

**Groben v Sacred Heart of Jesus Sch.**

2019 NY Slip Op 33813(U)

December 24, 2019

Supreme Court, New York County

Docket Number: 153983/2019

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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EMILY GROBEN,

Index No. 153983/2019

Plaintiff

- against -

DECISION AND ORDER

SACRED HEART OF JESUS SCHOOL,

Defendant

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover for injuries sustained May 22, 2018, when a student attacked plaintiff, a teacher in defendant's school. Plaintiff moves for permission to serve a late notice of claim and a supplemental summons on nonparties City of New York, New York City Department of Education (DOE), and New York City Board of Education (BOE) and to amend her complaint to add claims against them. C.P.L.R. §§ 305(c), 1002(b), 3025(b); N.Y. Gen. Mun. Law § 50-e(5). These nonparties oppose her motion. For the reasons explained below, the court denies plaintiff's motion with respect to the City of New York, but grants her motion in part with respect to DOE and BOE.

II. PLAINTIFF'S CLAIM AGAINST THE CITY

The City of New York is a separate municipal entity from DOE and BOE. Gonzalez v. City of New York, 94 A.D.3d 559, 559 (1st

Dep't 2012); Perez v. City of New York, 41 A.D.3d 378, 379 (1st Dep't 2007). See Padilla v. Department of Educ. of the City of N.Y., 90 A.D.3d 458, 458 (1st Dep't 2011). Although plaintiff's affidavit repeatedly refers to the City of New York, she simply equates the City of New York with DOE, when they are distinct entities, neither of which is subordinate to or supervisory over the other entity.

### III. PLAINTIFF'S LATE NOTICE OF CLAIM

Plaintiff failed to file a notice of claim with DOE or BOE within the required 90 days after she was attacked May 22, 2018. N.Y. Gen. Mun. Law § 50-e(1). Pursuant to General Municipal Law § 50-i(1)(c), however, plaintiff may move for leave to file a late notice of claim within the statute of limitations of one year and 90 days following her injury. N.Y. Gen. Mun. Law § 50-i(1)(c). Therefore plaintiff's motion served August 12, 2019, is timely.

In determining whether to grant leave to file a late notice of claim, the court considers three principal factors. They are whether DOE and BOE received actual knowledge of the essential facts of plaintiff's claims within 90 days after her claims arose or a reasonable time afterward, whether plaintiff demonstrates a reasonable excuse for the failure to serve the notice of claim timely, and whether the delay would substantially prejudice DOE and BOE. Mercedes v. City of New York, 169 A.D.3d 606, 607 (1st

Dep't 2019); Dominguez v. City Univ. of N.Y., 166 A.D.3d 540, 540-41 (1st Dep't 2018); Thomas v. City of New York, 118 A.D.3d 537, 537 (1st Dep't 2014).

A. Actual Knowledge

Although DOE and BOE maintain that they did not know about plaintiff's claims, DOE and BOE offer no evidence to contradict plaintiff's account. Plaintiff attests that she reported her concerns about the child who eventually attacked her to her supervisor, who subsequently reported plaintiff's concerns to "DOE case worker Marlene Berger." Aff. of Kenneth I. Beal Ex. A ¶ 5. Separately, plaintiff filed a report with the New York City Administration for Children's Services, which resulted in the assignment of a DOE case worker who not only observed plaintiff interacting with the child at defendant school, but also offered suggestions regarding how to handle the child. Both the case worker's presence in the classroom and the case worker's subsequent recommendations indicate the DOE's actual knowledge of the essential facts constituting plaintiff's claim. Rodriguez v. City of New York, 172 A.D.3d 556, 558 (1st Dep't 2019); Mercedes v. City of New York, 169 A.D.3d at 607; Thomas v. City of New York, 118 A.D.3d at 538.

B. Reasonable Excuse

DOE and BOE insist that the court must deny plaintiff's motion because plaintiff provides no reasonable excuse for the

failure to serve her notice of claim timely. Although her explanation that she was misinformed and believed her exclusive remedy was worker's compensation is not a reasonable excuse, Mehra v. City of New York, 112 A.D.3d 417, 418 (1st Dep't 2013), the lack of an excuse is not fatal to her motion. Mercedes v. City of New York, 169 A.D.3d at 607; Dominquez v. City Univ. of N.Y., 166 A.D.3d at 541; Thomas v. City of New York, 118 A.D.3d at 537.

C. Prejudice

Plaintiff maintains that the late notice will not substantially prejudice DOE or BOE because they knew of her concerns, created the program that assigned her to defendant school and the program's relevant protocols, funded the program, were directly involved in its day-to-day operations, and had the authority and opportunity to investigate the attack. Plaintiff thus satisfies her initial burden to demonstrate that her late notice of claim will not substantially prejudice DOE and BOE, Newcomb v. Middle Country Cent. Sch. Dist., 28 N.Y.3d 455, 466 (2016), which they do not rebut. Instead, they simply urge that the passage of time amounts to prejudice, without presenting the particularized evidence required to demonstrate prejudice. Id. at 467; Rodriguez v. City of New York, 172 A.D.3d at 557-58.

D. Failure to Sign the Notice of Claim

Finally, DOE and BOE claim that plaintiff's failure to sign her notice of claim amounts to a fatal defect. General Municipal Law § 50-e(2), however, explicitly allows the notice of claim to be sworn to "by or on behalf of the claimant." Plaintiff's attorney thus complied with the statute by verifying the notice of claim on plaintiff's behalf.

IV. CONCLUSION

Although plaintiff presents no excuse for her lateness, once she consulted an attorney she promptly and within the statute of limitations requested leave to file a late notice of claim with nonparties, which had received actual knowledge of the essential facts constituting her claims and demonstrate no prejudice. For these reasons, the court grants plaintiff's motion for leave to serve a late notice of claim and a supplemental summons on the New York City Department of Education and the New York City Board of Education. C.P.L.R. §§ 305(a) and (c), 3025(b); N.Y. Gen.Mun. Law § 50-3(5). See C.P.L.R. § 3012(b). The court considers her notice of claim filed with these two nonparties July 22, 2019, timely filed.

For the reasons explained above, the court denies plaintiff's motion to the extent that plaintiff seeks relief against the City of New York. Because she fails to present a proposed amended complaint as required, the court also denies her

motion to the extent that she seeks to amend her complaint.

C.P.L.R. § 3025(b); PK Rest., LLC v. Lifshutz, 138 A.D.3d 434, 438 (1st Dep't 2016); McBride v. KPMG Intl., 135 A.D.3d 576, 580 (1st Dep't 2016); VFS Fin. v. Insurance Servs. Corp., 111 A.D.3d 505, 506 (1st Dep't 2013); Dragon Head LLC v. Elkman, 102 A.D.3d 552, 553 (1st Dep't 2013). This decision constitutes the court's order.

DATED: December 24, 2019



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**