Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Mavis Ryner Harris, as mother and natural guardian of Shamois Harris, an infant and Mavis Ryner Harris, individually,

Plaintiffs,

- against -

Queens Long Island Medical Group, PC., Dr. Maria Rodriques, North Shore/Long Island Jewish Hospital, and Young Women's Leadership School,

Defendants.

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Index Number: 18547/09

Motion Date: 11/9/11

Motion Cal. Number: 4&5

Motion Seq. No.: 3&4

The following papers numbered 1 to 19 read on this motion by plaintiff for leave to file a late notice of claim and to serve a supplemental summons and amended complaint; motion by the New York City Department of Education (DOE) (sued herein as Young Women's Leadership School [YWLS]), to dismiss the complaint; and cross-motion by defendant, Long Island Jewish Medical Center (LIJ),to compel YWLS to produce copies of medical records.

	Papers Numbered
Notice of Motion(Pltf)-Affirmation-Exhibits.....	1-4
Notice of Motion(Young)-Affirmation-Exhibits.....	5-8
Notice of Cross-Motion-Affirmation.....	9-11
Affirmation in Support of Cross-Motion-Exhibits....	12-14
Affirmation in Opposition-Exhibits.....	15-17
Reply.....	18-19

Upon the foregoing papers it is ordered that the motions and cross-motion are decided as follows:

Motion by plaintiffs (Calendar No. 4) and motion by the DOE (Calendar No. 5) are consolidated for disposition.

Motion by plaintiff for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), and to serve a supplemental summons and amended complaint adding the DOE as a

defendant and including the prerequisite allegations required under the General Municipal Law is denied. Motion by the New York City Department of Education (DOE) (sued herein as Young Women's Leadership School [YWLS]), to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted. Cross-motion by LIJ to compel the DOE to provide copies of all medical and school records pursuant to HPAA authorizations heretofore furnished is denied as moot.

Infant plaintiff allegedly sustained injuries as a result of the failure of the DOE, through its physicians at Merrick Academy in Queens County, where she was a student from Kindergarten through sixth grade from 2000 through 2007, and Young Women's Leadership School (YWLS), where she attended seventh and eight grades during the 2007-2008 and 2008-2009 school years, to diagnose her scoliosis condition between August 2, 2004 through August 4, 2008. It is undisputed that both schools are public schools within the New York City Department of Education (DOE). Plaintiffs allege that the failure to diagnose infant plaintiff's scoliosis in time to allow it to be corrected resulted in her having to undergo spinal fusion surgery on August 21, 2008, after she was diagnosed with scoliosis by her pediatrician on June 14, 2008.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity 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]). Moreover, plaintiff is required to plead compliance with the notice of claim requirement in order to state a cause of action. Plaintiffs did not serve a notice of claim but commenced this action on July 14, 2009 and served YWLS by personal delivery of the summons and complaint to the "president" thereof at its address on Union Hall Street in Queens County on September 18, 2009. The complaint failed to allege compliance with the notice of claim requirement and the DOE was not named or served.

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, including, inter alia, 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 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]).

Plaintiffs have failed to proffer an adequate excuse for their failure to serve a notice of claim. Counsel for plaintiffs contends that he did not know that YWLS was a public school under the DOE until November 2009, when he was apprised of such fact by the DOE in its answer to the complaint, after the expiration of the 90-day deadline for serving a notice of claim. In other words, counsel is alleging law office failure, which does not constitute a reasonable excuse for the failure to serve a timely notice of claim (see Belenky v. Nassau Community College, 4 AD 3d 422 [2nd Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2nd Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2nd Dept 2000]).

Plaintiffs have also failed to demonstrate that the DOE acquired actual knowledge of the facts underlying the claim within the 90-day period or a reasonable time thereafter by virtue of medical records which "it may be presumed to have possessed". The possession of medical records does not impart actual knowledge of the facts underlying a claim where the information contained therein does not suggest a causal connection between the plaintiff's injuries and any negligence by the defendant (see Doyle v. Elwood Union Free School Dist., 39 AD 3d 544 [2nd Dept 2007]; Henriques v. City of New York, 22 AD 3d 847 [2nd Dept 2005]). The medical records annexed to the moving papers do not show any nexus between infant plaintiff's claimed injuries and any negligence on the part of the DOE's physicians. Likewise, counsel's contention that YWLS acquired actual knowledge of the essential facts in September 2008 when infant plaintiff missed a month of school as a result of her spinal surgery is without merit.

Counsel's further argument that actual notice was also acquired by virtue of the service of the complaint in September 2009 is also without merit. Even if, arguendo, the complaint erroneously served upon YWLS at the school, rather than upon the DOE at the office of its sole designated agent, the New York City Law Department at 100 Church Street in New York County, as is required (see Nacipucha v City of New York, 18 Misc 3d 846 (Sup. Ct. Bronx County 2008), were deemed to have apprised the DOE of the essential facts constituting the claim, the actual knowledge exception requires that actual knowledge of the facts underlying the claim be acquired within the 90-day period or a reasonable time thereafter. The service of the complaint on September 18, 2009, ten

months and fifteen days after the expiration of the 90-day deadline for service of a notice of claim (counted from August 4, 2008 as the accrual date of the cause of action), is not a reasonable time, as a matter of law.

In view of the foregoing, the Court does not reach the statutory factor of prejudice where plaintiffs have failed to demonstrate either that there was a reasonable excuse for their failure to timely file a notice of claim or that the DOE 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]).

In any event, it is the opinion of this Court that the passage of over ten months from the deadline for filing a notice of claim has prejudiced the DOE's ability to investigate the alleged claim effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]).

Finally, although the merits of a proposed claim are generally not considered on an application for leave to file a late notice of claim, where the claim is patently meritless, leave to file a late notice of claim should be denied (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]). Here, the basis of plaintiffs' claim against the DOE is that it was negligent in its duty to perform annual screenings for scoliosis as required pursuant to Education Law §905(1). However, that section specifically exempts the school district from any liability in connection with the performance of such screenings. Section 905(2) provides, in relevant portion, "Notwithstanding any other provisions of general, special or local law, the school authorities charged with the duty of making such screening examinations of students for the presence of scoliosis pursuant to this section shall not suffer any liability to any person as a result of making such screening examination, which liability would not have existed by any provision of law, statutory or otherwise, in the absence of this section."

Without merit is the argument of plaintiffs' counsel that although a breach of §905 does not create a private right of action, there exists a common law negligence basis for recovery, that common law basis being a claim for medical malpractice. The breach of a school district's duty with regard to annual scoliosis screenings pursuant to §905 may not form the basis of a common law negligence cause of action, as a matter of law (see Uhr v East Greenbush Cent. School Dist., 94 NY 2d 32 [1999]). Moreover, counsel's attempt to recast his pleadings to allege medical malpractice against the DOE is unavailing since the DOE is not a health care organization and cannot, as a matter of law, be held to

have departed from good and acceptable standards of medical care.

Thus, even if, arguendo, plaintiffs had presented a reasonable excuse for their delay in serving a notice of claim, established that the DOE acquired timely actual knowledge of the facts constituting the claim and that the DOE would not otherwise be prejudiced, leave to serve a late notice of claim must still be denied since plaintiffs' claim is patently without merit.

Accordingly plaintiffs' motion is denied. The DOE's motion to dismiss the complaint as against it is granted, for the reasons heretofore stated. LIJ's cross-motion to compel the DOE to provide copies of all medical and school records pursuant to HPAA authorizations heretofore furnished is denied as moot, since the DOE, in its affirmation in opposition, has submitted undisputed proof that it furnished the aforementioned records.

Dated: November 22, 2011

KEVIN J. KERRIGAN, J.S.C.