| **Ventura v New York City Dept. of Educ.** |
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| 2012 NY Slip Op 31177(U) |
| March 21, 2012 |
| Sup Ct, Queens County |
| Docket Number: 964/12 |
| Judge: Kevin Kerrigan |
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Rahmel I. Ventura, an infant by his mother and natural guardian, Shanae M. Burton, and Shanae M. Burton, Individually,

Petitioners,

- against -

New York City Department of Education and the City of New York, f/k/a The Board of Education of the City of New York,

Respondents.

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Index Number: 964/12

Motion Date: 3/13/12

Motion Cal. Number: 29

Motion Seq. No.: 1

The following papers numbered 1 to 7 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-Exhibit.................... | 5-7 |

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. 15 in Queens County, lost the tip of his right pinky finger on June 14, 2011 when the door to his classroom closed on his hand after he had returned from the bathroom and re-entered the classroom. The proposed notice of claim asserts causes of action for negligent hiring, training and supervision of school employees and for negligent supervision of infant petitioner.

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]). Therefore,

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petitioners were required to file a notice of claim no later than September 12, 2011. Petitioners concededly did not file a notice of claim but served the City and the Department of Education (DOE) with the instant order to show cause for leave to serve a late notice of claim on January 26, 2012, almost four and one-half 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, 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 only excuse offered by petitioner Shanae Burton, infant petitioner's mother, in her affidavit in support of the petition, for her failure to serve a timely notice of claim was that she was unaware of the requirement for filing a notice of claim. Ignorance of the law regarding the necessity of filing a timely notice of claim does not constitute a reasonable excuse (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]). Indeed, petitioners' counsel does not argue that petitioners had a reasonable excuse for their delay. He only contends that leave to file a late notice of claim should be granted because respondents acquired timely actual knowledge of the facts constituting the claim and they would not be prejudiced.

Counsel contends that the City and the DOE acquired actual knowledge of the facts underlying the claim because the accident was reported within minutes by a DOE employee and because a DOE injury report was prepared by the school nurse on the date of the accident, and thus respondents had a full opportunity to investigate the accident.

The injury report describes the nature, place and manner of

the injury as follows: "As per the student Rahmel Ventura, he was returning back to his classroom from the bathroom. When he was entering his classroom, the door closed on his right pinky. Ms. Brown, School Aide, who was monitoring the second floor, noticed him, immediately saw his finger was bleeding and proceeded to take him to the nurse. She met the Guidance Counselor in the hallway who then took Rahmel over to the nurse. EMS was called who took him to LIJ. Tip of finger was retrieved immediately at the scene and brought to the nurse who placed it in a plastic bag, put on ice immediately and sent with the EMS. Parent was called. Grandmother accompany him to the hospital."

These facts, in and of themselves, fail to demonstrate that the City or 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. 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]).

"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]; see Vicari III v. Grand Avenue Middle School, __AD 3d__, 2008 NY Slip Op 05938, [2nd Dept, June 24, 2008]). The mere fact that a teacher witnessed the accident does not of itself establish that the City acquired knowledge of the specific claim.

In Felice v. Eastport South Manor Central School Dist. (50 AD 3d 138 [2nd Dept 2008]), the Second Department has further clarified the difference between mere knowledge that a wrong has been committed and knowledge of the facts constituting the claim. "We have consistently held that a public corporation's knowledge of the accident and the injury, without more, does not constitute 'actual knowledge of the essential facts constituting the claim' [citations omitted], at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable. In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves" (Felice, 50 AD 3d at 147-148).

In other words, the essential facts constituting the claim are not merely the fact that a specific accident or incident occurred and the fact that certain injuries resulted (unless the incident and injuries alone constitute proof of the municipality's negligence). Rather, the essential facts constituting the claim are those which are necessary to support the claimant's theory of liability and alert the municipality or municipal entity of possible negligence on the part of its employees.

The fact that a child's fingers were caught in a door, and that the student was injured as a result, does not constitute prima facie evidence of negligence on the part of the DOE or the City. The injury report annexed to the petition merely states that petitioner's hand was caught in a door and he sustained injury. This fact does not give the DOE or the City notice of the grounds of liability against it.

Therefore, petitioners have failed to establish that the DOE or the City acquired actual knowledge of the essential facts constituting the claim, which are those facts supporting petitioner's theory of liability.

Counsel has also failed to show that a late notice of claim would not substantially prejudice the DOE or the City.

The Court need not even reach the statutory factor of prejudice, since even if there were no prejudice, it would be an abuse of discretion for the Court to grant the instant petition where petitioner has failed to demonstrate either that there was a reasonable excuse for failing to timely file a notice of claim or that the DOE or the City 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]).

But even were this Court to consider this factor, 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). Petitioners have failed to demonstrate a lack of prejudice. Indeed, the sole basis for counsel's contention that respondents would not be prejudiced is his unmeritorious argument that respondents acquired timely actual notice of the facts constituting the claim and therefore had a full and fair opportunity to conduct a timely investigation.

Thus, this Court finds that it would be an improvident exercise of its discretion to grant petitioner's application for leave to serve a late notice of claim absent either an adequate excuse for the delay, or the receipt by respondent of timely actual knowledge of the facts constituting petitioner's claim, or a showing of lack of prejudice (Jasinski v. HB Ward Tech. Sch., 306 A.D.2d 347 [2d Dept. 2003]; Cordero v. County of Nassau, 2 A.D.3d 567 [2d Dept. 2003]; Gomez v. City of New York, 250 Ad 2d 443 [1st Dept 1998]).

Finally, with respect to the City, even had the City acquired timely actual knowledge of the facts underlying the claim, leave to serve the City with a late notice of claim must still be denied since petitioner's claim against it is patently without merit.

It is undisputed that the subject premises where the accident occurred is a public school under the New York City Department of Education. The Department of Education of the City of New York (formerly 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. Since the City does not operate, maintain or control the subject public school, petitioner has no cause of action against the City, as a matter of law (see Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]). Suits involving public school property may only be brought against the Department of Education (Board of Education). New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education" (see also Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]).

Although the merits of a claim ordinarily may not be considered on an application for leave to file a late notice of claim, where the claim is patently meritless, the Court must deny leave to serve a late notice of claim (see State Farm Fire & Casualty Co. v Village of Bronxville, 24 AD 3d 453 [2nd Dept 2005]). Since petitioners' claim against the City is without merit as a matter of law, the application for leave to serve a late notice of claim against it must be denied upon this additional basis.

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

Dated: March 21, 2012

KEVIN J. KERRIGAN, J.S.C.