

Locke v First Student Inc.

2011 NY Slip Op 31336(U)

May 5, 2011

Supreme Court, Nassau County

Docket Number: 22791/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

KEISHA LOCKE, as mother and natural guardian of
SHAKIM JONES, an infant and KEISHA LOCKE,
individually,

Plaintiffs,

- against -

FIRST STUDENT INC. and NASSAU BOCES
EDUCATIONAL FOUNDATION, INC.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 22791/10
Motion Seq. Nos.: 01, 02
Motion Dates: 02/28/11
02/28/11

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion, Affirmation and Exhibit</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion and in Further Support of Motion</u>	<u>3</u>
<u>Plaintiff's Reply Affirmation and Exhibits</u>	<u>4</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Nassau BOCES Educational Foundation Inc. ("BOCES") moves (Seq. No. 01), pursuant to CPLR § 3211(a)(5), Education Law § 3813 and General Municipal Law §50-e, for an order dismissing plaintiffs' complaint and all cross-claims asserted against it for plaintiffs' failure to file a timely Notice of Claim. Plaintiffs oppose the motion and cross-move (Seq. No. 02), pursuant to General Municipal Law §50-e(5), for an order granting them leave to file a Notice of Claim against defendant BOCES. Defendant BOCES opposes plaintiffs' cross-motion. Defendant First Student Inc. failed to submit any papers in response to either motion.

The instant action arises from an incident that occurred on October 12, 2010. It is alleged that the infant plaintiff was assaulted by four other students while on a defendant First Student, Inc. bus, which was contracted by defendant BOCES for student transportation.

Defendant BOCES submits that plaintiffs failed to serve a Notice of Claim in the matter upon defendant BOCES at any time. A Summons and Verified Complaint were served on defendant BOCES on or about January 3, 2011. Defendant BOCES argues that Education Law § 3813 and General Municipal Law § 50-I provide that no action for personal injury alleged to have been sustained as the result of negligence of a school district shall be maintained against such school district unless a Notice of Claim has been served upon the district. General Municipal Law § 50-e requires that the Notice of Claim be served withing ninety (90) days after the claim arises. A timely Notice of Claim is a condition precedent to the commencement of a tort action against a school district.

Plaintiffs, in opposition to defendant BOCES' motion and in support of their cross-motion, claim that they are able to demonstrate a reasonable basis for having failed to file the Notice of Claim in the instant matter within ninety days of the incident. Plaintiffs further contend that there is no prejudice to defendant BOCES by permitting the late filing of the Notice of Claim. Plaintiffs state that the application to bring the late Notice of Claim is only two weeks following the expiration of the ninety day period. Plaintiffs submit that, at the time of the occurrence at issue, the bus in issue was upon the school property of defendant BOCES. Plaintiffs add that defendant BOCES had notice of prior harassment and assaults upon the infant plaintiff by fellow students upon the same bus before the occurrence at issue, that defendant BOCES failed to take action with respect to same and further were negligent in responding to the harassment and assault upon the infant plaintiff on October 12, 2010.

Plaintiffs state that "[a] search of the listing of New York Corporations revealed that

Nassau Boces Educational Foundation, Inc. was a domestic corporation listed with the Department of State as a non-profit corporation....Based upon said filing, and additional inquiries made, your affirgant believed that a Notice of Claim was not warranted herein and that Nassau Boces Educational Foundation, Inc., was the responsible party and was not a governmental agency and rather a non profit corporation.” Plaintiffs claim that defendant BOCES had actual notice of the incident at issue and that there is no indication that defendant BOCES was substantially prejudiced in investigating the claim.

In opposition to plaintiffs’ cross-motion, defendant BOCES first submits that the incident at issue did not take place on school property or during school hours. Defendant BOCES argues that plaintiffs have failed to offer a reasonable excuse for failing to file a timely Notice of Claim, stating that plaintiffs’ failure to research the Education Law and Municipal Law or look up BOCES via the internet is not a valid reasonable excuse for failing to file a Notice of Claim. Defendant BOCES asserts that plaintiffs’ ignorance is no excuse for the delay in filing a claim. Defendant BOCES explains that “BOCES are organized and exist under section 1950 of the Education Law. BOCES boards are considered municipal corporations to permit them to contract with other municipalities on a cooperative basis under section 119-n and 119-o of the General Municipal Law.” Defendant BOCES argues that plaintiffs’ failure to research and determine that BOCES was a municipal corporation and thereby subject to the General Municipal Law is no excuse for failing to timely file a Notice of Claim.

Defendant BOCES also states that it did not have actual knowledge of essential facts regarding the claim within ninety days of the incident and that satisfaction of the statutory requirement requires more than mere knowledge of the wrong, but actual notice of the claim. Defendant BOCES contends that, up until the present time and the filing of the present legal papers, it was never advised by plaintiffs or anyone else that there was any intention to assert a

legal claim against it. It states that its first awareness that there would be any legal issue arising from said incident was the filing of the Summons and Verified Complaint and, as a result, the matter was never investigated beyond a preliminary fact-finding. Defendant BOCES also argues that it never made any representation of knowledge of prior incidents and that plaintiffs failed to offer any evidence of same. Defendant BOCES states that it has been greatly prejudiced by plaintiffs' delay in that it was deprived of the opportunity to conduct a timely and meaningful investigation of this matter.

In reply, plaintiffs submit that there is no way defendant BOCES would be prejudiced in any manner whatsoever by the filing of this late Notice of Claim. Plaintiffs state that "the incident giving rise to the claim was reported extensively in Newsday and criminal prosecutions were conducted against the four students of BOCES who committed the assault. What possible prejudice could there be to the movant who learned immediately of the incident?" Further, plaintiffs submit that they did indeed consult the internet with respect to defendant BOCES and, according to the website for defendant BOCES, "it appears as though Nassau BOCES Educational Foundation, Inc. funds the school program and is an 'independent, non-profit, community-based organization' that has 'no taxing authority.'"

The determination of whether to grant an extension of time in which to serve a late Notice of Claim is left to the Court's discretion. *See Sverdlin v. City of New York*, 229 A.D.2d 544, 645 N.Y.S.2d 843 (2d Dept. 1996). While all relevant factors should be considered, key factors in determining whether leave to serve a late notice of claim should be granted are whether claimant has demonstrated reasonable excuse for failing to serve timely notice of claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days after its accrual, or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. *See id.*

Under the circumstances detailed above and the legal arguments presented by both parties, the Court finds that defendant BOCES was provided with adequate notice of the

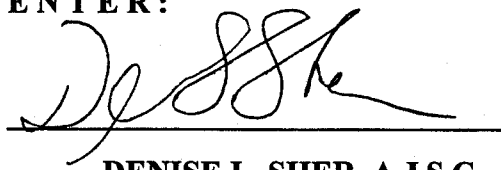
underlying facts herein constituting the claim and that defendant BOCES has failed to demonstrate prejudice. The Court also finds that plaintiffs have demonstrated a reasonable excuse for failing to timely serve the Notice of Claim.

Accordingly, the Court will exercise its discretion and grant plaintiffs' cross-motion (Seq. No. 02). Consequently, defendant BOCES' motion (Seq. No. 01) is hereby denied. Plaintiffs are directed to serve upon defendant BOCES a Notice of Claim, in the form annexed as an exhibit to their cross-motion, by May 20, 2011.

It is further ordered that the parties shall appear for a Preliminary Conference on May 24, 2011, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 5, 2011

ENTERED

MAY 09 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**