

**Matter of Mills v Board of Educ. of Comsewogue
Sch. Dist.**

2014 NY Slip Op 31727(U)

June 9, 2014

Sup Ct, Suffolk County

Docket Number: 3616-14

Judge: Denise F. Molia

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Index No.: 3616-14

**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,
Justice

In the Matter of the Application of Tariqah Mills,
individually, and as mother and natural guardian of
infant Tahliq Mills,

Petitioner,

for an Order deeming as timely, nunc pro tunc, the late
Notice of Claim that was served on February 12, 2014,

- against -

Board of Education of Comsewogue School District,
Comsewogue School District, Comsewogue High
School, County of Suffolk, Comsewogue High School
Athletic Director Matteo DeVincenzo, Comsewogue
High School Head Football Coach Sean Tremblay,
John Does #1-10 (being members of Comsewogue
High School football coaching staff whose identities
are unknown at this time) and John Does #11-20
(being members of Comsewogue High School Football
team whose identities are unknown at this time),Respondents.

CASE DISPOSED: NO
MOTION R/D: 3/11/14
SUBMISSION DATE: 3/28/14
MOTION SEQUENCE NO.: 001 MGATTORNEY FOR PETITIONER
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Upon the following papers filed and considered relative to this matter:

Notice of Petition and Petition dated February 20, 2014; Exhibits A through C annexed
thereto; Affirmation in Opposition dated March 4, 2014; Affirmation in Opposition dated March
14, 2014; Exhibits A and B annexed thereto; Reply Affirmation dated March 26, 2014; Reply
Affirmation dated March 26, 2014; Exhibits D and E annexed thereto; and upon due deliberation;
it is

ORDERED, that the portion of the motion by petitioner, Tariqah Mills, pursuant to General Municipal Law § 50-e(5), for an Order deeming as timely, *nunc pro tunc*, the late Notice of Claim that was served upon Board of Education of Comsewogue School District, Comsewogue School District, Comsewogue High School, Comsewogue High School Athletic Director Matteo DeVincenzo, Comsewogue High School Head Football Coach Sean Tremblay, John Does #1-10 (being members of Comsewogue High School football coaching staff whose identities are unknown at this time) and John Does #11-20 (being members of Comsewogue High School Football team whose identities are unknown at this time), is granted, and the Notice of Claim filed by petitioner on February 12, 2014, is hereby deemed as timely served, *nunc pro tunc*; and it is further

ORDERED, that the portion of the motion by petitioner, Tariqah Mills, pursuant to General Municipal Law §50-e(5), for an Order deeming as timely, *nunc pro tunc*, the late Notice of Claim that was served upon the County of Suffolk, is denied.

The underlying action arises from an incident that occurred during a nighttime High School football game held at Comsewogue High School on November 1, 2013. The petitioner alleges that her son Tahliq Mills, together with five of his teammates, were verbally and physically assaulted by Comsewogue High School's football coaches, assistant coaches and/or coaching staff personnel, and football team members.

The basis of the assault is alleged to have been racially motivated. Tahliq, an African American student, asserts that during the first half of the football game, members of the respondent's team, on multiple occasions, referred to him by an inappropriate and unacceptable racial slur. He contends that during the second half of the game, he was assaulted and battered by a white adult coach for Comsewogue High School, after he attempted to come to the aid of one of his teammates who is alleged to have been attacked by said coach and a Comsewogue player. It appears that the entire incident was reported by several television news outlets.

General Municipal Law §50-e, requires that a Notice of Claim be served upon a public corporation within ninety (90) days after the claim arises. Since the instant claim arose on November 1, 2013, the deadline for the petitioner's service of a Notice of Claim on the respondents expired on January 30, 2014. It appears that the petitioner did not consult with legal counsel until February 6, 2014, after she had heard other teammates of her son speak out about the incident. Petitioner then attempted to serve a late Notice of Claim on February 12, 2014. Such attempt was rejected by the respondents. The petitioner now seeks leave to serve a late Notice of Claim.

Although the plaintiff failed to file a Notice of Claim as required by the General Municipal Law, she now seeks leave to file a late Notice of Claim. General Municipal Law §50-e(5) provides the court with broad discretion in ruling upon applications for the filing of late Notices of Claim. See, Lemma v. Off Track Betting Corp., 272 A.D.2d 669, 7070 N.Y.S.2d 276. Said statute serves to protect a public corporation against spurious claims and assure it "an adequate opportunity to explore the merits of the claim while information is still readily available." Gerzel v. City of New York, 117 A.D.2d 549, 499 N.Y.S.2d 60.

General Municipal Law §50-e(5) provides, in relevant part:

“In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was . . .; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.” GML §50-e(5).

“In determining whether to permit service of a late notice of claim, the court must consider all relevant facts and circumstances, including whether (1) the public corporation (or its attorney or insurance carrier) acquired actual knowledge of the essential facts constituting the claim within 90 days fo the incident or a reasonable time thereafter, (2) the claimant was an infant at the time the claim arose and, if so, whether there was a nexus between the claimant’s infancy and the delay in service of a notice of claim, (3) the claimant had a reasonable excuse for the delay, and (4) the public corporation was prejudiced by the delay in its ability to maintain its defense on the merits.”

Funkhouser v. Middle Country Central School District, et al., 102 .S.3d 689, 689-690; see also, Lavender v. Garden City Union Free School Dist., 93 A.D.3d 670, 670-671; Limniatis v. Greenburgh Cent. School Dist. No. 7, 23 A.D.3d 353.

Here, the petitioner’s infant son is the victim of the same alleged assault and battery that occurred on November 1, 2013, for which five of his teammates served timely Notices of Claim. The subject incident took place on the respondent school district’s property and is alleged to have been perpetrated by employees and students of the respondent school district. Each of the Notices of Claim filed by Tahliq’s teammates states in detail the nature of the claim, the time and place the claim arose, the manner in which the claim arose and items of injury and damage claimed. As such, the respondents were timely notified of the alleged assaults, batteries, and injuries claimed by respondents, and already have been apprised of the facts that underlie the legal theories on which liability is predicated in the petitioner’s proposed Notice of Claim. The respondents would be hard pressed to assert that they had not “acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter,” (Lavender v. Garden City Union Free School Dist., 93 A.D.3d 670), as a result of the previously filed Notices of Claim.

The petitioner alleges that her reasonable excuse for not timely filing her Notice of Claim was the fear that coming forward would negatively impact Tahliq’s ability to receive scholarships for college. She has also stated that Tahliq had been hesitant to discuss the events of the attack

with her, and that this lack of communication contributed to the delay in service of the Notice of Claim. Petitioner also contends that Tahliq initially feared for his safety because his other teammates, who had come forward to complain of the event, had received threatening social media messages and communication thereafter. Such fears of an infant are not unreasonable, especially in light of the allegations of the racially charged circumstances under which the incident occurred. Even if such excuses were found to be unreasonable and unrelated to Tahliq's infancy, "where there is actual notice and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of a petition for leave to serve a late notice of claim (*see Matter of Vasquez v. City of Newburgh*, 35 A.D.3d 621, 624[2006])." *Allende v. City of New York*, 69 A.D.3d 931, 933.

The defendant has not demonstrated that its efforts to investigate this matter have been prejudiced by the late service of a notice of claim, taking into consideration the other sources from which they were timely made aware of the subject accident. The service of a late notice of claim alone is not to be equated with prejudice when, under all of the circumstances, justice and fairness compel a discretionary finding of little or no prejudice. See, *Gerzel v. City of New York*, 117 A.D.2d 549, 499 N.Y.S.2d 60; *Rivera v. NYC Housing Authority*, 169 A.D.2d 414, 563 N.Y.S.2d 827. "Mere lapse of time, unaccompanied by proof of actual prejudice to the defendant, is not a sufficient ground for denial of such a motion. *Brewster v. City of New York*, 78 A.D.2d 406, 407. Here, the petitioner's attempt to file a Notice of Claim was less than two weeks after the statutory ninety day period, and in close proximity to the other timely Notices of Claim which alleged virtually the same facts and circumstances. The Comsewogue respondents conclusory assertion that they will be unable to investigate the petitioner's claim due to the passage of time is insufficient to overcome the petitioner's showing of a lack of substantial prejudice. See, *Matter of Leeds v. Port Washington Union Free School Dist.*, 55 A.D.3d 734 at 735-736; *Matter of Melissa G. v. North Babylon Union Free School Dist.*, 50 A.D.3d 901, 902.

Based on the foregoing, it would appear that the respondent School District, its staff and student respondents, acquired knowledge of the essential facts constituting the claim within ninety days of the incident. The petitioner has alleged that on or before January 7, 2014, the principal of Amityville High School had been in contact with the principal of Comsewogue High School to discuss the latter's potential liability arising from the November 1, 2013 incident. The District has failed to demonstrate that it was prejudiced by the late notice of a formal notice of claim or that its ability to investigate this claim has in any way been impaired. See, *Friedman v. Syosset Central School District*, 154 A.D.2d 337, 545 N.Y.S.2d 814. Under the circumstances presented, the petitioner is granted leave to serve a late Notice of Claim upon the Comsewogue respondents.

With regard to the application for leave to file a late Notice of Claim against the County of Suffolk ("County"), the petitioner's request must be denied. The respondent County has stated that it does not own or manage the independent school districts that exist within Suffolk County, and that each school district is autonomous and operates without any intervention of the County. The petitioner has failed to demonstrate otherwise. Further, petitioner's contentions to the contrary, the County of Suffolk has not been shown to have any involvement with, or regulation of a school district's interschool athletic programs which are solely within the purview of the

trustees of each community's board of education. See, e.g., Benitez v. New York City Board of Education, 73 N.Y.2d 650, 658; Polmanteer v. Bobo, 19 A.D.3d 69, 794 N.Y.S.2d 171.

"While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, where the proposed claim is patently without merit, leave to serve a late notice of claim should be denied." Allende v. City of New York, 69 A.D.3d 931 at 932. Here, the petitioner's claim, seemingly based on a theory of negligent hiring/negligent supervision, is without merit. Petitioner has failed to establish a basis on which to support leave to file a late Notice of Claim as against the County of Suffolk.

The foregoing constitutes the Order of this Court.

Dated: June 9, 2014

Hon. Denise F. Molia

HON. DENISE F. MOLIA A.J.S.C.