SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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STEPHANY HOSKING,

Plaintiff,

-against-

DECISION/ORDER
Index No. 157081/2013
Seq. No. 001

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION AND THE NEW YORK CITY BOARD OF EDUCATION,

Defendants.

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KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED	1,2.(Exs. A-F)
ORDER TO SHOW CAUSE	.....
ANSWERING AFFIDAVITS	.....3.....
REPLYING AFFIDAVITS	..4..(Exs. A-B)

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Plaintiff Stephany Hosking moves for an order, pursuant to General Municipal Law ("GML") § 50-e (5), for leave to serve a late notice of claim, nunc pro tunc, upon defendants the New York City Board of Education and the New York City Department of Education (hereinafter collectively "the DOE") or to deem a notice of claim filed on the DOE on June 13, 2012 to be timely. In the alternative, plaintiff seeks an order, pursuant to GML § 50-e (6), to correct the omission of the DOE from a notice of claim served on the defendant City of New York ("the City") on March 19, 2004. After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion in all respects.

Factual and Procedural Background:

This action, alleging negligent supervision, arises from an incident on February 5, 2004 in which plaintiff was allegedly sexually assaulted by fellow students at P.S. 4 in Manhattan. On February 10, 2004, the DOE issued an "Occurrence Report" (Ex. A)[1] reflecting that, on February 5, 2004, an unidentified individual waved a knife in plaintiff's face and threatened her and that she was inappropriately touched by two male students in a hallway on the third floor of the school. Ex. A.[2]

On March 19, 2004, plaintiff, by her mother and natural guardian, Priscilla Cabrera, and Priscilla Cabrera individually, filed a notice of claim against the City alleging that plaintiff was sexually assaulted at knifepoint by two fellow classmates on February 5, 2004. Ex. B. On April 28, 2005, plaintiff, through her guardian, Cabrera, as well as Cabrera individually, commenced an action against the City under Index Number 105910/05. Ex. B to Plaintiff's Reply Aff. In the complaint, plaintiff alleged that she was sexually assaulted on February 5, 2004. *Id.* The parties' papers are silent as to whether issue was joined by the City and the court notes that a Request for Judicial Intervention was never filed under that Index Number.

On May 14, 2004, plaintiff testified at a 50-h hearing. Ex. D. She testified, inter alia, that her date of birth was May 8, 1994 (Ex. D, at 5) and that she was sexually assaulted in her school at knifepoint on February 5, 2010 Ex. D, at 7-9.

On July 13, 2012, plaintiff filed a notice of claim against the DOE alleging the same assault by fellow classmates. Ex. E. On August 2, 2103, plaintiff, in her individual capacity, commenced

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[1]Unless otherwise noted, all references are to exhibits to the plaintiff's motion.

[2]Although the Occurrence Report also reflects that the incident occurred on February 5 and 10, 2004, this appears to be a typographical error since, as noted below, the notice of claim and plaintiff's 50-h hearing testimony reflect that it occurred on February 5, 2004.

the above-captioned action sounding in negligent supervision against the City and the DOE under Index Number 157081/13. Ex. F.

Plaintiff now moves for an order, pursuant to GML § 50-e (5), to serve a notice of claim, nunc pro tunc on the DOE, or to deem the notice of claim served on the DOE on June 13, 2012 to be timely filed. In the alternative, plaintiff moves for an order, pursuant to GML § 50-e (6) to correct her good faith omission of the DOE from the notice of claim filed on the City on March 19, 2004.

Positions of the Parties:

In support of its motion, plaintiff argues that she should be entitled to file a late notice of claim against the DOE since the City's Law Department, the "attorney" for the DOE, was served with a timely notice of claim, thereby providing the DOE with actual knowledge of the essential facts constituting the claim. This "actual knowledge", urges the plaintiff, is evidenced by the Occurrence Report completed by the DOE in connection with the alleged incident. Ex. A. Plaintiff also asserts that the instant motion is timely since it was made within one year and 90 days after she turned 18 on May 8, 2012 and the infancy toll on her claim terminated. Plaintiff further maintains that her motion must be granted since the DOE cannot demonstrate any prejudice resulting from the delay and because she had reasonable excuses for her delay, including her infancy and the fact that it was reasonable to name only the City as a defendant since the case of *Padilla v Dept. of Educ. of the City of New York*, 90 AD3d 458 (1st Dept 2011), reflected that the law was unclear as to whether the DOE had to be named separately. Finally, plaintiff asserts that, pursuant to GML § 50-e (6), she should be permitted to correct the good faith omission of the DOE from the notice of claim.

The City and the DOE oppose the motion, arguing that the statute of limitations for filing a timely notice of claim against the DOE pursuant to GML § 50-e has expired. They maintain that the

June 13, 2012 notice of claim filed against the DOE is therefore a nullity. Next, defendants assert that plaintiff has failed to meet the requirements for filing a late notice of claim as set forth in GML § 50-e (5). Specifically, defendants assert that plaintiff failed to set forth a reasonable excuse for failing to serve a timely notice of claim and waited over nine years after the alleged incident before attempting to file a late notice of claim. Further, defendants assert that plaintiff cannot amend the notice of claim to name the DOE as a party since the addition of a new party is a substantive change requiring a new notice of claim. The defendants also maintain that plaintiff failed to comply with GML § 50-e (2) by naming the DOE in the notice of claim. Finally, defendants assert that GML § 50-e (6) precludes plaintiff from naming the DOE since this would be a substantive change to her initial notice of claim.

In her reply affirmation in further support of the motion, plaintiff reiterates that the DOE would not be prejudiced if a late notice of claim were filed against it because it had actual knowledge of the essential facts constituting the claim. Plaintiff also asserts that the DOE would not be prejudiced by the filing of a late notice of claim since the City's response to a FOIL request she made reflects that the City had settled numerous "school related cases" in which it was the only named defendant, thus establishing that the City and DOE were united in interest. Finally, plaintiff asserts that her claim against the DOE is timely based on the "relation back doctrine."

Conclusions of Law:

"In [GML] § 50-e, the Legislature enacted a protocol for serving a notice of claim as a condition precedent to suit against a public corporation. Section 50-e (1) requires that the notice be served within 90 days after the claim arises. The Legislature, however, gave courts discretion to extend the time and devised criteria for determining whether to grant extensions. Section 50-e, the

late notice statute, directs the court to consider, in particular, whether within 90 days or a reasonable time thereafter the public corporation . . . acquired actual knowledge of the facts underlying the claim. In deciding whether to grant an extension, the court must also consider a host of factors, including infancy and whether allowing late filing would result in substantial prejudice to the public corporation." *Williams v Nassau Co. Med. Ctr.*, 6 NY3d 531, 535 (2006) (*citation omitted*). The court is also to consider "whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted", as well as "all other relevant facts and circumstances." GML § 50-e (5).

There is no question that plaintiff failed to file a timely notice of claim against the DOE within 90 days of the alleged occurrence; in fact she did not file a notice of claim against the DOE until June of 2012. Ex. E. However, since plaintiff, born May 8, 1994, was an infant at the time of the occurrence (Ex. D, at 5), she had one year and 90 days from the time she reached the age of 18 to seek leave to file a late notice of claim against the DOE or to have the June, 2012 notice of claim deemed timely filed nunc pro tunc. *See Rowe v Nassau Health Care Corp.*, 57 AD3d 961 (2d Dept 2005). Since plaintiff's motion was filed with this Court on August 5, 2013, it was timely. However, although plaintiff's infancy tolled the one year and 90 day period, it does not compel the granting of her motion for leave to file a late notice of claim. *Id.*

This Court, in its discretion and upon applying the criteria set forth above, denies plaintiff's motion. Although the DOE Occurrence Report (Ex. A) arguably reflects that the DOE had knowledge of the essential facts underlying the claim, and the defendants do not deny such knowledge in opposing the motion, "other relevant facts and circumstances" strongly militate against granting the application. GML § 50-e (5)

Initially, plaintiff's argument that her infancy was a reasonable excuse for her failure to file

a timely notice of claim against the DOE is without merit. *See Rodriguez v New York City Health and Hosps. Corp.*, 78 AD3d 538 (1st Dept 2010). It is apparent that plaintiff's "delay [in moving to file a late notice of claim] was not the product of [her] infancy." *Williams*, 6 NY3d *supra* at 538. This is evident from the fact that, despite her infancy, plaintiff, by her mother and guardian Priscilla Cabrera, was able to file a notice of claim against the City on March 19, 2004 (Ex. B) and a summons and complaint against the City on April 28, 2005. Ex. B to Plaintiff's Reply Aff. Even if plaintiff's mother lacked an understanding of the legal basis for the claim, such ignorance of the law would not excuse the mother's delay. *See Rodriguez, supra.* Moreover, the 2004 notice of claim and 2005 complaint against the City were both filed by plaintiff's current counsel, which also represented plaintiff at her 50-h hearing. Ex. D. Therefore, it is beyond peradventure that plaintiff's infancy did not affect her ability to timely name the DOE in a notice of claim.

Plaintiff, relying on the case of *Padilla v Dept. of Educ. of the City of New York, supra*, asserts that it was reasonable to name only the City as a defendant since the law was unclear as to whether the DOE had to be named separately. Indeed, the defendants concede that "[p]laintiff is correct that the court in *Padilla* found that the plaintiff's mistake in failing to file a notice of claim against the DOE was excusable given the large amount of confusion regarding the notice of claim requirements as they apply to the DOE." Defendants' Aff. In Opp., at par. 21.

In *Padilla*, the First Department noted that, after November of 2002, when "the Office of the Corporation Counsel posted a notice in the New York Law Journal indicating that it was the 'sole representative for the New York City Department or Board of Education' for service of notices of claim and process", there was a "'period of particular confusion' about notice of claim procedure." *Padilla, supra* at 458. However, stated the First Department, "[t]his situation was clarified in 2007, when [it] held [in the matter of *Perez v City of New York* , 41 AD3d 378 (1st Dept 2007), *lv denied*

10 NY3d 708 (2008)] that the City was not a proper party to actions arising out of torts allegedly committed by the [DOE] and its employees." *Id.*, at 458. In *Padilla*, the First Department, in reversing the dismissal of the complaint due to plaintiff's failure to serve the DOE with a notice of claim, stated that, in 2006, before the clarification set forth in *Perez*, "it was reasonable for plaintiff to name the City as the only defendant in her initial notice of claim timely filed with Corporation Counsel." *Padilla, supra* at 458-459. The Court further stated that "[b]y the time *Perez* was decided, it was too late for plaintiff to move for leave to serve a late notice of claim." *Id.*, at 459.

The defendants correctly assert that plaintiff has failed to explain why she waited until six years after *Perez* was decided in 2007 to make this motion, as that decision clearly held that the DOE needed to be sued separately from the City. They are also correct in stating that, at the very latest, plaintiff should have moved to file a late notice of claim when the First Department decided *Padilla* in 2011. However, plaintiff, without any reasonable excuse, waited until 2013 to make the instant motion.

Citing *Renelique v New York City Hous. Auth.*, 72 AD3d 595 (1st Dept 2010), plaintiff asserts that "the lack of a reasonable excuse, *standing alone*, is not a sufficient reason to deny an application for leave to serve and file a late notice of claim" (*emphasis provided*). Plaintiff's Reply Aff., at par. 10. First, this statement is incorrect, since the lack of a reasonable excuse, in and of itself, may warrant the denial of a motion for leave to file a late notice of claim. *See Palmer v City of New York*, 226 AD2d 149 (1st Dept 1996). Further, the court in *Renelique* actually stated that:

> The lack of a reasonable excuse is not, standing alone, sufficient to deny an application for leave to serve and file a late notice of claim where, as here, defendant's employee witnessed the accident and where defendant cannot show that it was prejudiced by the delay (*citations omitted*). *Id.*, at 596.

Plaintiff thus disingenuously failed to provide this Court with the entire quote she relies on. This is of extreme importance since *Renelique* is distinguishable from this matter. There is no indication in the parties' papers that any employee of the DOE witnessed the alleged incident. Additionally, as discussed immediately below, prejudice can be inferred from plaintiff's delay in this matter.

Plaintiff's egregious delay in seeking to file a late notice of claim is a major factor warranting the denial of her motion. Plaintiff did not file a notice of claim against the DOE until June of 2012, more than 8 years after the alleged assault (Ex. E). She did not bring the instant motion seeking leave to file a late notice of claim against the DOE, or to have the June, 2012 notice of claim deemed timely, until August of 2013, more than 9 years after the alleged incident. "Although the length of the delay is not alone dispositive, it is influential." *Williams*, 6 NY3d *supra* at 538-539. In *Williams*, 6 NY3d *supra* at 539, n.3, the Court of Appeals, citing *Leader v Maroni, Ponzini & Spencer*, 97 NY2d 95, 107 (2001), noted that, in the analogous situation of commencing an action or special proceeding, late service pursuant to CPLR 306-b is permissible "upon good cause shown or in the interest of justice" and that "lengthy delays in service can lead a court to infer substantial prejudice." Since neither a notice of claim nor complaint was filed against the DOE in connection with this matter until years after the alleged incident, the DOE may not have investigated the occurrence as thoroughly as it may have had a timely notice of claim been filed and thus prejudice may be inferred from plaintiff's delay.

Plaintiff's argument that this Court should allow her notice of claim against the City to be corrected, pursuant to GML § 50-e (6), to reflect the good faith omission of the DOE, is without merit. That section provides that any "mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section . . . may be corrected, supplied or

disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." First, as noted above, prejudice may be inferred from plaintiff's extensive delay in moving to file a late notice of claim. Further, the addition of the DOE as a party cannot be considered the type of technical mistake or omission this section was enacted to remedy. *See generally Torres v New York City Hous. Auth.*, 261 AD2d 273 (1st Dept 1999).

This Court notes that the complaint filed against the DOE in August of 2013 does not in any way satisfy the notice of claim requirement despite the fact that it was timely filed within one year and 90 days after the infancy toll was lifted. "If any complaint served after the expiration of 90 days but within the statutory period for the commencement of an action could be deemed to be a notice of claim, the entire statutory scheme requiring the filing of notices of claim would be obviated." *Tarquinio v City of New York*, 84 AD3d 265, 268 (1st Dept 1982), *affd sub nom. Pierson v City of New York*, 56 NY2d 950 (1982). Here, plaintiff never served a valid notice of claim on the DOE. Although a timely summons and complaint were filed against the DOE, "the statute clearly contemplates a notice of claim distinct from the complaint." *Tarquinio*, 84 AD2d *supra,* at 268.

Finally, plaintiff's contention that her claim against the DOE relates back to her claim against the City is without merit. The relation back doctrine allows for the addition of a party even after the statute of limitations has run if 1) both claims arise out of the same conduct, transaction or occurrence; 2) the additional party is united in interest with the original party; and 3) the additional party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, it would have been named. *See Buran v Coupal*, 87 NY2d 173 (1995). Here, however, this argument cannot be considered by the Court since it is raised for the first time in plaintiff's reply papers. *See IndyMac Bank, FSB v LaMattina*, 49 AD3d 395 (1st Dept 2008). In any event, plaintiff's assertion that the "statute of limitations has not even run" (Plaintiff's Reply Aff., at par. 24)

undermines her reliance on the doctrine.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: April 29, 2014

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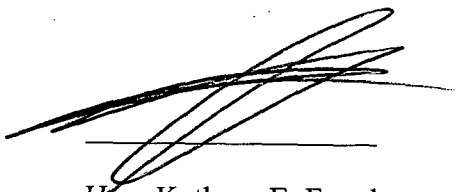

Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT