCEDURAL BACKGROUND

Petitioners allege that on November 23, 2009, infant petitioner, then a five-year old student at Manhattan School for Children, P.S. 333, was injured at the playground during recess, having collided with another student on the monkey bars and fallen on the hard ground underneath. (Affidavit of Vincent Kennedy, dated Aug. 16, 2010). They also allege that

approximately 90 to 150 students were playing at the time, supervised by three volunteers. (*Id.*). Immediately after the accident, infant petitioner was taken to the school nurse, who contacted his family. (*Id.*). He was taken to the emergency room, subsequently underwent surgery on his fractured left elbow, and was absent from school for approximately three months. (*Id.*).

Fearing "some type of retaliation," infant petitioner's father did not contact an attorney about his son's accident until March 2010, after being informed that a second surgery was necessary. Counsel informed him that the 90-day period for filing a notice of claim had expired and that before seeking leave to file late notice, supporting documentation was required. (Affirmation of Andrew L. Spitz, Esq., dated Aug. 20, 2010). On March 11, 2010, petitioners filed a Freedom of Information Law (FOIL) seeking: 1) the school's accident report; 2) the school nurse's evaluation and assessment notes; 3) the rules and regulations governing playground behavior; 4) the maintenance schedule and "inspection of playground equipment and ground maintenance including ground material under equipment"; and 5) the guidelines for playground supervision "based upon student to staff ratio requirements," and alleging that infant petitioner was "seriously injured as a result of a fall" at the school's location. (*Id.*, Exh. A).

By letter dated June 17, 2010, DOE provided petitioners with the school's Faculty Handbook and the occurrence report and accident form which both reflect that infant petitioner and another boy had bumped into each other, causing infant petitioner to fall to the ground and hurt his elbow, requiring that he be taken to the emergency room for x-rays. (*Id.*).

On July 1, 2010, infant petitioner, his father, and an investigator went to the playground, which was locked. (Kennedy Affid.). They were nonetheless able to see that the ground area where infant petitioner had fallen was covered with new black padding. (*Id.*).

On August 20, 2010, the instant petition was served on respondents. (Spitz Aff., Exh. C). The proposed notice of claim alleges the failure to provide covering under the monkey bars, safety devices, and insufficient personnel to supervise the activities. (*Id.*).

II. CONTENTIONS

Petitioners argue that they are entitled to leave to file a late notice of claim because DOE received actual notice of the accident and the theory of liability in the FOIL request, accident report, and occurrence report. Moreover, they assert that DOE was aware of the absence of any padding beneath the monkey bars, that DOE is not prejudiced, and that a fear of retaliation constitutes a reasonable excuse. (Spitz Aff.).

In opposition, DOE argues that leave should be denied because fear of retaliation is not a reasonable excuse, it denies actual knowledge of the essential facts constituting claim, and asserts that it will be prejudiced by the delay. (Affirmation of Zacharie J. Harden, Esq., dated Sept. 28, 2010).

III. ANALYSIS

Pursuant to General Municipal Law (GML) § 50-e(l)(a) and 50-i, a tort action against a municipality must be commenced by service of a notice of claim upon the municipality within 90 days of the date on which the claim arose. The notice of claim must include: 1) the name and address of each claimant; 2) the nature of the claim; 3) the time, place, and manner of the claim; and 4) the nature of injuries. (GML § 50-e[b][2]).

The court may extend the time to file the notice, and in deciding whether to grant the extension, it must consider, *inter alia,* whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter,

whether the delay in serving the notice of claim substantially prejudiced the municipality in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Grunt v Nassau County Indus. Dev. Agency* , 60 AD3d 946, 947 [2d Dept 2009]). The court may also consider the petitioner's infancy, even in the absence of any nexus between the infancy and the lateness. (GML § 50-e[5]; *Lisandro v New York City Health and Hosp. Corp.*, 50 AD3d 304 [1st Dept 2008], *lv denied* 10 NY3d 715; *Harris v City of New York*, 297 AD2d 473 [1st Dept 2002], *lv denied* 99 NY2d 503). No single factor is determinative, each going "into the mix," and the statute providing for leave to leave to amend is to be "liberally construed." (*Pearson v New York City Health and Hosp. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]).

Infant plaintiff's infancy constitutes a factor in favor of granting the petition. (*Pearson*, 43 AD3d at 93; *Moody v New York City Health and Hosp. Corp.*, 2004 NY Slip Op 30224[U], *affd* 29 AD3d 395 [1st Dept 2006]). Petitioners' unexplained fear of retaliation, however, does not constitute a reasonable excuse for the delay. (*Allende v City of New York*, 69 AD3d 931, 933 [2d Dept 2010] *Formisano v Eastchester Union Free School Dist.*, 59 AD3d 543, 544 [2d Dept 2009]). Moreover, petitioners allege that, even after deciding to bring an action and meeting with an attorney, they delayed an additional five months in order to obtain evidence in support of the claim, a delay which does not justify granting leave to file a late notice. (*McCord v City of New York*, 19 Misc 3d 544, 546-547 [Sup Ct, Kings County 2008] [delay due to FOIL request not reasonable excuse for late notice; records not necessary for notice of claim]). Nevertheless, the absence of a reasonable excuse is not fatal where actual notice and an absence of prejudice is established. (*Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596 [1st Dept 2010];

Allende, 69 AD3d at 933).

Here, the school nurse treated infant petitioner immediately after the accident and prepared a report, which, like the occurrence report, reflects that infant petitioner was taken to the emergency room for his injury. These reports evidence DOE's actual notice of some of the essential facts constituting petitioners' claim. (*Allende*, 69 AD3d 931). The FOIL request conveyed additional actual knowledge of the essential facts as it reflects petitioners' potential claims concerning the maintenance of the school equipment and ground material, the lack of adequate supervision, and infant petitioner's serious injuries. Consequently, DOE acquired significant knowledge of the facts supporting petitioners' claim, and has not alleged prejudice beyond a conclusory assertion.

IV. CONCLUSION

In light of infant petitioner's infancy, DOE's actual knowledge of petitioners' potential claims, and the absence of prejudice, it is hereby

ORDERED, that the petition for leave to serve a late notice of claim is granted and the annexed notice of claim is deemed timely served, *nunc pro tunc,* upon service of notice of entry of this order, and it is hereby

ORDERED, that petitioners shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

DATED: February 14, 2011
New York, New York