Valero v City of New York
2014 NY Slip Op 33829(U)
September 22, 2014
Supreme Court, Queens County
Docket Number: 14597/11
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

----------X

Michael Valero, an infant under the age of fourteen(14), by his mother and natural guardian, Yenny Valero and Yenny Valero, individually,

Plaintiff,

- against -

City of New York and New York City Department of Education,

Defendants.

----------X

Index Number: 14597/1

FILED
OCT - 1 2014
COUNTY CLERK
QUEENS COUNTY

Motion Date: 9/16/14

Motion Cal. Number: 163

Motion Seq. No.: 1

The following papers numbered 1 to 8 read on this motion by the New York City Department of Education (DOE) to dismiss; and cross-motion by plaintiff for leave to serve a late notice of claim, *nunc pro tunc*.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the DOE to dismiss the complaint against it upon the ground that plaintiff failed to serve a predicate notice of claim pursuant to General Municipal Law §50-e is denied. Cross-motion by plaintiff for leave to serve a late notice of claim, nunc pro tunc, upon the DOE, pursuant to General Municipal Law §50-e(5), is denied as moot.

Plaintiff, a kindergarten student at P.S. 112 in Queens County, allegedly was sexually assaulted by other students in the bathroom of the school on June 11, 2010. Infant plaintiff's mother, defendant Yenny Valero, through her former attorney, filed a notice of claim with the NYC Comptroller's Office on August 27, 2010, which notice of claim was acknowledged by the Office of the

Comptroller, Department of Education Team, on September 8, 2010. Moreover, the Office of the Comptroller sent plaintiffs' counsel a notice of 50-h hearing dated September 8, 2010. Plaintiffs commenced the present action on June 17, 2011.

The DOE contends that the notice of claim was served upon the City through the Comptroller's Office and not upon the DOE, which is a separate legal entity, and, therefore, the action that was commenced was a nullity against the DOE and must be dismissed for failure to state a cause of action, pursuant to CPLR 3211.

In opposition, plaintiffs contend that their notice of claim filed on August 27, 2010 was timely and valid against the DOE. However, in the event that the Court were to find that the DOE was not served with a notice of claim, plaintiffs cross-move for leave to serve a late notice of claim.

A condition precedent to commencement of a tort action against a municipality or municipal entity is the service of a notice of claim upon the municipality or municipal entity within 90 days of accrual of the claimant's cause of action (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). If a notice of claim is not timely served, the claimants may seek leave to serve a late notice of claim within the period of limitation for commencement of an action. 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 municipal entity acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether it 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]).

With respect to the DOE, the New York City Law Department is the sole agent of the DOE for service of notices of claim and of process (see Padilla v Department of Education of the City of New York, 90 AD 3d 458 [1st Dept 2011]). A notice published in the New

York Law Journal on November 12, 2002 (p 37, col 3) gave notice that The Law Department of the City of New York is the sole agent for service of notices of claim and of process and that all such documents must be served upon the Law Department at 100 Church Street (fourth floor), New York, NY. It is undisputed that plaintiff did not serve a notice of claim upon the DOE at the aforementioned address. Instead, plaintiff's counsel mailed a notice of claim to the New York City Comptroller's Office at 1 Centre Street, New York, NY.

General Municipal Law §50-e(3)(c) provides: "If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received." Here, the notice of claim that was served is date-stamped received on August 27, 2010 by the NYC Law Department, and acknowledgment of receipt of the notice of claim, although sent by the Comptrollers Office, was sent by the Department of Education Unit. Moreover, not only is it neither shown nor alleged that the notice was returned by the DOE specifying the defect in it, but it is undisputed that the DOE litigated this matter up to the present. Therefore, since the unrebutted evidence presented on this record is that the NYC Law Department, the proper agent for service of notices of claim against the DOE, in fact received the notice of claim in a timely manner, notwithstanding that it was mailed to the Comptroller's Office, and that what apparently is an office or unit of the DOE acknowledged receipt of the notice of claim and did not reject it, the notice of claim heretofore served was valid as against the DOE and constituted a proper condition precedent to commencement of the present action against it.

Even if, arguendo, the notice of claim were not effectively served upon the DOE, plaintiffs have shown a reasonable excuse for their failure to serve a timely notice of claim. A clearly reasonable impression was given, based upon the foregoing and the course of conduct of the DOE in this matter, that the DOE received and accepted the notice of claim well within the 90-day time frame. Moreover, plaintiffs have also demonstrated that the DOE acquired actual knowledge of the essential facts underlying their claim within the 90-day time period through documentary proof of the filing of incident reports with the DOE and the conduction of investigations by the DOE. In addition, since plaintiffs have shown

uncontested proof that the DOE acquired timely actual knowledge of the facts underlying their claim, they have also demonstrated that the DOE would not be prejudiced by the filing of a late notice of claim. Thus, plaintiffs have demonstrated that it would be a provident exercise of this Court's discretion to allow the filing of a late notice of claim. However, these points are moot, and plaintiffs need not file a new notice of claim, since the original notice of claim was timely received, and accepted, by the DOE. Indeed, the DOE has neither proffered a reply to dispute that it received the notice of claim in a timely manner nor submitted opposition to the instant cross-motion.

Accordingly, the motion is denied, and the cross-motion is denied as moot.

Dated: September 22, 2014

KEVIN J. KERRIGAN, J.S.C.

FILED

OCT - 1 2014

COUNTY CLERK
QUEENS COUNTY