Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Maria LaFauci-Forte,

Plaintiff,

- against -

The City of New York,

Defendants.

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Index Number: 704406/13

Motion Date: 12/17/13

Motion Cal. Number: 110

Motion Seq. No.: 2

The following papers numbered 1 to 11 read on this petition for leave to serve a late notice of claim nunc pro tunc.

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits.....	1-4
Amended Affirmation in Support.....	5-6
Affirmation in Opposition.....	7-8
Reply-Exhibit.....	9-11

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, nunc pro tunc, pursuant to General Municipal Law §50-e(5), is denied.

Petitioner, a teacher at MS 226 in Queens County, allegedly sustained injuries as a result of being assaulted by a student at the school on October 24, 2012.

A condition precedent to commencement of a tort action against a municipality or municipal entity 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 petitioner's cause of action accrued on October 24, 2012, she had until January 22, 2013 to file a notice of claim.

Separate notices of claim were served upon the City and the Department of Education (DOE) on October 11, 2013, over 9 months past the expiration of the 90-day deadline. The instant petition for an order deeming the late notice of claim timely served nunc pro tunc, was served on November 8, 2013, 10 months 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]).

Petitioner has failed to offer a cognizable excuse for her failure to serve respondents within the statutory period, 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 for her failure to serve a timely notice of claim is her professed ignorance of the law. Such is not a cognizable excuse. 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]).

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 petitioner contends that respondents acquired actual knowledge of the essential facts by virtue of an investigation conducted by the DOE. However, the injury report and the student witness statements, annexed to the petition, merely recount that petitioner was attacked by the subject student.

"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 annexed documents that apprises respondents of any connection between the incident 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.

The only other factor that petitioner's counsel contends would militate in favor of granting leave to serve a late notice of claim is his perfunctory declaration that respondents would not be prejudiced if the Court were to grant leave to file a notice of claim at this late juncture. 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). Petitioner has failed to demonstrate a lack of prejudice, since counsel's contention that respondents would not be prejudiced is based upon his unmeritorious and unsubstantiated contention that respondents acquired timely actual knowledge of the facts underlying the claim.

Moreover, in view of the foregoing, the Court may 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]). But even were this Court to consider the issue of prejudice, it is the opinion of this Court that the passage of 10 months 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]).

Finally, with respect to the City, the foregoing factors are irrelevant since there is no merit to petitioner's claim against it as a matter of law.

MS 226 is undisputably 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 DOE for purposes of education, recreation and other public uses. Since the City does not operate, maintain or control the subject public school, no claim lies against it 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 DOE. New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Moreover, although the 2002 amendments to the Education Law granted the Mayor greater control over public schools and limited the power of the Department of Education (L 2002, ch 91), such amendments did not alter the fact that the City and the DOE are separate legal entities and did not serve to abrogate the rule that tort actions involving public schools may not be brought against the City (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). Moreover, the rule that tort actions relating to public schools may only be brought against the DOE and not the City is not limited merely to claims of premises liability but also applies to actions involving intentional torts committed by students (see id.).

Leave to serve a late notice of claim must be denied, without consideration of whether petitioner had a reasonable excuse for the delay in serving a notice of claim, whether there was actual notice of the claim or whether there was prejudice, where the claim is patently meritless (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]). Since no cause of action lies against the City as a matter of law, leave to serve a late notice of claim against it must be denied. The Court also notes in this regard that since the DOE is a separate and distinct entity from the City and that management of its schools, including supervision of its students, is exclusively the responsibility of the DOE, any knowledge acquired by the DOE in the course of its alleged investigation of the incident, which petitioner's counsel argues is evidenced by the injury report and student witness statements, generated by the DOE, cannot, as a matter of law be imputed to the City. Therefore, not only is the claim asserted against the City patently meritless, but even under the standard criteria for determining whether to allow the service of a late notice of claim, it is conclusively established, as a matter of law, that there is no valid excuse for petitioner's failure to serve a timely notice of claim and that the City did not acquire timely actual knowledge of the facts underlying the claim.

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

Dated: January 7, 2014

KEVIN J. KERRIGAN, J.S.C.