SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MICHAEL TIERNEY,

Plaintiff,

-against-

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

Defendants.

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Part C - 2

Present:
Hon. Thomas P. Aliotta

DECISION & ORDER

Motion No. 1239 - 003
Index No. 102447/09

The following papers numbered 1 to 4 were fully submitted on the 13th day of July, 2011:

	Papers Numbered
Defendants' Notice of Motion for Leave to Renew, with Supporting Papers (dated April 27, 2011)	1
Plaintiff's Affirmation in Opposition (dated June 1, 2011)	2
Defendants' Reply Affirmation (dated June 28, 2011)	3
Plaintiff's Sur-Reply Affirmation (dated July 7, 2011)	4

Upon the foregoing papers, defendants' motion for leave to renew is granted in accordance with the following.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Michael Tierney on May 1, 2009 at Susan E. Wagner High School in Staten Island, New York, when a ceiling tile fell and struck him on his head during a music class.

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In the present motion, defendants City of New York and The Board of Education of the City of New York (hereinafter "defendants") seek leave to renew so much of the Order of this Court dated December 15, 2011 [sic] which granted plaintiff partial summary judgment on the issue of liability. In support, defendants' counsel, i.e., the Office of Corporation Counsel, maintains that it was not until mid-March 2011 that witness statements were discovered regarding the incident underlying this lawsuit. More particularly, it is alleged that the "Department of Education Comprehensive Accident Report" previously exchanged during discovery failed to indicate that two witnesses, i.e., plaintiff's music teacher (Christopher Cipollo) and an eyewitness, fellow student (Adam Z.), had given written statements at the time of the accident. According to the Corporation Counsel, since such statements are typically listed in the Comprehensive Accident Reports, there was no "reasonable basis" for defendants to believe that any such statements even existed until their paralegal was sent to the high school to retrieve a piece of the subject ceiling tile in preparation for trial. According to defendants, it was only at this juncture that it was learned that "Written Statement Forms" relative to the incident had been filed in the Dean's Office. Subsequent to this discovery, one of the witnesses (plaintiff's music teacher) was interviewed and his affidavit regarding his recollection of the incident has been submitted in support of this motion.

In his supporting affidavit, the music teacher (Mr. Cipollo) attests that at the request of the Corporation Counsel, he conducted a search for witness statements in the records maintained at the high school and found two, i.e., his own and one given by a student in the

class, Adam Z. According to Mr. Cipollo, he did not see the tile fall on plaintiff, however, "at the beginning of the day he made sure to move all the student desks away from the area where tile allegedly fell" either because the tiles were wet or because there was a leak in the ceiling at that location. Plaintiff's desk was not situated under the area where the tile allegedly fell, nor did he have any reason to be standing in that area when the incident occurred. Further, the teacher attests that at the end of the class he was informed by another student (Adam Z.) that plaintiff "actually poked the subject tile with a metal wire stand from a Casio keyboard causing it to fall". Mr. Cipollo's written statement is consistent with this affidavit, as well as the unsworn written statement given by Adam Z., who wrote that plaintiff had used a "wire" piece from the piano keyboard to "hit the ceiling tiles" which then fell onto the floor, barely striking his head.

Defendants' point out that both witness statements along with the affidavit of Mr. Cipollo directly contradict plaintiff's affidavit in support of the prior motion for summary judgment wherein he attests that he was in music class "seated appropriately at the [electronic] keyboard [when] part of the ceiling...came loose and struck [him] on the head". According to plaintiff, the force of the collapsing ceiling was so great as to cause him traumatic brain damage and permanent cognitive disabilities.

In opposition to renewal, plaintiff argues that the so-called newly discovered school records were prepared by defendants' employees and in their constructive possession at the time of the prior motion. Therefore, this evidence was easily ascertainable and readily available to defendants with the exercise of even minimal diligence at the time of plaintiff's

motion. Accordingly, plaintiff maintains that counsel's failure to fully investigate the facts and locate the pertinent school records concerning plaintiff's accident constituted mere "law office failure" and, as such, is insufficient to warrant the granting of renewal. In addition, plaintiff contends that both written statements should not be considered by the Court since they are unsworn and/or unintelligible, undated and wholly devoid of evidentiary value.

It is well established that "[a] motion for leave to renew is addressed to the sound discretion of the court" (Matheus v Weiss, 20 AD3d 454, 454-455). Moreover, the motion must be based upon "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]), and must contain "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]; *see* Ramirez v Khan, 60 AD3d 748; Lardo v Rivlab Transp. Corp., 46 AD3d 759, 759). Nevertheless, it is familiar law that the standard for granting renewal predicated upon allegations of newly discovered facts is a flexible one, and that it is well within a court's discretion to grant renewal based upon the existence of facts known to the moving party at the time of the original motion so long as "the movant offers a reasonable excuse for the failure to present those facts on the prior motion" (Matter of Surdo v Levittown Pub. School Dist., 41 AD3d 486, 486; *see* Heaven v McGowan, 40 AD3d 583, 586).

Consonant with the foregoing, it is the opinion of this Court that the Corporation Counsel's reliance upon the contents of the Comprehensive Accident Report which, for reasons unknown, failed to reveal that written statements had been obtained from persons

present at the time of this incident constitutes a reasonable excuse for defendants' failure to present these facts on the prior motion (*see* Gonzalez v Vigo Constr. Corp., 69 AD3d 565, 566). Moreover, the newly acquired evidence is sufficient to raise material questions of fact regarding, e.g., plaintiff's role in causing the accident and the extent of the injuries he claims to have suffered as a result of being struck by the falling ceiling tile (*see generally*, Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557). Upon renewal, plaintiff's motion for summary judgment on the issue of liability must, therefore, be denied.

Accordingly, it is

ORDERED, that defendants' motion for leave to renew is granted; and it is further

ORDERED, upon renewal, plaintiff's prior motion for summary judgment on the issue of liability is hereby denied; and it is further

ORDERED, that the Clerk mark his records accordingly.

E N T E R,

Dated: July 28, 2011

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Hon. Thomas P. Aliotta
J.S.C.