Mack v City of New York
2014 NY Slip Op 32949(U)
October 28, 2014
Supreme Court, Queens County
Docket Number: 705639/13
Judge: Phyllis Orlikoff Flug

ORIGINAL

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

ADONIS MACK, and Infant by his m/n/g CRYSTAL WATSON, and CRYSTAL WATSON, Individually,

Plaintiffs,

-against-

THE CITY OF ENW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, BARRY JOHNSON, LARMIA SNYDER, MIA PEEBLES, WILBURN SMITH, and LISSA GRANT-STEWART,

Defendants.

Index Number..705639/13

Motion Date...8/20/14

Motion Cal. Number.....103

Sequence No...2

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QUEENS COUNTY

The following papers numbered 1 to 5 read on this motion

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Plaintiffs move *inter alia* for leave to serve a late notice of claim on defendants, the City of New York (hereinafter "City") and the New York City Department of Education (hereinafter "Board"). Defendants, City and Board, cross-move *inter alia* for summary judgment, dismissing plaintiffs' complaint as asserted against them.

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff, Adonis Mack, on February 15, 2013 when he was physically assaulted by defendant Barry Johnson, a paraprofessional assisting the infant plaintiff's class at P.S. I.S. 268, located at 92-07 175th Street, in the County of Queens, City and State of New York.

A Notice of Claim must be served within ninety days after the

claim arises (GML 50-e[1][a]). A court may grant the claimant leave to serve a late Notice of Claim if leave is sought within the time limited for the commencement of the action (See Pierson v. City of New York, 56 N.Y.2d 950 [1982]).

"In exercising its discretion to grant leave to serve a late notice of claim, the court must consider various factors, including whether (1) the claimant has demonstrated a reasonable excuse for failing to serve a timely notice of claim, (2) the claimant was an infant, or mentally incapacitated, (3) the public corporation [or its attorney or its insurance carrier] acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (4) the delay would substantially prejudice the public corporation in defending on the merits" (Keyes v. City of New York, 89 A.D.3d 1086 [2d Dept. 2011] (citing GML 50-e[5]; Iacone v. Town of Hempstead, 82 A.D.3d 888 [2d Dept. 2011]; Barnes v. New York City Health & Hosps. Corp., 69 A.D.3d 934 [2d Dept. 2010]; Chambers v. Nassau County Health Care Corp., 50 A.D.3d 1134, 1135 [2d Dept. 2008])).

Plaintiffs' belief that a Notice of Claim did not need to be served until the conclusion of the prosecution of defendant Johnson does not constitute a reasonable excuse (See, e.g., Singh v. City of New York, 88 A.D.3d 864 [2d Dept. 2011]; Casias v. City of New York, 39 A.D.3d 681, 683 [2d Dept. 2007]; see generally Whittaker v. New York City Bd. of Educ., 71 A.D.3d 776 [2d Dept. 2010]).

Indeed, it is well settled that ignorance of the notice of claim requirement is not a reasonable excuse (See Pico v. City of New York, 8 A.D.2d 287, 288 [2d Dept. 2004] (citing Gilliam v. City of New York, 250 A.D.2d 680 [2d Dept. 1998]; Lamper v. City of New York, 215 A.D.2d 484 [2d Dept. 1995])). The late retention of counsel likewise fails to constitute a reasonable excuse (See Bollerman v. New York City Sch. Construction Auth., 272 A.D.2d 469, 470 [2d Dept. 1998]; Ealey v. City of New York, 204 A.D.2d 720, 720-21 [2d Dept. 1994]).

In addition, plaintiffs have failed to demonstrate a nexus between plaintiff's infancy and the delay in filing a notice of claim sufficient to demonstrate a reasonable excuse (see Inglesias v. Brentwood Union Free Sch. Dist., 118 A.D.3d 785, 786 [2d Dept. 2014]; Doyle v. Elwood Union Free Sch. Dist., 39 A.D.3d 544, 545 [2d Dept. 2007]) and their claim that they were unaware of the severity of plaintiff's injuries until after the time to file a notice of claim had elapsed is not supported by medical evidence (See Walker v. Riverhead Cent. Sch. Dist., 107 A.D.3d 727, 728 [2d Dept. 2013]; Felice v. Eastport/South Manor Cent. Sch. Dist., 50 A.D.3d 138, 151 [2d Dept. 2008]).

However, failure to set forth a reasonable excuse is not fatal

to the application if the municipality had actual knowledge and there is an absence of prejudice (See Rivera-Guallpa v. County of Nassau, 40 A.D.3d 1001, 1002 [2d Dept. 2007]; Nardi v. County of Westchester, 18 A.D.3d 521, 522 [2d Dept. 2005]; Hendershot v. Westchester Medical Ctr., 8 A.D.3d 381, 382 [2d Dept. 2004]).

Plaintiffs have established that defendants had actual knowledge of the facts underlying the plaintiff's claim because its own employees engaged in the conduct which gave rise to the claim (See Erichson v. City of Poughkeepsie Police Dept., 66 A.D.3d 820, 821 [2d Dept. 2009]; Ragland v. New York City Hous. Auth., 201 A.D.2d 7, 11 [2d Dept. 1994]).

Not only were defendants' employees engaged in the conduct giving rise to the claim, the employees also witnessed the alleged assault, which occurred on school property, reported the subject incident, and referred the matter to a Special Commissioner to conduct an investigation, and a prosecution ensued (See Whittaker, *supra*, at 777-78).

Moreover, as defendants had actual knowledge of the essential facts constituting the claim, plaintiffs have established that they are not prejudiced by the delay (See Whitaker, *supra*, at 778; Jordan v. City of New York, 41 A.D.3d 658, 660 [2d Dept. 2007]).

Defendants' conclusory assertion of prejudice is wholly without merit in light of their failure to submit any evidence regarding the extent of the investigation undertaken (See Speed v. A. Holly Patterson Extended Care Facility, 10 A.D.3d 400, 401 [2d Dept. 2004]).

Notably, defendants fail to identify any investigatory steps they were prevented from taken due to the lack of a notice of claim and there is no evidence to suggest that the short delay has prevented respondent from obtaining information that would have otherwise been available (See Gibbs v. City of New York, 22 A.D.3d 717, 719-20 [2d Dept. 2005]; McHugh v. City of New York, 293 A.D.2d 478 [2d Dept. 2002]).

Nevertheless, leave to serve a late notice of claim should not be granted where the claim is patently without merit.

It is well established that the City and the Board are separate legal entities and the City cannot be held liable for the torts committed by the Board and its employees (See Allende v. City of New York, 69 A.D.3d 931, 932 [2d Dept. 2010]; Perez v. City of New York, 41 A.D.3d 378, 379 [1st Dept. 2007]).

The individual defendants named in the complaint have the positions of teaching assistant, teacher, assistant principal and

principal, and, as such, they are properly considered employees of the Board not the City (See, e.g., Stepper v. Dep't of Educ. of the City of New York, 104 A.D.3d 412 [1st Dept. 2013]).

Although plaintiff submits evidence to demonstrate that these employees are paid by the City not the Board, plaintiff fails to cite any law in support of their contention that this provides a basis to hold the City liable.

Notably, as the Board's attorney affirms that these individuals are employees of the Board, not the City, the Board would be estopped from denying its status as employer.

Accordingly, plaintiffs' application is granted to the extent that plaintiffs are directed to serve a notice of claim on defendant the New York City Department of Education no later than November 28, 2014. The application is denied in all other respects.

Defendants' cross-motion is granted to the extent that plaintiff's complaint is dismissed as asserted against defendant the City of New York, only, and is denied in all other respects.

October 28, 2014

J.S.C.
HON. PHYLLIS ORLIKOFF FLUG