

**D.G. v New Visions for Pub. Schs., Inc.**

2020 NY Slip Op 35679(U)

August 26, 2020

Supreme Court, Bronx County

Docket Number: Index No. 32733/2018E

Judge: Donald Miles

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This opinion is uncorrected and not selected for official publication.

#003

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 08

|                     |                          |
|---------------------|--------------------------|
| Case Disposed       | <input type="checkbox"/> |
| Settle Order        | <input type="checkbox"/> |
| Schedule Appearance | <input type="checkbox"/> |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

-----X

D.G., an infant by and through her Parent and  
Legal Guardian LILIA MORENO, and LILIA MORENO,  
individually,

Index No. 32733/2018E

*C*

-against-

Hon. DONALD MILES

NEW VISIONS FOR PUBLIC SCHOOLS, INC and  
NEW VISIONS CHARTER SCHOOL FOR  
ADVANCED MATH AND SCIENCE,

Justice Supreme Court

-----X

The following papers numbered 1 to      Read on this motion, (Seq. No ) for  
**VACATE ORDER/JUDGMENT** noticed on **MAY 07 2020.**

|  | PAPERS NUMBERED |  |
|--|-----------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | No(s).          |  |
| Answering Affidavit and Exhibit  | No(s).          |  |
| Replying Affidavit and Exhibits  | No(s).          |  |

Upon the foregoing papers, it is ordered that the decision of 5/7/2020 is hereby vacated, and the motion to dismiss is decided in accordance with memorandum decision rendered on August 26, 2020.

Respectfully Referred to: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: September 15, 2020

Hon. *Donald Miles*  
\_\_\_\_\_  
**DONALD A. MILES, J.S.C.**

#003

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
IAS PART 8

Index No. 32733/2018E  
Motion No.:  
Motion Date.:

D.G., an infant by and through her Parent and  
Legal Guardian LILIA MORRERO, and  
LILIA MORRERO, Individually

Plaintiffs,

-against-

NEW VISIONS FOR PUBLIC SCHOOLS, INC  
and NEW VISIONS CHARTER SCHOOL FOR  
ADVANCED MATH AND SCIENCE,

Defendants.

*NEW*  
**DECISION/ ORDER**  
**Present:**  
**Hon. Donald Miles**  
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss and plaintiffs' motion for leave to file late notice of claim.

Papers

Numbered

Notice of Motion, Affirmation in Support and  
exhibits thereto.....  
Memorandum of Law in Support.....  
Memo of Law in Opposition by Plaintiffs.....  
Memo of Law in Reply.....  
Notice of Motion by Plaintiffs, Affirmation  
in Support and Exhibits thereto.....  
Affirmation in Opposition and Exhibits.....  
Reply Affirmation.....

1  
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7

Defendants New Visions for Public Schools, Inc. ("New Visions") and New Visions Charter High School for Advanced Math and Science ("AMS") incorrectly sued herein as "New Visions Charter School for Advanced Math and Science," seek dismissal of the complaint, pursuant to CPLR § 3211(a)(5) and CPLR § 3211(a)(7), on the grounds of *res judicata*, and that the complaint fails to state a cause of action as plaintiffs failed to satisfy the mandatory condition precedent of serving a Notice of Claim on AMS, prior to commencing the action, contrary to the requirements of Education Law 3813 and General Municipal Law 50-e. Plaintiffs oppose the motion and move by a separate motion for, *inter alia*, leave to file a late notice of claim. Both motions are consolidated for disposition as follows:

Plaintiffs commenced the instant action on or about November 7, 2018, by filing a summons and complaint seeking to recover monetary damages for injuries sustained by the infant plaintiff Destiny Gonzalez in separate incidents on June 11, 2014 and April 22, 2015. This action is identical to the summons and complaint filed on or about October 31, 2016 by said counsel on behalf of the plaintiffs against defendant New Visions, under Index No.27385/2016E, which was subsequently amended on or about December 22, 2016, to add AMS as a defendant. On or about February 27, 2017, Plaintiffs signed a Stipulation of Discontinuance with Prejudice as to New Visions. See Ex. "B."

Defendant AMS subsequently moved for dismissal of the complaint on the ground that plaintiffs had failed to serve a notice of claim upon the school. On or about August 10, 2018, the Honorable John R. Higgitt granted defendant's motion, a copy of which Order with Notice of Entry is annexed to the moving papers. See Ex. "F." The plaintiffs' subsequent motion to renew and reargue that decision and order was denied by Judge Higgitt in an Order dated November 8, 2018.

Defendants now move to dismiss this second action on the basis that the subject claims have already been dismissed by the Court and because plaintiffs have continued to fail to meet the condition precedent of serving a Notice of Claim upon AMS. Plaintiffs oppose the motion and move by their own separate motion for, *inter alia*, leave to file a late notice of claim on the grounds that AMS possesses actual knowledge of the claims and the lack of prejudice to defendants. Plaintiffs also maintain that *res judicata* and the timeliness bar of Education Law § 3813(a)(2) are inapplicable, since the infancy of plaintiff Destiny Gonzalez, who was born in January, 1999, tolled the applicable statute of limitation, and that once dismissed, pursuant to CPLR § 205-a, a plaintiff is still eligible to re-file the matter and file a notice of claim for an additional six months - hence the reason plaintiffs re-filed the instant action as a second action.

Plaintiffs do not dispute that they are statutorily required to serve AMS, a charter school, with a notice of claim, prior to commencing this action. In their complaint plaintiffs failed to allege that a written notice of claim had been served upon AMS. Because of this very fact, the court issued a final judgment dismissing the first action. The second action which involves the same parties, same claims and arises out of the same transaction or series of transactions is

therefore barred by *res judicata*

Education Law § 3813(2), in conjunction with General Municipal Law § 50-i, set forth a one-year and ninety-day (90) statute of limitations period from the accrual date for tort actions brought against public schools. General Municipal Law 50-(e)(5) provides that an application for an extension of time to serve a notice of claim may be granted at the court's discretion. However, the claimant must seek leave of the court to serve a late notice of claim within the applicable statute of limitations. A court is without power to authorize the late filing of a claim or to order that a late filed claim be deemed timely *nunc pro tunc* where the statute of limitations has expired. It is well-settled that New York courts do not have discretion to accept an application for leave to file a late notice of claim once it is beyond the one year ninety-day statute of limitations. (See *Hall v City of New York*, 1 AD3d 254 [1st Dept 2003]), and the filing of a summons and complaint does not toll that time frame (See e.g. *Mills v Glance*, 430 NYS2d 22 [Sup Ct, Kings County 1980]; *Robinson v Lancaster*, 187 AD2d 932 [4th Dept 1992].)

In the case at bar, plaintiff's injuries occurred on June 11, 2014 and April 22, 2015 and thus plaintiffs were required to commence an action or seek leave to file a late Notice of Claim on or before September 9, 2015 for the first alleged incident and July 21, 2016 for the second alleged incident. However, plaintiffs' proposed Notice of Claim and motion which seeks leave to file a late Notice of Claim are both dated September 13, 2018, well beyond the one year ninety-day statute of limitations. Since this action was not commenced until November 7, 2018, it is time-barred and must be dismissed with prejudice. Even if the statute of limitations were tolled until plaintiff turned eighteen in January 2017, the time to seek leave to serve a late notice of claim, one year and ninety days after her eighteenth birthday - April 2018 - has still expired. Plaintiff's argument that the complaint was first filed within the statute of limitations is unavailing.

Furthermore, Plaintiffs' claims against New Visions are improper as the Stipulation of Discontinuance filed on or about February 27, 2017, bars plaintiffs from bringing any additional action arising out of the same occurrences that were the subject of the first action.

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendant New Visions Charter School for

Advanced Math and Science is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint as against defendants; and it is further

ORDERED that the motion for leave to file a late notice of claim by plaintiffs is denied.

This constitutes the decision and order of this Court.

August 26, 2020

DATE

*Donald A. Miles*

HON. DONALD MILES, J.S.C.