

Matter of S.S. v Monticello Cent. Sch. Dist.
2016 NY Slip Op 33054(U)
May 2, 2016
Supreme Court, Sullivan County
Docket Number: 0162-2016
Judge: Stephan G. Schick
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

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In the Matter of the Application of
S.S., an infant by her f/n/g,
Jay Sherb,

Plaintiff,

-against-

DECISION & ORDER

Monticello Central School District
and Monticello High School,

Defendants.

-----X
Motion Return Date: March 7, 2016
RJI No.: 52-37760 2016
Index No.: 0162-2016

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Schick, J.:

Plaintiff petitions this Court for leave to file a late notice of claim. Defendant opposes.

Preliminarily, this matter is not properly before this Court. Plaintiff previously moved this Court for the same relief under index number 2338-2015, RJI No.: 52-37512 2015, which action was voluntarily withdrawn without prejudice.

Plaintiff then brought this action, new index number, new RJI, new action. As it is a new action, Plaintiff must obtain jurisdiction over the defendants through service of process in accordance with CPLR Chapter 3, specifically §311, personal service upon a corporation or governmental subdivision.

CPLR §2103, cited by Plaintiff,¹ deals with the service of papers in an action that is already pending, after jurisdiction has been obtained.²

As Plaintiff merely mailed these papers to the Monticello Central School business office, Monticello High School and defense counsel's office,³ without following the mandates of CPLR §311, jurisdiction was never obtained.

However, moving to the merits of the action, General Municipal Law Section 50-e(1)(a) requires that in those cases in which a notice of claim is required by law, the notice must be served within ninety days after the claim arises.

General Municipal Law Section 50-e(5) provides for late filing of the notice within 15 months of the incident.

In determining whether to grant a petition for leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits ...⁴

In the matter at bar, Plaintiff has failed to provide a reasonable excuse. According to Plaintiff's papers the reasonable excuse is found in the affidavit annexed as Exhibit B of the petition.⁵ The only excuse provided in Exhibit B is found in paragraph 4:

Over the last two-plus years, both S.S. and I were fearful that S.S. would suffer negative repercussions if she brought a claim against the School District or the School which accounts for our delay in filing a Notice of Claim. I was concerned that bringing such a claim would negatively impact S.S.'s relationship with her teachers and school administrators. However,

¹Plaintiff's reply affirmation dated March 1, 2016, paragraph 3.

²CPLR §2103(b): "Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney." (emphasis added.)

³Plaintiff's reply affirmation, Exhibit B.

⁴*Matter of Mitchell v. City of New York*, 112 A.D.3d 940, 940 (2d Dept. 2013)

⁵Plaintiff's affidavit in support of leave to serve late notice of claim, paragraph 15.

given the seriousness of the threats made on January 23, 2015 which we consider a failure of the School and District to responsibly address this long standing issue, I decided it would be in S.S.'s best interest to do so.

This non-explanation is a chronology, not a reasonable excuse. No "why" is provided to explain why a notice of claim was not filed within 90 days of the January 23, 2015, incident. There are no facts here which would have prevented a notice of claim being filed.

Plaintiff's attorney then argues that the FOIL request had to be resolved prior to a claim being filed, but once again, this is a chronology, not an explanation.⁶ No "why" is provided. Why did the FOIL request have to be resolved? Nothing in this application derives from the FOIL request.

Although Plaintiffs provide facts, they do not provide a reasonable excuse for a more than one year delay in filing a notice of claim.⁷

Moreover,

[t]he claim herein is for personal injuries, physical and emotional pain and suffering, medical and related expenses sustained by the Claimant, S.S., as a result of persistent and ongoing bullying and harassment while a student attending school under the auspices of the Monticello Central School District ... culminating in the infant claimant being threatened with physical harm on or about January 23, 2015.⁸

The failure to provide prompt notice and subsequent loss of the ability to have a timely 50(h) hearing must, of necessity, substantially prejudice Defendant's ability to defend this suit. Had the notice been timely, students and staff would still have been attempting to recall incidents two years prior. Although the staff members who witnessed the January 23, 2015, incident may still be available, no mention is made by Plaintiff regarding the ability of Defendants to locate and interview potential student witnesses who may now have graduated three years ago.

Accordingly, it is hereby

⁶Plaintiff's petition for leave to serve late notice of claim, paragraph 10.

⁷*Matter of Destine v. City of New York*, 111 A.D.3d 629 (2d Dept. 2013).

⁸Plaintiff's petition, paragraph 2.


ORDERED, that as there is no reasonable excuse for failing to file a notice of claim and the delay would substantially prejudice the school district in its defense on the merits," Plaintiff's motion for leave to serve a late notice of claim is denied.

This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

SO ORDERED

Dated: Monticello, NY
May 2, 2016

ENTER


HON. STEPHAN G. SCHICK, JSC

Papers considered:

Plaintiff's motion for leave to serve late notice of claim dated January 25, 2016.
Defendant's affirmation in opposition dated February 12, 2016
Plaintiff's reply affirmation in further support dated March 1, 2016.
Defendant's letter of April 15, 2016