

L.L. v New York City Dept. of Educ.

2023 NY Slip Op 33917(U)

November 2, 2023

Supreme Court, New York County

Docket Number: Index No. 153899/2023

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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INDEX NO. 153899/2023

L.L. AN INFANT, UNDER THE AGE OF 14 YEARS
BY HIS MOTHER AND NATURAL GUARDIAN,
XIAMIN ZENG,

MOTION DATE 07/10/2023

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion for LEAVE TO FILE – LATE NOTICE OF CLAIM.

Upon the foregoing documents, plaintiffs’ motion for leave to serve a late notice of claim is granted for the reasons set forth below.

In June of 2022, plaintiffs, proceeding pro se, filed a notice of claim against defendant the New York City Department of Education (“DOE”) asserting claims for negligent hiring, training and/or supervision based on allegations that the infant plaintiff was bullied by other students at PS 124 Yung Wing School on several occasions, resulting in physical injuries, and verbally abused by teachers, and that DOE refused to transfer him to a different school after being informed of these events (See NYSCEF Doc. No. 13).

After filing the notice of claim, plaintiffs retained counsel. Plaintiffs were unable to provide a copy of the notice of claim to counsel (NYSCEF Doc. No. 6 [Shields Affirm. at ¶9]) and, as a result, plaintiffs served an amended notice of claim on March 28, 2023 (the “Amended Notice of Claim”) alleging that the infant plaintiff was assaulted by another student or students on April 1,

2022, and that “from February through May 2022,” his teachers at PS 124 Yung Wing School engaged in corporal punishment¹ (NYSCEF Doc. No. 7 [Amend. Notice of Claim at ¶3]).

On April 28, 2023, plaintiffs commenced this action reiterating the factual allegations set forth in their Amended Notice of Claim and asserting a claim for negligent supervision as well as a derivative claim by plaintiff Xiamin Zeng, the infant plaintiff’s mother (NYSCEF Doc. No. 1 [Compl.]).

On July 10, 2023, plaintiffs filed the instant motion pursuant to General Municipal Law (“GML”) §50-e(5), to deem the amended notice of claim filed on March 28, 2023 timely filed nunc pro tunc. In support of their motion, plaintiffs argue that the DOE acquired actual knowledge of the essential facts constituting their claims through its receipt of plaintiffs’ original notice of claim in June 2022 as well as its employees’ involvement in the acts giving rise to plaintiffs’ claims and, therefore, will not be prejudiced.

The DOE opposes plaintiffs’ motion, arguing that plaintiffs have not demonstrated that the DOE timely acquired actual knowledge of plaintiffs’ claims and that it will be prejudiced if leave is granted as it is now unable to adequately investigate plaintiffs’ claims. The DOE argues that plaintiffs’ claims are barred by the applicable statute of limitations to the extent that they arise from events occurring prior to April 10, 2022.

DISCUSSION

As a threshold matter, since plaintiffs’ seek leave to file an amended notice of claim asserting additional, substantive theories of liability (i.e., that the infant plaintiff’s teachers engaged in corporal punishment), it is clear that plaintiffs’ motion is one for leave to serve a late

¹ The Amended Notice of Claim does not list the infant plaintiff’s mother as a separate plaintiff or assert derivative claims on her behalf.

notice of claim pursuant to GML §50-e(5), rather than a motion to amend the original notice of claim pursuant to GML §50-e(6), as the DOE contends.

Neither is plaintiffs' amended notice of claim barred, in whole or in part, by the applicable statute of limitations, as the City contends. Given the infant plaintiff's infancy, the one-year-and-ninety-day statute of limitations that would typically apply to such a motion (See GML §50-i) has not yet begun to run (CPLR §208; see also Matter of Quick v New York City Health & Hosps. Corp., 106 AD3d 493, 493 [1st Dept 2013]). Accordingly, the Court turns to the merits of plaintiffs' motion.

When considering an application for leave to file a late notice of claim, the court considers a number of factors, with particular emphasis on: "(i) the reasonableness of the excuse offered for the delay in filing the notice of claim; (ii) whether the municipality obtained actual knowledge of the essential facts constituting the claim within the 90-day as-of-right filing period or within a reasonable time thereafter; and (iii) whether the municipality was prejudiced because the claimant did not file during the as-of-right period" (Orozco v City of New York, 200 AD3d 559, 560 [1st Dept 2021], lv to appeal granted, 39 NY3d 903 [2022]). "The presence or absence of any one factor is not determinative. However, courts have noted that the most important factor is whether the municipality acquired actual knowledge of the essential facts constituting the claim within the time specified" (Matter of Corwin v City of New York, 141 AD3d 484, 489 [1st Dept 2016] [internal citations and quotations omitted]). The statute "is remedial in nature and should be liberally construed" (Id.).

While petitioners do not offer a reasonable excuse for their delay in filing the instant motion, this omission is not dispositive where, as here, plaintiffs have established that the DOE had actual notice and will suffer no prejudice from the delay. Specifically, plaintiffs established

that the DOE acquired knowledge of the infant plaintiff's claim that he was assaulted on April 1, 2022 through their receipt of the original notice of claim (See e.g., Matter of Corwin v City of New York, 141 AD3d 484, 489-490 [1st Dept 2016] ["to the extent that the allegations concerning the design of the station differ between the original notice of claim and the proposed amended notice of claim, the City unquestionably had actual notice of the claims in the latter document, based on the original notice of claim"]). In addition, as DOE employees were allegedly directly involved in the corporal punishment of the infant plaintiff, plaintiffs have demonstrated that the DOE had actual knowledge of the essential facts underlying this claim (See K.A. v Wappingers Cent. Sch. Dist., 151 AD3d 828, 831 [2d Dept 2017] [actual knowledge established where "an employee of the School District was not only 'directly involved' in the incident, but he committed the intentional tortious conduct giving rise to the claim"]; see also Matter of Orozco v City of New York, 200 AD3d 559, 562 [1st Dept 2021]).

In light of the DOE's actual knowledge of the facts underlying their claims, plaintiffs have also established that the DOE will not be prejudiced by plaintiffs' delay in filing the notice of claim (See Matter of Orozco v City of New York, 200 AD3d 559, 563 [1st Dept 2021]). The DOE's contention "that it did not have an opportunity to conduct an investigation because it was not able to preserve potential evidence or interview witnesses while their memories and recollections were fresh," is "insufficient to demonstrate prejudice" (Matter of Dominguez v City Univ. of New York, 166 AD3d 540, 541 [1st Dept 2018]; see also Matter of Mercedes v City of New York, 169 AD3d 606, 607-608 [1st Dept 2019]).

In light of the foregoing, it is

ORDERED that plaintiffs’ motion is granted and the amended notice of claim (NYSCEF Doc. No. 7) previously served on the New York City Department of Education on March 28, 2023 is deemed timely filed and served nunc pro tunc; and it is further

ORDERED that plaintiffs shall, within ten days of the date of this decision and order, file and serve a copy of this decision and order, with notice of entry, upon defendant as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “Efiling” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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11/2/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: