

D.W. v City of New York
2019 NY Slip Op 32770(U)
September 14, 2019
Supreme Court, New York County
Docket Number: 156415/2019
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

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D.W., INFANT, BY AND THROUGH HER MOTHER AND
NATURAL GUARDIAN, CHARMAINE DIXON,

Petitioner,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF EDUCATION

Respondent.

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INDEX NO. 156415/2019
MOTION DATE 09/11/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15

were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, petitioner's motion to amend her notice of claim, or in the alternative, for leave to serve a late notice of claim is denied, with the exception of amending Mr. Lim's full name to Yohan Lim deemed filed timely nunc pro tunc.

Petitioner filed a timely notice of claim on December 3, 2015. At the time of the filing petitioner was not represented by counsel, however in her notice of claim she provided a date of incident and details regarding the specific allegations for the date in question. Petitioner now moves to amend her original notice of claim to include additional dates of incidents, allegations and potential offenders.

GML § 50-e (6)

Pursuant to General Municipal Law Section 50-e subsection 6, a petitioner may correct a mistake or defect in the notice of claim at any stage of the proceeding "in the discretion of the

1 The Court would like to thank Amanda Gerstman for her assistance in this matter.

court, provided it shall appear that the other party was not prejudiced thereby.” *GML* § 50-e.

The Court of Appeals has held that an amendment to a notice of claim that only listed property damage but wished to include personal injuries was not a technical amendment, thus not within the scope of the statute. (*La Rocco v New York*, 29 NY2d 687, 688 [1971]).

Petitioner avers that the addition of further incidents on different dates, details regarding all those additional incidents and alleged offenders are “technical, non-substantive” amendments to the timely filed notice of claim.

The Court disagrees with petitioner’s contention. Adding additional incidents to a notice of claim, nearly 4 years after the timely notice of claim was filed, and where the action has yet to be commenced, would clearly obviate the purpose as spirit of *GML* §50-e, allowing prompt investigations of claims. Allowing such conduct would render the statute meaningless and would contradict well-settled case law.

Alternatively, petitioner seeks leave to file a late notice of claim. Petitioner argues that the City is not prejudiced by either an amendment or a late notice of claim because the City had notice of the alleged incidents.

GML § 50-e (5)

It is well settled law that granting a petition to file a late notice of claim is discretionary. *GML* § 50-e (5), which pertains specifically to an application to file a late notice of claim, states in pertinent part that, “Upon application, the court, in its discretion, may extend the time to serve a notice of claim... [and] the 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 period specified... or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including, ...whether the delay in

serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.”

Additionally, it is well settled that courts consider “whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame.”

(see *GML § 50-e [5]*). The presence or absence of any one factor is not determinative.

(*Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], quoting *Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003].)

Specifically, the failure to assert a reasonable excuse, alone, is not fatal to the application.

Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.], citing (*Ansong v City of NY*, 308 AD2d 333 [1st Dept 2003].)

In the context of *GML § 50-e*, "actual knowledge" means that the respondent acquired knowledge of the essential facts forming the basis of the claim, not simply knowledge of the occurrence of an accident. *Kim v City of New York*, 256 AD2d 83 [1st Dept 1998], app. denied, 93 NY29 896 [1999]. Petitioner has the burden of establishing this element. *Washington v City of New York*, 72 NY2d 881 [1988].

Petitioner, in a conclusory fashion, states that respondents knew about the prior incident and “had been in possession of the relevant information and investigation materials since the beginning”, however, petitioner does not provide any evidence to support this contention. The petition is devoid of an affidavit from petitioner’s mother specifying dates and times she spoke to school officials or any names of the school officials she allegedly contacted. Further, there are no exhibits of letters or email correspondence to any school official detailing any allegations that respondents are being charged to have notice of. Petitioner does not even identify what those

“investigation materials” actually are, thus has failed to establish her burden that the respondents have actual notice.

It is well-settled that the passage of time can be inferred as prejudice. *See Donaldson v. New York City Hous. Auth.*, 91 AD3d 550, 551, [2012] “Moreover, the prejudice to defendant is apparent inasmuch as the original notice of claim was insufficient to allow defendant to conduct a meaningful investigation of plaintiff’s amended claim”.

Based on the foregoing, and petitioner’s failure to meet her burden with respect to actual notice, lack of prejudice, and failure to provide any excuse for the almost 4-year delay, the petition is denied.²

Accordingly, it is hereby

ORDERED that the petition is denied without prejudice, except as indicated above.

This constitutes the decision and order of the Court.

9/14/2019
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED NON-FINAL DISPOSITION

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT OTHER REFERENCE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK J.S.C.

² Assuming *arguendo* that the statute of limitations in GML § 50-i is tolled pursuant to CPLR § 208, petitioner has failed to meet her burden as stated above.