Matter of Rivera v City of New York
2012 NY Slip Op 30698(U)
January 26, 2012
Supreme Court, Queens County
Docket Number: 26769/11
Judge: Kevin Kerrigan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

----------X

In the matter of the application of
Jazmine Rivera, an infant under the age of eighteen (18) years old, by her mother and natural guardian, Raquel Asgarli, and Raquel Asgarli, individually,

Petitioners,

- against -

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

Respondents.

----------X

Index Number: 26769/11

Motion Date: 1/24/12

Motion Cal. Number: 22

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this petition for leave to serve a late notice of claim.

	Papers Numbered
Order to Show Cause-Petition-Affirmation-Affidavit -Exhibits	1-5
Affirmation in Opposition	6-7
Reply	8-9

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

Application by petitioners 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. 220 in Queens County, allegedly sustained injuries as a result of falling from the monkey bars in the playground at the school on May 31, 2007.

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]). Petitioners commenced the instant special proceeding by submitting an Order to

Show Cause on December 1, 2011, over four years and two months past the 90-day deadline for filing a notice of claim.

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]).

Infant petitioner's mother, co-petitioner Raquel Asgarali, has failed to articulate any cognizable excuse for her failure to serve defendants, the City and the Department of Education (DOE), within the statutory period.

In her affidavit in support of the motion, she avers that she was unaware of the notice of claim requirement and, for that reason, did not retain counsel until November 8, 2011. 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, as a matter of law (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]).

She also avers in summary boilerplate language clearly of her attorney's authorship and not her own, "Petitioner was seriously injured as previously stated and was more concerned about her physical well-being than consulting an attorney."

In the first instance, since petitioner who was injured was, at the time of her accident, and still is, an infant, and therefore does not have the capacity to consult an attorney, her mother's averment that her injured daughter was too preoccupied with her physical condition to consult an attorney is illogical. The Court surmises, in interpreting Asgarali's affidavit in a light most favorable to her, that what her counsel was probably trying to say

was that Asgarali herself was too preoccupied with her daughter's condition to consult an attorney on her daughter's behalf.

However, such bare, perfunctory statement that she was "more concerned about her physical well-being than consulting an attorney" does not constitute a reasonable excuse for her failure to do anything to assert a claim for over four years (see James v. City of New York, 242 AD 2d 630 [2nd Dept 1997]). Moreover, such excuse is belied by her own averment that she did not know that she had a legal claim until she retained an attorney on November 8, 2011. Indeed, a lack of awareness of the possibility of a lawsuit does not constitute a reasonable excuse (see Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]; D'Anjou v. New York City Health and Hospitals Corporation, 196 AD 2d 818 [2nd Dept 1993]).

Petitioners' counsel also contends that the City and DOE acquired actual knowledge of the facts constituting the claim by virtue of the school's accident report.

The acquisition of actual knowledge of the facts constituting the claim is a factor that must be given particular consideration in determining whether to grant leave to file a late notice of claim (see Hebbard v. Carpenter, 37 AD 3d 538 [2nd Dept 2007]). Petitioners have failed to demonstrate that the City and the DOE acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter.

Petitioners rely upon a New York City Bureau of School Health, Department of Health and Mental Hygiene medical report prepared by a physician on May 31, 2007(the "accident report" to which petitioners' counsel refers), the body of which states in its entirety, "Please evaluate left arm. Child stated she fell off monkey bars in playground."

It is well-established that concerning the acquisition of actual knowledge, "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]).

The aforementioned medical report merely relates that infant petitioner fell off the monkey bars. There is nothing in this document to indicate any negligence on the part of the City or the DOE (see Beretey v. New York City Health & Hospitals Corp., 56 AD 3d 591 [2nd Dept 2008]; 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]).

Petitioners' counsel failed to annex to the petition a copy of a proposed notice of claim. He does annex such proposed notice of claim to his reply. The alleged negligence on the part of the City and the DOE alleged in the proposed notice of claim, in sum, are negligent hiring, training and supervision of school personnel and negligent supervision of infant petitioner and the other students, and in failing to provide a "safe and proper environment." However, no facts are presented in the medical report that would give respondents notice of such claims. Therefore, petitioners have failed to establish that respondents acquired timely actual knowledge of the essential facts constituting the claim, which are those facts supporting petitioners' theory of liability.

Petitioners' counsel also argues that there has been no showing of prejudice by virtue of respondents' acquisition of timely actual notice of the underlying facts by way of the report.

However, as heretofore stated, petitioners have failed to demonstrate that respondents acquired timely actual notice of the essential facts comprising the claim. It is the burden of the claimant seeking leave to file a late notice of claim to establish 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). Since counsel's contention that the City and DOE would suffer no prejudice is predicated upon his unmeritorious argument that the City and the DOE acquired timely actual knowledge of the essential facts underlying petitioners' claim, petitioners have failed to meet their affirmative burden of demonstrating lack of prejudice (see id.). In any event, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant petition where petitioners have failed to demonstrate either that there was a reasonable excuse for their failure to timely file a notice of claim or that the City and the DOE acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see National Grange Mutual Ins. Co. v. Town of Eastchester,48 AD 3d 467, supra; Hebbard v. Carpenter, 37 AD 3d 538 [2nd dept 2007]; 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]).

Finally, this Court notes, sua sponte, that P.S. 220 is a public school under the New York City Department of Education. The Department of Education of the City of New York (also known as the Board of Education) is a separate and distinct entity from the City

of New York (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education, recreation and other public uses. Moreover, New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Since the City does not operate, maintain or control P.S. 220, and since suits involving public school property may only be brought against the DOE, no claim lies against the City for the schoolyard injuries allegedly sustained by infant petitioner as a result of the DOE's alleged negligence in the supervision of petitioner and her fellow students, in the hiring, training and supervision of school personnel and in providing a "safe and proper environment", as a matter of law (see generally Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]).

Although the courts should not ordinarily delve into the merits in determining an application for leave to serve a late notice of claim, the Court may deny leave to serve a late notice of claim where the claim is patently meritless and it would make no sense to grant leave to serve a notice of claim under such circumstances (see Besedina v New York City Transit Authority, 47 AD 3d 924 [2nd Dept 2008]; Katz v. Town of Bedford, 192 AD 2d 707 [2nd Dept 1993]). Therefore, even had petitioners demonstrated a reasonable excuse for the delay in filing a late notice of claim, and even if the City acquired timely actual notice of the underlying facts of the claim, and even if petitioners demonstrated that there would be no prejudice, it would still be an improvident exercise of the Court's discretion to allow the filing of a late notice of claim against the City, since such claim is without merit as a matter of law.

Accordingly, the application is denied and the petition is dismissed.

Dated: January 26, 2012

KEVIN J. KERRIGAN, J.S.C.