Matter of Stark v West Hempstead Union Free Sch. Dist.
2014 NY Slip Op 33802(U)
August 1, 2014
Supreme Court, Nassau County
Docket Number: 3475/14
Judge: Jeffrey S. Brown
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[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

In the Matter of the Application of KEVIN STARK, for leave to serve a Late Notice of Claim,	**TRIAL/IAS PART 16**
Petitioner(s),	**INDEX # 3475/14** **Mot. Seq. 1** **Mot. Date 5.5.14** **Submit Date 7.5.14**
-against-	
WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT,	
Respondent(s).	

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	1
Answering Affidavit	2
Reply Affidavit	3

Petitioner moves by order to show cause for an order pursuant to GML §50-e (5), and Public Authority Law § 1984 granting petitioner leave to serve a late notice of claim upon the West Hempstead Union Free School District.

Petitioner was employed as Director of Facilities by Gersh Academy in or about 2005. Gersh Academy was leasing property from the West Hempstead Union Free School District (school district) as of July 1, 2013. Pursuant to the lease, the school district was to turn over a functioning boiler in good condition. In July of 2013, while meeting with Anthony Vecchione, the Director of School Facilities and Operations for the School District, petitioner was informed that the boilers would be sent out to be repaired and were not operational at that time. In September 2013, Mr. Vecchione informed petitioner once again that the boilers were not ready for use and would be sent out for work. At that time, Mr. Vecchione explained to petitioner and

Thomas Heerbrant, the Gersh School Custodian, how to turn on the boiler. In August and September petitioner saw work being done on the boilers by HTP Mechanical. By mid-October 2013, petitioner called Mr. Vecchione to see if the boilers were ready for use and was informed that they were done and could be used whenever they were needed.

On October 22, 2013, petitioner and Mr. Heerbrant decided that due to the temperature in the building the boiler should be turned on, and they proceeded to open it as they had been instructed. Petitioner was standing in front of the boiler. After being turned on, the boiler began sputtering, and in approximately 15 seconds, the boiler doors flew open and a fireball shot out, throwing petitioner backwards 4 feet and onto the ground. Petitioner suffered numerous injuries as a result. Immediately following, the incident was reported to the principal of the school and the director of transitional programming. An incident report was taken on behalf of Gersh Academy. On October 23, 2013, petitioner explained what had happened to Mr. Vecchione and was told that a mechanic was coming in to inspect the boiler. Additionally, Jonathan Vecchione, a custodian at Gersh Academy, told petitioner that the school district had HTP Mechanical come to inspect the boiler.

The last day to serve a notice of claim was on January 20, 2014. Petitioner argues that the reason he did not retain a lawyer earlier was because he believed he could not bring an action against his employer. On March 11, 2014, after learning that he could bring a claim, petitioner retained a lawyer. Petitioner states that it was their aim to file a notice of claim on or before April 9, 2014, which would make the claim approximately 78 days late.

Petitioner argues that there was a reasonable excuse for the late filing of the notice of claim. Also, petitioner argues that the school district had knowledge of the essential facts constituting the claim. Finally, petitioner argues that there is no prejudice against the school district, if this motion is granted, as they have as much information as they would have had if the notice was filed earlier, and this delay in time is not going to cause the school district to be at a disadvantage. Respondent argues that the incident report and inspection following the incident are insufficient to be relied on as actual knowledge of the essential facts.

General Municipal Law § 50-e (5) provides for the filing of a notice of claim with the public corporation who may be liable for the happening of an incident. A notice of claim must be filed within 90 days after the claim arose (GML § 50-e [1] [a]), though a court may grant the claimant leave to file a late notice of claim within one year and 90 days of accrual (GML § 50-e [5]; *Pierson v City of New York*, 56 NY2d 950 [1982]). In making its determination, the trial court must focus on whether the movant has demonstrated a reasonable excuse for its failure to file a timely notice of claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. (*Acosta v. City of New York*, 39 AD3d 629 [2nd Dept. 2007]).

This court must ascertain whether the respondent was prejudiced by the defect in the notice. (*See Zapata v. City of New York*, 225 AD2d 543, 543 [2d Dept 1996]). In doing so, this court must consider "circumstances which directly impact the [respondent's] ability to defend the potential claim on the merits." (*Isereau v. Brushton-Moira Sch. Dist.*, 6 AD3d 1004, 1005 [3d Dept 2004]).

In this case, there was a reasonable excuse for the delay in submission of the motion. Petitioner believed he was unable to bring a lawsuit against the school district because he was working there at the time of the incident. Once he realized he was able to bring an action against the school district, he consulted an attorney and the motion process began.

Furthermore, respondent received petitioner's motion containing the notice of claim approximately 78 days after the expiration of the 90-day period. Thus, the respondent acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day period (see *Matter of Ambrico v Lynbrook Union Free School Dist.*, 71 AD3d 762 [2d Dept 2010]; *Matter of Gelish v Dix Hills Water Dist.*, 58 AD3d 841 [2d Dept 2009]; *Matter of Harrison v New York City Hous. Auth.*, 188 AD2d 367 [1st Dept 1992]; *Matter of Gershanow v Town of Clarkstown*, 931 NYS2d 131 [2d Dept 2011]).

Based upon review of the foregoing papers, the court finds that the school district also acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident (see *Matter of St. Paul Guardian Ins. Corp. v. Pocatello Fire Dist.*, 90 AD3d 761, 762 [2d Dept 2011]; *Matter of Boskin v. New York City Tr. Auth.*, 44 AD3d 851, 852 [2d Dept 2007]; *Lavender v. Garden City Union Free Sch. Dist.*, 93 AD3d 670, 671 [2d Dept 2012)]. The director of school facilities and operations of the school district was informed of the incident on October 23, 2013. Furthermore, the school district called in the repair company to inspect the boiler within a day of the incident.

The court further finds that the delay would not substantially prejudice the school district in maintaining its defense on the merits in light of the fact that it had a full opportunity to investigate the occurrence.

Accordingly, it is

[* 4]

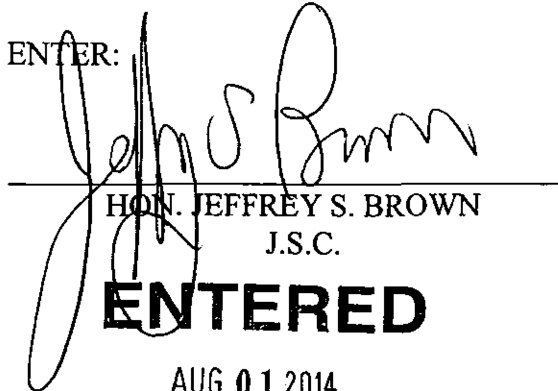
ORDERED, that the application for permission to serve a late notice of claim is **GRANTED**, and it is further

ORDERED, that the notice of claim annexed to petitioner's affirmation is deemed properly served, *nunc pro tunc*.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
August 1, 2014

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

ENTERED
AUG 01 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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