Jennifer C. v Shoreham-Wading Riv. Cent. School Dist.

2011 NY Slip Op 31989(U)

June 27, 2011

Supreme Court, Suffolk County

Docket Number: 41038-10

Judge: Denise F. Molia

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[* 1]

COPY Index No.: 41038-10

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

JENNIFER C., an infant by her Father and Natural Guardian, MICHAEL C., and MICHAEL C., Individually,

Plaintiffs,

- against -

SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT,

Defendant.

CASE DISPOSED: YES
MOTION R/D: 1/27/11
SUBMISSION DATE: 2/18/11
MOTION SEQUENCE NO.: 001 MG
002 XMD

ATTORNEY FOR PLAINTIFF
O'Donnell & Fox, PC
39 Broadway, Suite 1620
New York, New York 10006

ATTORNEYS FOR DEFENDANT
Congdon Flaherty O'Callaghan Reid
The OMNI
333 Earle Ovington Blvd., Suite 502

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated December 10, 2010; Affirmation dated December 10, 2010; Exhibits A and B annexed thereto; Affirmation in Opposition dated January 20, 2011; Exhibits A and B annexed thereto; Notice of Cross Motion dated January 20, 2011; Affirmation dated January 20, 2011; Affidavit dated January 18, 2011; Infant Affidavit dated January 14, 2011; Exhibits A and B annexed thereto; Affirmation in Opposition dated February 7, 2011; Exhibit C annexed thereto; Reply Affirmation dated February 15, 2011; Exhibits A through C annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by defendant, pursuant to CPLR 3211(a)(5), Education Law §3813, General Municipal Law §50-e, and General Municipal Law §50-i, for an Order dismissing the action as against defendant on the basis that the plaintiffs have failed to file a timely notice of claim, and that the claim of Michael C., is time-barred, is granted; and it is further

ORDERED, that the cross motion by plaintiffs, pursuant to CPLR 208, and General Municipal Law §§ 50-e(5) and 50-i, for an Order deeming the filing of the late Notice of Claim *nunc pro tunc*, or in the alternative, for leave to serve a late notice of claim, is denied.

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[* 2]

The underlying action arises from an incident that is alleged to have occurred in or about the first or second week of November 2008. It is alleged that Jennifer C., a student at the Shoreham-Wading River High School ("District"), was sexually assaulted by two unidentified students in a bathroom at the school. A notice of claim dated December 3, 2009, was served by claimants upon the defendant School District on or about December 8, 2009, more than one year after the incident. A summons and complaint was served on the School District on behalf of the infant plaintiff and her father, individually, on or about November 23, 2010. A 50(h) hearing was conducted of both the infant plaintiff and her father on May 20, 2010. The defendant now moves for a dismissal of the action based upon the failure of the plaintiffs to serve a timely Notice of Claim. The plaintiffs have cross moved for leave to serve a late Notice of Claim, *nunc pro tunc*.

The infant plaintiff has submitted an affidavit in which she describes the event which is the subject of the proposed late Notice of Claim as follows:

During the first or second week of November 2008, while attending the Shoreham-Wading River High School, the infant plaintiff was granted permission to go to the bathroom prior to her third period class. When she entered the bathroom located on the bottom floor of the B-wing, she was grabbed by two unidentified males, who put her in a headlock, put her face down on the floor, stabbed her right arm with a hypodermic needle thereby paralyzing her, and proceeded to rape and sexually assault her "for what seemed to be at least 30 minutes." The plaintiff could not yell for help and does not recall hearing anyone at or outside the door. When the attack was finished, the attackers carved the letters "G" and "T" onto her left wrist, and then left the bathroom. There were no witnesses other than the infant plaintiff and the unknown assailants.

The plaintiff said that she felt shame, embarrassment, and total helplessness about the event and as a result, did not tell anyone until the beginning of the 2009 school year, when she related the incident to her boyfriend. The plaintiff subsequently informed her parents of the event on September 23, 2009 and after seeing a psychiatrist approximately three times, began counseling with a social worker. The plaintiff states that she is still being counseled at her home, which is now in Maine.

The plaintiffs now seek permission to serve a late Notice of Claim, alleging that a Notice of Claim was served on the District within ninety days of Michael C's knowledge of the incident. The defendants have opposed the motion, maintaining that a proper basis has not been demonstrated to permit service of a late Notice of Claim, and noting that the statutory period has run on the derivative claim of Michael C.

Education Law §3813 and General Municipal Law §50-i provide that an action for personal injury alleged to have been sustained as the result of the negligence of a school district may not be maintained against the school district unless a Notice of Claim shall have been served upon such district. General Municipal Law §50-e requires a Notice of Claim to be served within 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. See. General Municipal Law §§50-e(1)(a) and 50-i(1). Service of a notice of claim beyond the ninety day statutory period without leave of the court is a nullity. Santiago v. City of New York, 294 A.D.2d 483, 742 N.Y.S.2d 566; Kokkinos v. Dormitory Auth. of the State of N.Y., 238 A.D.2d 550, 657 N.Y.S.2d

81.

General Municipal Law §50-i provides that the statute of limitations for personal injury actions against a school district is one year and ninety days. Since the date of the alleged occurrence was in November 2008, the statute of limitations would have run in February 2010. The complaint of this action was filed in November 2010, which was nine months beyond the limitations period. In support of his application, Michael C., states that the present action was commenced within one year and ninety days of his "notice and knowledge of the incident." However, there is no "delayed discovery" rule applicable in actions for personal injury based on sexual abuse. In the Matter of N.M. v. Westchester County Health Care Corp., 10 A.D.3d 421, 781 N.Y.S.2d 681. Accordingly, the statute of limitations began to run at the time of the commission of the alleged tortious act in November, 2008, and the derivative claim of Michael C., is time-barred and must be dismissed.

It is within the discretion of the court to deny an application for leave to file a late notice of claim. See, Shapey v. East Rockaway Union Free School District, 277 A.D.2d 441, 715 N.Y.S.2d 893; Koustantinides v. City of New York, 278 A.D.2d 235, 717 N.Y.S.2d 301; Ryder v. Garden City School District, 277 A.D.2d 388, 716 N.Y.S.2d 97. In deciding an application for leave to serve a late notice of claim, the court must consider a number of criteria, with the most important being the determination that the municipality "acquired actual knowledge of the essential facts constituting the claim" within ninety days or a reasonable time thereafter. Felice v. Eastport/South Manor CSD, 50 A.D.3d 138, 147. Consideration may also be given to whether the claimant has demonstrated a reasonable excuse for the delay, whether the claimant was an infant or physically or mentally incapacitated , and whether the municipal entity's opportunity to investigate and defend against the claim was substantially prejudiced by the delay. See, General Municipal Law §50-e(5); Doe v. Goshen CSD, 13 A.D.3d 526, 787 N.Y.S.2d 75 (The infant claimant alleged that he was sexually abused by a school employee. The Second Department affirmed the denial of claimant's late notice of claim application where there was no evidence that the defendant acquired actual knowledge of the claim within 90 days or shortly thereafer, where there was a ten month delay in notifying the District of the claim).

The plaintiffs allege that the failure to serve a timely Notice of Claim is related to the infancy of the plaintiff, and that the statute of limitations had been tolled during the thirteen month delay in serving Notice of Claim from the date of accrual. However, if infancy is asserted as the reason for the failure to serve the Notice of Claim, the movant must demonstrate a nexus between the delay of service and the infancy of the plaintiff. Brown v. County of Westchester, 293 A.D.2d 748, 741 N.Y.S.2d 281. The infancy of the plaintiff, standing alone, does not compel the granting of an application for leave to serve a late Notice of Claim. Matter of Knightner v. City of New York, 269 A.D.2d 397, 702 N.Y.S.2d 643; see also, Matter of Donald E. v. Gloversville Enlarged School District, 191 A.D.2d 749, 594 N.Y.S.2d 385; Matter of Bloom v. Herrick Union Free School Dist., 174 A.D.2d 665,666, 571 N.Y.S.2d 527. The plaintiffs have not set forth evidence demonstrating a nexus between the infancy of Jennifer C., and the failure to file a timely Notice of Claim.

Late notice of claim applications have been denied even in cases where a municipal entity had general knowledge that a wrong had been committed, but had not received notice of the specific claim. See, Morrison v. New York City Health & Hosps. Corp., 244 A.D.2d 487, 664

[* 4]

N.Y.S.2d 342. Even timely incident and accident reports do not necessarily provide the municipality with the requisite knowledge of the specific legal claim. See, Conroy v. Smithtown Cent. Sch. Dist., 3 A.D.3d 492, 770 N.Y.S.2d 428 (incident report prepared the day after the accident was insufficient to establish knowledge of the claim); Price v. Board of Educ. of Yonkers, 300 A.D.2d 310, 751 N.Y.S.2d 286 (accident report completed on the day of the accident did not apprise the school of the supervision claim); Ryder v. Garden City Sch. Dist., 277 A.D.2d 388, 716 N.Y.S.2d 97 (incident form filled out two days after an accident did not provide actual notice of a negligent supervision claim). Here, the defendants had no knowledge of the incident for nearly one year, with the plaintiffs failing to file a Notice of Claim until more than one year subsequent to the incident.

Inasmuch as the plaintiffs failed to demonstrate that the District was even aware that the assault of plaintiff had taken place, they necessarily failed to make a showing that the District had knowledge of the essential elements of the claim. See, Burgess v. County of Suffolk, 56 A.D.3d 769, 868 N.Y.S.2d 250 (denying application where town was not aware of the incident until a proceedings commenced six months later); Montfort v. Rockville Centre Union Free School District, 56 A.D.3d 480, 866 N.Y.S.2d 775 (application denied where claimant failed to show that the school was even aware that she was injured); Dell'Italia v. Long Island Rail Road Corp., 31 A.D.3d 758, 820 N.Y.S.2d 81 (application properly denied where town did not have any knowledge of the claim until a proceeding was commenced 14 months after the incident); Riordan v. East Rochester Schools, 291 A.D.2d 922, 737 N.Y.S.2d 202 (application denied where school was not aware of the incident until claimant made an application five months after the incident).

Under the instant circumstances, the District did not have actual knowledge of the essential facts constituting the claim within ninety days or a reasonable time thereafter. The plaintiff testified at her §50(h) hearing that she never told a teacher or anyone else from the District about the subject incident, nor did she report the attack to her family or the authorities. The incident was not reported to the District until September 24, 2009, when the infant plaintiff's father notified the District, after first learning of the attack himself on September 23, 2009. A proposed Notice of Claim was still not served upon the District for another two and one half months.

While the court may consider the claimant's infancy in determining the instant motions [General Municipal Law §50-e(5)], infancy alone "does not . . . dictate that such applications automatically be granted." Goldstein v. Clarkstown CSD, 208 A.D.2d 537, 616 N.Y.S.2d 1010. Rather, the infancy of the plaintiff is of little consequence where plaintiff "has failed to established a nexus between [the] infancy and [the] delay in filing the notice of claim." Golstein v. Clarkstown CSD, 208 A.D.2d 537, 538, 616 N.Y.S.2d 1010, 1011; see also, Julie F. v. City of New York, 50 A.D.3d 794, 855 N.Y.S.2d 622. Here, it has not been demonstrated that there was a nexus between the plaintiff's infancy and the delay in filing the notice of claim or commencing the action.

The plaintiffs have cited the infant plaintiff's trauma as a reasonable excuse for the delay in reporting the incident. However, where a plaintiff claims that her physical condition prevented the filing of a timely notice of claim, there must be medical evidence supporting that excuse. See, Werner v. Nyack UFSD, 76 A.D.3d 1026, 908 N.Y.S.2d 103; Godfrey v. City of New Rochelle,

[* 5]

74 A.D.3d 1018, 903 N.Y.S.2d 497. Similarly, evidence must also be adduced where there is a claim that a plaintiff's psychological condition caused the delay. See, Roberts v. County of Rensselaer, 16 A.D.3d 829, 790 N.Y.S.2d 751. In the instant matter, the plaintiffs assert only that "trauma" prevented plaintiff from reporting the incident. There is no supporting diagnosis, report, affidavit or other evidence by either a medical or psychological professional to substantiate this claim. Without more, a conclusory excuse of fear of reporting, or a claim of other emotional motivations or preoccupations is not a reasonable excuse for the failure to serve a timely notice of claim. See, Formisano v. Eastchester UFSD, 59 A.D.3d 543, 873 N.Y.S.2d 162; Doukas v. East Meadow UFSD, 187 A.D.2d 552, 590 N.Y.S.2d 226. The plaintiffs have failed to submit sufficient evidence to establish that the infant's mental condition caused the delay in serving the notice of claim, to establish a nexus between the plaintiff's infancy and the delay in serving the notice, or to establish any valid excuse for the delay in making the instant application. Matter of Rennell S. v. North Junior High School, et al., 12 A.D.3d 518; 784 N.Y.S.2d 623; see also, Matter of N.M. v. Westchester County Health Care Corp., 10 A.D.3d 421, 781 N.Y.S.2d 37; Matter of Nairne v. New York City Health and Hosps. Corp., 303 A.D.2d 409, 755 N.Y.S.2d 855; Perre v. Town of Poughkeepsie, 300 A.D.2d 379, 380, 752 N.Y.S.2d 68; Rabanar v. City of Yonkers, 290 A.D.2d 428, 429, 736 N.Y.S.2d 93; Matter of Matarrese v. New York City Health & Hosps.Corp., 215 A.D.2d 7,9, 633 N.Y.S.2d 837.

A claimant seeking leave to serve a late notice of claim bears the burden of demonstrating that the delay will not substantially prejudice the municipal entity. Felice v. Eastport/South Manor CSD, 50 A.D.3d 138 at 152. In the instant matter, the defendants allege that they have been prejudiced by the delay in the service of the Notice of Claim, and that the plaintiffs cannot show that the District acquired timely actual knowledge of the claim within a reasonable time. Although no "fact witnesses" have been identified, and there is no videotaped record of the subject hallway and bathroom areas in the building, the District points out that it is now handicapped in attempting to investigate the incident and identify potential witnesses, including students and staff, who may have had knowledge of the surrounding circumstances if they had been questioned closer to the time of the incident. Indeed, the affidavit of Michael C., states that when he contacted the police upon learning of the incident, "they were unable to do anything due to the age of the incident and the lack of surveillance or witness evidence. (Michael C., Affidavit, ¶ 35). Since the District was unaware of the attack, there was no reason to conduct an investigation, and the District would, in fact, be prejudiced if it were to be compelled to prepare a defense at this late date. See, Corrales v. Middle Country CSD, 307 A.D.2d 907, 762 N.Y.S.2d 908; Ryder v. Garden City Sch. Dist., 277 A.D.2d 388, 716 N.Y.S.2d 97; Price v. Bd. of Educ. of City of Yonkers, 300 A.D.2d 310, 751 N.Y.S.2d 286.

Based on the totality of the circumstances, and the balancing of all factors, the cross motion for permission to serve a late notice of claim is denied, and the defendant's motion to dismiss for failure to comply with General Municipal Law §§50-e and 50-I, and Education Law §3813, is granted.

The foregoing constitutes the Order of this Court.

Dated: June 27, 2011

HON. DENISE F. MOLIA J.S.C.