

Sherb v Monticello Cent. Sch. Dist.
2016 NY Slip Op 33047(U)
December 28, 2016
Supreme Court, Sullivan County
Docket Number: 1499-2016
Judge: Mark M. Meddaugh
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At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on October 26, 2016

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

-----X
SAMANTHA SHERB,

Plaintiffs,

**DECISION/ORDER
Index # 1499-2016
RJI # 52-38505-16**

-against-

MONTICELLO CENTRAL SCHOOL DISTRICT,

Defendants.

-----X
**Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court**

**Appearances: The Post Law Firm, PLLC
By: Craig A. Post, Esq.
Attorneys for the Plaintiff
7 Stokum Lane
New City, NY 10956**

**Catania, Mahon, Milligram & Rider, PLLC
By: Mark L. Schuh, Esq.
Attorneys for the Defendants
P.O. Box 1479
Newburgh, NY 12550**

MEDDAUGH, J.:

The Plaintiff seeks leave to serve a late Notice of Claim pursuant to Section 50-e(5) of the General Municipal Law and Section 3813(2-a) of the New York State Education Law.

The Plaintiff indicates that this action is based upon a claim that the Monticello School District allowed the Plaintiff to be bullied, intimidated and harassed by a fellow student, Terrell Gray, and that the School District failed to take the proper steps to address the bullying and to protect the Plaintiff.

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It is asserted that the Plaintiff was subjected to two years of persistent bullying, intimidation and harassment, culminating in an incident on June 15, 2015, and that the School District had actual timely knowledge of the essential facts constituting the claim. It is alleged that a school security guard witnessed the June 15, 2015 incident, and that the Plaintiff's father emailed the school's principal and the School District's Superintendent about the incident, and then spoke with the School's principal about it. It is also asserted that the School District had ample time to investigate the claim, and that it had knowledge of prior incidents between the Plaintiff and Mr. Gray and of the two-year history of harassment and bullying of the Plaintiff.

The Plaintiff's attorney asserts that the Plaintiff had a reasonable excuse for the delay in filing the notice of claim, in that the Plaintiff had previously applied to file a late notice of claim, with regard to an earlier incident which occurred on January 23, 2015, which application was denied by Decision and Order, dated May 2, 2016. The Plaintiff argues that, if the prior application had been granted, the instant application would have been unnecessary.

In opposition, the School District filed a cross-motion seeking to deny the Plaintiff's motion, to sanction the Plaintiff for frivolous conduct, and to require the Plaintiff to pay the Defendant's costs and the attorney's fees it expended in the defense of this application.

The School District asserts that this is the Plaintiff's third application for leave to serve a late notice of claim upon the Monticello Central School District.

The first application was dated October 28, 2015, and alleged that the incident on January 23, 2015, was "part of ongoing and persistent bullying, intimidation and harassment, verbal and physical abuse." This first application was withdrawn by the Plaintiff on December 3, 2015.

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The second request to file a late notice of claim was filed on January 28, 2016, and it sought the same relief as was requested in the previously withdrawn application. The Defendant argues that, when the Plaintiff alleged in its prior application that the incident was part of an ongoing pattern, the notice of claim included all incidents up to and including the date of the Notice of Claim on October 28, 2015, including the incident on June 15, 2015, which is the subject of the most recent notice of claim.

The Decision and Order which denied the Plaintiff's second application to file a late notice of claim, found that the Plaintiff had failed to demonstrate a reasonable excuse for failing to timely file the notice of claim, and found that the delay would substantially prejudice the school district and its defense on the merits.

In opposition to the instant application, the School District again argues that the Plaintiff has not demonstrated a reasonable excuse for her delay in commencing the instant action, and in seeking leave to file a late notice of claim. It is argued that the Plaintiff's sole excuse for the delay was that her prior application to file a late notice of claim was not denied until May 10, 2016, and that if the application had been granted, the instant application would not have been necessary. The Defendant argues that, by making the foregoing argument, the Plaintiff is tacitly acknowledging that the June 15, 2015 incident was included in the prior notice of claim.

It is also argued that the Plaintiff has failed to demonstrate any excuse for the delay between the Judge Schick's Decision denying Plaintiff's prior motion, and the filing of the instant application. It is argued that even if the Plaintiff's cause of action accrued on the date of Judge Schick's decision, the Plaintiff still failed to timely file the Note of Claim.

The Defendant next disputes that it received timely knowledge of the essential facts constituting the claim. The Defendant's counsel asserts that the email sent by the Plaintiff's

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father to the high school's principal and the district's superintendent, only indicated that Terrell Gray stared at the Plaintiff for approximately five minutes and then "sped up next to her and start[ed] beeping his horn." It is argued that the Defendant's knowledge of these facts does not establish knowledge of an ongoing pattern of harassment, nor does it give the Defendant knowledge that of the claim that the School District suffered and permitted the alleged harassment to continue.

The Defendant also argues that, when the School District was conducting an internal investigation, the Plaintiff refused to cooperate with or be interviewed by the Investigators. It is claimed that this refusal thwarted the Defendant's ability to ascertain if the Plaintiff has made prior complaints, and if there were any prior complaints, whether they were properly handled. The Defendant asserts that the Plaintiff is not merely claiming that she was harassed by another student, but that the School District permitted the harassment to continue. The School District argues that it was not advised in a timely manner that the Plaintiff believed that her complaints were not being handled properly.

Finally, it is argued that the Defendant will suffer actual prejudice if the Plaintiff is permitted to file a late notice of claim, in that a timely claim would have allowed the Defendant to timely conduct a §50-h hearing to identify specific incidents and any witnesses thereto, as well as whether any complaints were made and to whom. The Defendant points out that Terrell Gray has graduated, thereby diminishing the Defendant's ability to investigate the claim, nor is it expected that Mr. Gray's recollection will be as good as it would have been if he were timely interviewed.

The Defendant asks that the Plaintiff be sanctioned for frivolous conduct, based upon the fact that this is the Plaintiff's third attempt to file a late notice of claim.

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In reply, and in opposition to the cross-motion, Plaintiff's counsel asserts that Judge Schick dismissed the prior proceeding on jurisdictional grounds, pursuant to CPLR §311, and that once the jurisdictional finding was made, any findings on the merits were dicta.

The Plaintiff's counsel argues that the School district was aware of the pattern of harassment, bullying and intimidation to which the Plaintiff was subjected, which was outlined in the affidavit of the Plaintiff's father submitted in support of the prior motion made before Judge Schick, as well as a report from Sarah Dittmar, the RISE¹ program manager, addressed to the High School, dated February 27, 2015. The Plaintiff also asserts that the Defendant did not argue that the June 15, 2015 incident could not form a good faith basis for an action.

The Plaintiff disputes that the Defendant's argument that the June 15, 2015 incident was subsumed into the prior Notice of Claim. The Plaintiff argues that each instance of bullying can serve as a separate and distinct basis for a cause of action, and it requires a separate notice of claim.

Finally, the Plaintiff argues that the Defendant's claim of prejudice is without merit, in that the Plaintiff's father, Terrell Gray and the high school faculty and staff who were advised of the incident were all available to be interviewed when the incident was first reported to the school. Plaintiff's counsel reiterates that the High School's principal was notified immediately about the June 15, 2015 incident, and the principal indicated that he would conduct an investigation of the incident.

Finally, the Plaintiff's counsel argues that it did explain the delay in filing the Notice of Claim after Judge Schick's decision was issued. The Plaintiff's asserts that, following the issuance of the Decision and Order on May 2, 2016, a request was made to the Defendant for any

¹Rape Intervention Services and Education

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information which they had with regard to the June 15, 2015 incident and that the action was started after receiving the Defendant's reply on July 26, 2016. The Court notes that the reply merely indicated that the school did not maintain any records with regard to the June 15, 2015 incident.

CONCLUSIONS OF LAW

Where, as here, the Notice of Claim was not served within the 90-day period specified in Section 50-e (1) of the General Municipal Law, the individual possessing a potential tort claim against a public corporation may apply to the court pursuant to Section 50-e (5) for an extension of the time within which to serve such notice upon the defendant.

Section 50-e(5) of the General Municipal Law provides that the extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation, which time limit is one year and ninety days after the happening of the event upon which the claim is based (General Municipal Law §50-i(1)(c)). This time limit for commencing an action against the public corporation has generally been regarded as a Statute of Limitations subject to the tolls for infancy provided in CPLR 208 (Cohen v Pearl Riv. Union Free School Dist., 51 NY2d 256, 434 N.Y.S.2d 138[1980]). Therefore, where the putative Plaintiff was an infant at the time of the event, the period is tolled until the child's eighteenth birthday (Mindy Q. v Binghamton City School Dist., 83 AD3d 1335, 921 N.Y.S.2d 696 [3d Dept 2011]).

In the case at bar, the Plaintiff was born on June 29, 1998, and turned eighteen in June of 2016. It has been held that an application to file a late Notice of Claim is timely if brought within one year and ninety days of the Plaintiff's 18th birthday (Babcock v Walton Cent. School Dist., 119 AD3d 1061, 1065 989 N.Y.S.2d 172 [3d Dept 2014]). The application in the case at bar was made by Notice of Motion, and the simultaneous commencement of the action on

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September 7, 2016. Therefore, the Plaintiff's application was timely made

Section 50-e(5) of the General Municipal Law further provides statutory criteria to determine whether to grant an extension of time to file a Notice of Claim, as follows:

[T]he 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.

It has been held that, in considering whether to permit service of a late Notice of Claim, the Court shall consider all relevant facts and circumstances, including whether:

- (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter;
- (2) the Plaintiff was an infant at the time the claim arose and, if so, whether there was a nexus between the Plaintiff's infancy and the failure to serve a timely notice of claim;
- (3) the Plaintiff demonstrated a reasonable excuse for the failure to serve a timely notice of claim; and
- (4) the public corporation was substantially prejudiced by the delay in its ability to maintain its defense on the merits.

(Babcock v Walton Cent. School Dist., supra.; Fox v New York City Dept. of Educ., 124 AD3d 887, 2 N.Y.S.3d 210 [2d Dept 2015]).

The public corporation's actual knowledge of the essential facts constituting the claim is a factor which is afforded great weight in determining whether or not to grant leave to serve a late notice of claim (Stenowich v Colonie Indus. Dev. Agency, 151 AD2d 894, 542 N.Y.S.2d 863 [3d Dept 1989], appeal denied 74 N.Y.2d 615, 549 N.Y.S.2d 960 [1989]), and it is the claimant who bears the burden of demonstrating that the Respondent had actual knowledge (Dalton v Akron Cent. Schools, 107 AD3d 1517, 966 N.Y.S.2d 787 [4th Dept 2013], aff'd, 22 N.Y.3d 1000, 979 N.Y.S.2d 559 [2013]). Actual knowledge of the essential facts underlying the claim requires more than mere notice of the underlying occurrence (Babcock v Walton Cent. School Dist., supra., and in a case such as the one before this Court, it requires that the Defendant be

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made aware of the Plaintiff's claim that her injuries were caused by the Defendant failing to take the proper steps to address the bullying and to protect the Plaintiff (Petersen v Susquehanna Val. Cent. School Dist., 57 AD3d 1332, 1334, 870 N.Y.S.2d 155 [3d Dept 2008]).

In the case at bar, the report that Terrell Gray was staring at the Plaintiff in the parking lot, and then sped up next to her and started beeping his horn, in the presence of the school safety staff, was not sufficient to apprise the Defendant of the Plaintiff's claim that the Monticello School District allowed the Plaintiff to be bullied, intimidated and harassed by Mr. Gray, and that the School District failed to take the proper steps to address the bullying and to protect the Plaintiff (Lewis v E. Ramapo Cent. School Dist., 110 AD3d 720, 972 N.Y.S.2d 326 [2d Dept 2013]; Gunsam v E. Suffolk Bd. of Co-op. Educ. Services, 109 AD3d 542, 543, 970 N.Y.S.2d 587 [2d Dept 2013]).

The Court also finds that the Plaintiff failed to proffer an excuse for her delay in filing the notice of claim. The Plaintiff's only excuse was that it did not believe that a Notice of Claim was necessary until the earlier application to file a late notice of claim was denied in May of 2016. The incident in June of 2015 was not listed in the Plaintiff's original notice of claim and could not be interposed in a cause of action against the Defendant in that earlier action (Finke v City of Glen Cove, 55 AD3d 785, 866 N.Y.S.2d 317 [2d Dept 2008]) and, therefore, the denial of the earlier application to file a later notice of claim would not excuse the delay in filing a notice of claim arising out of the June 2015 incident.

The Court also finds that to the extent that the June 2015 incident involved a student who has since graduated, the Defendant arguably suffered substantial prejudice with respect to its opportunity to promptly and thoroughly investigate the incident (Petersen v Susquehanna Val. Cent. School Dist., 57 AD3d 1332, 1334, 870 N.Y.S.2d 155 [3d Dept 2008]; Manuel v

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Riverhead Cent. School Dist., 116 AD3d 1048, 984 N.Y.S.2d 409 [2d Dept 2014]) which showing of prejudice was not rebutted by the Plaintiff (Lewis v E. Ramapo Cent. School Dist., *supra.*; Gunsam v E. Suffolk Bd. of Co-op. Educ. Services, *supra.*).

The Court shall decline to sanction the Plaintiff, pursuant to 22 NYCRR §130-1.1, and to require her to pay the costs and reasonable attorney's fees expended in the defense of the instant application. The earlier action was brought by the Plaintiff's father prior to the Plaintiff's birthday and she cannot be held responsible for that earlier failure to timely file a notice of claim.

WHEREFORE, based on the foregoing, it is hereby

ORDERED that the Plaintiff's motion to file a late notice of claim is denied; and it is further

ORDERED that the Defendant motion for sanctions for frivolous conduct is denied.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: December 20, 2016
Monticello, New York

ENTER: Mark M. Meddaugh
HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated September 6, 2016
2. Affirmation of Craig A. Post, dated September 6, 2016
3. Affidavit of Samantha Sherb, sworn to August 27, 2016
4. Affidavit of Jay Sherb, sworn to August 29, 2016
5. Notice of Cross-Motion, dated September 30, 2016
6. Affirmation of Mark L. Schuh, Esq., dated September 30, 2016
7. Affirmation in Opposition and Reply of Craig A. Post, Esq., dated October 19, 2016