| **Matter of Doe v Taylor** |
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| 2016 NY Slip Op 32470(U) |
| January 29, 2016 |
| Supreme Court, Rockland County |
| Docket Number: 030854/2015 |
| Judge: Victor J. Alfieri, Jr. |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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IN THE MATTER OF "JANE DOE", as Mother and Natural Guardian of "JOHN DOE" (Infant), and "JANE DOE", individually,

Plaintiffs/Petitioners,

-against-

KIMBERLY TAYLOR, and THE ROCKLAND COUNTY BOARD OF COOPERATIVE EDUCATIONAL SERVICES, also known as THE BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ROCKLAND COUNTY,

Defendants/Respondents.
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DECISION AND ORDER

Index No. 030854/2015
Action#1
and
Index No. 032076/2015
Action #2

HON. VICTOR J. ALFIERI, JR., AJSC

In this tort action, defendants move to dismiss plaintiff's complaint for, *inter alia*, failure to file timely Notice of Claim (Action #1). Plaintiffs oppose defendants' motion in Action #1 and then file a new special proceeding requesting the Court to grant leave to file a late Notice of Claim or to have the notice of claim previously filed deemed filed nunc pro tunc (Action #2). Defendants/Respondents cross-move to dismiss Action #2. The parties have agreed to have all motions consolidated for submission purposes and shall be decided together herein. The Court has considered the following documents:

1. Notice of Motion/Affidavits/Memorandum of Law;
2. Affirmation in Opposition/ Affidavit of Jane Doe/ Exhibits A through Q attached thereto;
3. Reply Affirmation/ Exhibits A and B attached thereto[1]; **(Action #1)**
4. Amended Notice of Petition/ Petition/ Exhibits A through Q attached thereto;
5. Notice of Cross Motion; Memorandum of Law;
6. Affirmation in Opposition/ Exhibits A through C attached thereto; and
7. Reply Memorandum of Law **(Action #2)**.

[1] Plaintiff's sur-reply has not been considered plaintiff did not obtain express permission from the Court in advance as is required by this Court's Part Rules.

In order to maintain a tort action against a school district, a claimant must serve a notice of claim within 90 days of the alleged injury (*see* Education Law §3813[2]; General Municipal Law §50-i[1]; Matter of Felice v Eastport/South Manor Cent. School Dist., 50 AD3d 138 [2d Dept. 2008]). Plaintiff has made application pursuant to General Municipal Law 50-e(5) for permission to serve a late notice of claim or to deem the late notice of claim timely served, nunc pro tunc, upon respondent school district seeking damages for injuries the infant petitioner sustained as a result of an incident on February 28, 2014. In determining whether to grant such an extension, the court must consider certain facts and circumstances: (1) whether the school district or its attorney or insurance carrier acquired actual knowledge of the essential facts constituting the claim within 90 days after the incident or a reasonable time thereafter, (2) whether the injured party was an infant at the time the claim arose and, if so, whether there was a nexus between the infancy and the failure to serve a timely notice of claim, (3) whether the petitioner demonstrated a reasonable excuse for the delay and (4) whether the school district was substantially prejudiced by the delay in its ability to maintain its defense on the merits the actual knowledge of the public corporation of the "essential facts constituting the claim". (*see* Education Law §3813[2-a]; General Municipal Law §50-e[5]; *Id.* at 145).

While the presence or absence of any one of the factors is not determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance (*See*, Nurena v Westchester County 120 AD3d 781 [2d Dept. 2014]). Here, the evidence submitted by the petitioner did not establish that BOCES had actual knowledge of the "essential facts constituting the claim" which is understood to mean facts that would demonstrate a connection between the happening of the accident and any negligence on the part of the municipality. In other words, petitioner has not established that BOCES had notice or knowledge of the specific claim and not just merely some general knowledge that a wrong has been committed Lillian Arias v NYC Health & Hospital Corp., 50 AD3d 830 (2d Dept. 2008); *see*, Matter of Placido v County of Orange, 112 AD3d 722 (2d Dept. 2013). Petitioner's notice of claim alleges negligence in the retention, supervision, review, training and lack of training of respondent, Taylor, and as a result, the infant claimant suffered severe physical and emotional distress. It further alleges that respondent, Taylor, assaulted, battered, screamed at and physically touched the infant claimant without cause (*Petition Exhibit A*). There is no report of the incident

which recites or alleges that Respondent Taylor assaulted, battered or physically touched the infant claimant. After the incident, the infant claimant was examined by Dr. Andrew L. Satran of Advanced Pediatrics. His report describes the incident as the "principal yelled at [the infant claimant] and spit went into his mouth, patient got very upset." Dr. Satran's report indicates the infant claimant has had numerous outbursts at school and now there is

> "concern for his safety and the safety of staff. Per school psychologists, psychiatrist and teacher, [infant] has labile mood swings, can't control his temper when he becomes agitated, blames others for this outbursts and becomes violent, throwing things at principal and teacher."

He further indicated that he spoke with petitioner (infant's mother) in detail about the situation who admitted to a lack of discipline at home (*Petition Exhibit P*). Nowhere in the report is there any recitation or allegation of any assault or battery resulting in injury. Only hours after the incident, Dr. Satran's performed an examination of the infant noting that his "Head & Face" were "Normal"; no swelling or redness, that his "Neck" was "Normal; supple with no swelling or tenderness" and his "Skin" was "Normal" (*Id.*). Petitioner also submits a letter and three emails sent to representatives of the North Rockland Central School District to establish respondents' knowledge, but same were never provided to BOCES. The evidence submitted by the petitioner fails to establish that the appellants had actual knowledge of the essential facts constituting the claim within the requisite 90-day period or a reasonable time thereafter.

Petitioners also failed to establish a nexus between the infant petitioner's infancy and their failure to timely serve a notice of claim, or demonstrate a reasonable excuse for their delay. Petitioners have failed to show any connection between infancy and the service of a late notice of claim (*See*, Matter of Magana v Westchester County Health Care Corp., 89 AD3d 851 (2d Dept. 2011). It is alleged that the severity of the infant petitioner's emotional injuries as a result of the incident alleged in the complaint were not immediately discoverable, but petitioners do not submit any medical evidence to support such allegation. The delays in serving the notice of claim and, thereafter, in commencing this proceeding pursuant to General Municipal Law 50-e for leave to serve a late notice of claim, were not the produce of the petitioner's infancy. Further, the infancy toll is personal to the infant petitioner, and does not extend to the derivative cause of action (*see* Matter of Andrew T.B. v Brewster Cent. School District 18 AD3d 745 [2d Dept. 2005].

[* 4]

Petitioner alleges several reasons for the delay in filing a notice of claim including taking care of her newborn child, her recovery from cesarean surgery, being consumed with efforts to enroll infant claimant in school and moving to a new home. In addition, petitioner avers that she did in fact seek legal counsel in a timely fashion and was advised not to file a claim by attorney, Gerard Damini. In reply to such allegation, respondents submitted an affirmation of Mr. Damiani who states that he was never made aware of the facts concerning petitioners' claim nor would he have discussed such facts with the Petitioner as she was the complainant on a criminal matter wherein he represented the defendant in Stony Point Justice Court (*See*, Respondent's Reply - Damiani Affirmation ¶¶ 5 with supporting documentation). Petitioners have failed to demonstrate a reasonable excuse for their delay in filing a notice of claim (Matter of Magana, *supra*. at 852).

Finally, petitioners have failed to demonstrate that the respondents would not be substantially prejudiced in their ability to maintain a defense on the merits as respondents did not have knowledge of the essential facts constituting the petitioners' claim (*See*, Williams v Jamaica Hosp. Med. Ctr., 124 AD3d 636 (2d Dept. 2015).

Respondents move to dismiss the complaint against Kimberly Taylor on the grounds that the she was neither served with the notice of claim nor named in the notice of claim. General Municipal Law §50-e(1)(b) provides in pertinent part, that

> "service of a notice of claim upon an... employee of a public corporation *shall not be a condition precedent* to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the corporation, service of the notice of claim *upon the public corporation* shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law" (emphasis added).

Accordingly, there is no merit to respondents' contention that the failure to serve Kimberly Taylor with the notice of claim requires dismissal of the complaint against her (*See*, Scott v City of New Rochelle, 44 Misc.3d 366 [Sup Ct West.Cty 2014]).

That being said, as claimants have not established their entitlement to serve a late notice of claim, such failure requires dismissal of their claims against Kimberly Taylor who was acting within the scope of her employment and in the discharge of her duties when the alleged acts were

committed (Nurena v Westchester County, *Supra*. at 782.)

Accordingly, it is hereby

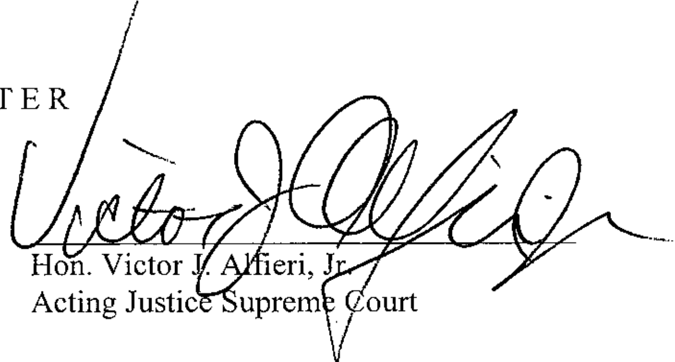
**ORDERED** that the petition for leave to file a late notice of claim or to have the notice of claim previously filed deemed filed nunc pro tunc is denied; and it is further

**ORDERED** that respondents' motion to dismiss the complaint in its entirety for failure to file a timely notice of claim is granted.

The parties remaining contentions are without merit or need not be reached in light of the Court's determination.

This shall constitute the decision and order of the Court.

ENTER



Dated: January 29, 2016
New City, New York

Hon. Victor J. Alfieri, Jr.
Acting Justice Supreme Court

TO: Counsel of record via NYSCEF