

J.P. v Bronx Community Charter Sch.

2017 NY Slip Op 31720(U)

July 7, 2017

Supreme Court, Bronx County

Docket Number: 301954/2016

Judge: Howard H. Sherman

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7/14

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF THE BRONX - Part 4

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 J.P., *an infant by his mother and natural guardian,*
 Tamar Pacheco , and Tamar Pacheco , *Individually*

Decision and Order

Plaintiffs

-against-

Bronx Community Charter School

Defendant

Index No. 301954/2016

Howard H. Sherman

J.S.C.

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 The following papers numbered 1- 5 read on Defendant's motion to dismiss and plaintiff's cross-motion for leave to file a late notice of claim returnable 09/08/16

Notice of Motion, Affirmation , Exhibits, Affidavit of S. Wilson	1,2	
Memorandum in Support of Motion	3	
Notice of Cross-Motion, Affirmation,	4	
Affirmation in Opp/Cross-Motion , Reply /Motion	5	

Upon the forgoing papers, the above motions are decided as set forth below.

Plaintiffs commenced this action on May 16, 2016 alleging the negligence of Bronx Community Charter School (BCCS) and seeking damages for personal injuries sustained on October 10, 2014 when the then six-year old infant plaintiff fell from monkey bars in a public playground. His mother interposes a derivative claim [Second Cause of Action].

Within ninety days of the incident, plaintiffs served a Notice of Claim on the City of New York and the New York City Department of Education as respondents advising of a claim for damages resulting from the negligence of respondents in leaving the

infant claimant school child unattended and unsupervised while he was using the monkey bars, and in the maintenance, management , control, installation , construction, and repair of the playground equipment.

This action was commenced on May 25, 2016.

Bronx Community Charter School (BCCS) now moves to dismiss the complaint in its entirety pursuant to CPLR 3211[a][7] and [a][5] on the grounds that plaintiffs failed to comply with the condition precedent of serving a timely Notice of Claim on the defendant charter school before commencing the action,¹ and on the further grounds that the action is time-barred, having been commenced more than one year and ninety days after the accident (see, Education Law § 3813[2] and General Municipal Law § 50-i[1][c]).

Plaintiffs oppose the motion and contend that charter schools are not political subdivisions of the state and as such, there is no requirement that they be served with a Notice of Claim before the commencement of a tort action. Plaintiffs also maintain that this action is not time-barred because the statute of limitations was tolled by operation of the infancy of the plaintiff (see, CPLR § 208). Alternatively , plaintiffs seek an extension of time to serve the Notice of Claim on BCCS nunc pro tunc , arguing that

¹It is undisputed that plaintiffs served a timely Notice of Claim on the City of New York and the New York City Department of Education [Exhibit C], and did not serve one on BCCS.

they met the requisite criteria for such relief as : 1) the extension does not exceed the statute of limitations as tolled; 2) BCCS acquired actual knowledge of the essential facts within the 90-day filing period because the infant plaintiff fell and sustained his injuries while in the care and supervision of the school, and 3) the delay in serving the Notice of Claim has not substantially prejudiced defendant in maintaining a substantive defense.

In opposition to the cross-motion , BCCS argues that as an independent and autonomous public school it is entitled to be served with notice of claim before commencement of an action, and the failure to prove timely adherence to this prerequisite is a fatal defect.

Defendant also notes that any tolling of the statute of limitations due to the infancy of the her son, does not preclude a determination that the claims of Thamar Pacheco in her individual capacity are time-barred.

With respect to the alterative relief sought , defendant first notes that the cross-moving papers are procedurally defective as they fail to include a copy of the proposed notice of claim. Substantively, BCCS asserts that plaintiffs have failed to establish a basis for any extension because they have neither demonstrated that the school acquired actual knowledge of the acts constituting the claim of negligent supervision, nor provided any reasonable excuse for the failure to serve a timely notice , as ignorance of the requirement for service of a notice of claim on a charter school is

unavailing for such purpose. In addition, defendant notes that plaintiffs make no showing of any connection between the infancy of the plaintiff and the late filing, and this factor militates against an exercise of discretion in favor of the application.

Defendant also argues that plaintiffs have failed to meet the requisite burden to show that the school would not be prejudiced by the filing of the late notice.

Discussion and Conclusions

New York Education Law § 3813 in pertinent part provides that:

1. No action or special proceeding, for any cause whatever ... shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services, school ... or any officer of a school district, board of education, board of cooperative educational services, or school ... unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

While it is plaintiffs' contention that the defendant charter school is not entitled to such notice because it is a "private entity", in a case cited as authority for this position, the Court of Appeals considered whether the legislature had exceeded its constitutional authority by delegating and directing the Comptroller to conduct audits of charter schools, and observed the following.

Indeed, a charter school has been deemed by the Legislature to be “an independent and autonomous public school” (Education Law § 2853[1][c])⁴ and that the charter entity and the Board of Regents are “the public agents authorized to supervise and oversee the charter school” (id.). Further, a charter school is governed by a self-selecting board of trustees that has “final authority for policy and operational decisions of the school” (Education Law § 2853[1][f]). However, it falls both to the Board of Regents and charter entity to oversee each school approved pursuant to the Act “and both may visit, examine into and inspect any charter school, including the records of such school, under its oversight” (Education Law § 2853 [2]). Further, “[o]versight by a charter entity and the board of regents shall be sufficient to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions” (id.).

Matter of New York Charter Schools Assn., Inc. v. DiNapoli, 13 NY3d 120, 125-126 , 914 N.E.2d 991 [2009]

In recognition of this , the Federal District Court has found “unavailing” any argument that charter schools are not public schools for purposes of the notice of claim requirement (Rodriguez v. International Leadership Charter School, 2009 WL 860622, at 6. [S.D.N.Y. March 30, 2009], citing authority of Scaggs v. N.Y. State Dep't of Educ., 2007 WL 1456221, at 19 [E.D.N.Y. May 16, 2007]).

Having failed to comply with this condition precedent, the court must now consider whether plaintiffs are entitled to an extension of time to file a late Notice of Claim on the charter school nunc pro tunc. Education Law 3813 [2][a] provides the following.

In determining whether to grant the extension, the court shall consider, in particular, whether the district or school or its attorney or its insurance carrier or other agent 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. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the district or school or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the district or school against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the district or school in maintaining its defense on the merits.

The presence or absence of any single factor is not determinative in the analysis (see, *Velazquez v City of N.Y. Health & Hosps. Corp. (Jacobi Med. Ctr.)* 69 A.D.3d 441 at 442, 894 N.Y.S.2d 15 [1st Dept. 2010]²), however, it has been noted that the “most important factor” is whether the defendant “acquired actual knowledge of the essential facts constituting the claim within the time specified” (*Padilla v. Department of Educ. of the City of N.Y.*, 90 A.D.3d 458, 459, 934 N.Y.S.2d 139 [1st Dept.2011] [internal quotation marks omitted]).

Upon consideration of the record here, the court finds that BCCS would have acquired notice of the infant’s claims at the time of the incident. While defendant asserts that the school’s awareness of the accident does not constitute knowledge of the acts constituting the claim of negligent supervision, to the extent the infant plaintiff was in the care and custody of the school at the time of the incident, the claim of

²In *Velazquez*, the court was considering an application pursuant to General Municipal Law § 50-e (5).

negligent supervision is not so finely nuanced as to originate from anything other than the events of the incident itself. The court also finds that under these circumstances, plaintiffs have made an initial showing that defendant was not substantially prejudiced in its defense as a result of the delay, and defendant has failed to come forward with any evidence that it was (see, *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 68 N.E.3d 714 [2016]).

Plaintiffs have established that the claims of the infant plaintiff may be tolled, but they make no assertion nor offer proof to conclude that there is any connection between plaintiff's infancy and the failure to file timely notice of these claims on BCCS. Nonetheless, while the lack of a causative nexus may make the delay less excusable, it does not make it fatally deficient (see, *Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 538, 847 N.E.2d 1154 [2006]; see also, *Hosking v. City of New York*, 139 A.D.3d 629, 30 N.Y.S. 3d 629 [1st Dept. 2016],). In addition, the proffered excuse for the delay is an imperfect understanding of the public/private dichotomy of charter schools themselves, and the different supervisory roles over them, if any, of state and municipal agencies (see, *Matter of New York Charter Schools Assn., Inc. v. DiNapoli*, supra.), the court finds plaintiffs' error in designating the entity to be noticed "excusable."

As noted, defendant has made the requisite showing to support dismissal of Tamar Pacheco's derivative claim as time-barred as she cannot benefit from the tolling

for her son's infancy (see, *Rosado v. Langsam Property Service Corp.*, 251 A.D.2d 258, 675 N.Y.S. 2d 53 [1st Dept. 1998]).

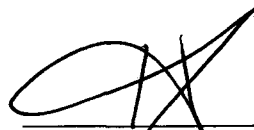
Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of dismissing as time-barred the claims of plaintiff Tamar Pacheco, and it is further

ORDERED that the cross-motion be and hereby is granted and plaintiffs granted leave for leave to file a late Notice of Claim upon defendant Bronx Community Charter School nunc pro tunc.

This shall constitute the decision and order of this court.

Dated: July 7, 2017


Howard H. Sherman