Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Amal Alaoui Kendil, an infant by her Mother and Natural Guardian, Saida Ait Messaoud,

Petitioner,

- against -

City of New York, New York City Board of Education and New York City Department of Education,

Respondents.

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Index Number: 15909/11

Motion Date: 8/16/11

Motion Cal. Number: 17

Motion Seq. No.: 1

The following papers numbered 1 to 6 read on this petition for leave to serve a late notice of claim.

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-6

Upon the foregoing papers it is ordered that the petition is decided as follows:

Application by petitioner for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), is denied.

Infant petitioner, a student at P.S. 70 in Queens County, allegedly sustained injuries on March 17, 2009 when a group of unsupervised male students pushed her as she was walking up an interior stairwell of the school, causing her to fall. Infant petitioner also alleged that there was a liquid substance resembling juice on the stairs.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Since infant petitioner's cause of action accrued on March 18, 2009, her mother had until June 15, 2009 to file a notice of claim. No notice of claim was filed. The instant petition for leave to file a late

notice of claim was served on July 14, 2011, over two years after the expiration of the 90-day deadline.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, foremost of which are whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Scolo v. Central Islip Union Free School Dist., 40 AD 3d 1104 [2nd Dept 2007]; Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

The statute also directs the Court to consider all other relevant factors, including, inter alia, whether the claimant was an infant, which, although listed separately, is related to the inquiry as to whether claimant had a reasonable excuse (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]).

Petitioner has failed to offer a cognizable excuse for her failure to serve respondents within the statutory period, failed to demonstrate that her infancy was in any way related to the failure to serve a notice of claim, failed to demonstrate that respondents acquired actual knowledge of the facts underlying the claim within 90 days of the incident or a reasonable time thereafter and failed to show that a late notice of claim would not substantially prejudice respondents.

The only excuse proffered by petitioner's mother, Saida Messaoud, for her failure to serve a notice of claim on her behalf is that she was born on Morocco, had a limited command of the English language and that she was unaware of the notice of claim requirement and that she had a meritorious cause of action until she met with her attorney. She also alleges that she was afraid that if she brought a claim against respondents that her daughter might be asked to leave. In other words, Messaoud proffers ignorance as her excuse. Petitioner's counsel also contends that petitioner had a reasonable excuse by virtue of her infancy. Such,

however, are not cognizable excuses.

A lack of awareness of the possibility of a lawsuit or ignorance of the law regarding the necessity of filing a timely notice of claim do not constitute reasonable excuses (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]). Moreover, Messaoud's averment that she was afraid that if she filed a claim against respondents that her daughter might be asked to leave is inconsistent with her contention that she was unaware of the possibility of asserting a claim against respondents.

As to her excuse that her English language skills were limited, such is not a legally acceptable excuse (see Vicari III v. Grand Avenue Middle School, 52 AD 3d 838 [2nd Dept 2008]; Astree v. NYC Transit Authority, 31 AD 3d 589 [2nd Dept 2006]).

Petitioner's counsel also argues that petitioner's infancy serves as a reasonable excuse for failing to serve a notice of claim. However,"[P]etitioner's infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse" (Vicari III v. Grand Avenue Middle School, 52 AD 3d 838, 839 [2nd Dept 2008]). Here, there was no relationship between petitioner's infancy and the failure to file a timely notice of claim.

Messaoud concedes in her affidavit that she was informed by the school of plaintiff's accident and was informed by infant plaintiff herself of all the details of the incident on the same day, March 17, 2009 and, thus, had full and immediate knowledge of all the facts constituting her claim. There was nothing about the fact of petitioner's infancy that prevented her from filing a notice of claim within 90 days thereafter. No argument is made, and no evidence is shown, that she was hampered in any way by her daughter's infancy from timely filing a notice of claim.

Therefore, petitioner has failed to proffer a reasonable excuse for the delay in filing a notice of claim.

Although the lack of a reasonable excuse for the delay is not, in and of itself, fatal to an application for leave to file a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]), no such additional factors are present in this case.

Petitioner has also failed to demonstrate that respondents acquired actual notice of the essential facts of the claim within

90 days after the claim arose or within a reasonable time thereafter. The Appellate Division, Second Department has emphasized that in determining whether to grant leave to file a late notice of claim, the acquisition by the municipality of actual knowledge of the facts constituting the claim is a factor that must be given particular consideration (see Hebbard v. Carpenter, 37 AD 3d 538 [2nd Dept 2007]).

Counsel for petitioners contends that respondents acquired actual knowledge of the essential facts by virtue of an Occurrence Report prepared by the Department of Education. However, the Occurrence report, annexed to the petition, merely states, "When the class was traveling up staircase E with the classroom teacher, Amal tripped causing her to fall and injure her ankle."

"What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2nd Dept 1996]; Vicari III v. Grand Avenue Middle School, 2008 NY Slip Op 05938, supra). There is nothing in the Occurrence Report that apprises respondents of any connection between infant petitioner's injuries and any negligence on the part of the City or the DOE.

Therefore, petitioner has failed to establish that respondents acquired actual knowledge of the essential facts constituting the claim, which are those facts supporting petitioner's theory of liability.

No other factor is proffered by petitioner's counsel that would militate in favor of granting leave to serve a late notice of claim. Counsel does contend that an additional factor is "whether the claim appears to be meritorious", citing Blair v Pleasantville Union Free School District (52 AD 3d 827 [2nd Dept 2008]). However, Blair does not state that a meritorious cause of action is a factor in determining an application for leave to file a late notice of claim. Rather, that case merely recites the established trio of factors, namely, whether the claimant has demonstrated a reasonable excuse for the delay, whether the municipality acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay. The merits of a claim is not a basis to grant leave to file a late notice of claim (see Besedina v New York City Transit Authority, 47 AD 3d 924 [2nd Dept 2008]; State Farm Fire & Casualty Co. v Village of Bronxville, 24 AD 3d 453 [2nd Dept 2005]). The merits are only a basis for denial of leave to file a late notice of claim where the claim is patently

meritless (id.).

The Court notes that petitioner does not contend that respondents would not be prejudiced if the Court were to grant leave to file a notice of claim at this late juncture. Even had petitioner so alleged, in view of the foregoing, the Court would not reach the statutory factor of prejudice where petitioner has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that respondents acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

Moreover, it is the claimant seeking leave to file a late notice of claim who has the burden of establishing that the municipality would not suffer prejudice if a late notice of claim were allowed (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138, supra). Not only has petitioner has failed to demonstrate a lack of prejudice, no allegation of lack of prejudice has been proffered.

Indeed, it is the opinion of this Court that the passage of over two years from the deadline for filing a notice of claim has prejudiced respondents' ability to investigate the alleged claim effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]). Therefore, even if respondents had acquired actual knowledge of petitioner's claim within 90 days of March 17, 2009, or a reasonable time thereafter, the failure of petitioner's mother to serve a timely notice of claim on her behalf and her delay of over two years from the date of expiration of the 90-day period in seeking leave to serve a late notice of claim has now unfairly prejudiced respondents.

Accordingly the application is denied and the petition is dismissed. Respondents may enter judgment accordingly.

Dated: August 31, 2011

KEVIN J. KERRIGAN, J.S.C.