

Mak-Rivera v City of New York
2024 NY Slip Op 35218(U)
May 24, 2024
Supreme Court, Queens County
Docket Number: Index No. 702580/2024
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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IVY MAK-RIVERA AND AARON RIVERA,

Index No.:702580/2024

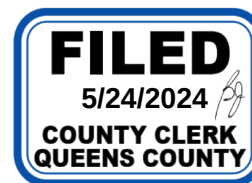
Petitioners,

Motion Date: 3/25/2024

Motion Cal. No.: 22

-against-

Motion Sequence No.: 1

THE CITY OF NEW YORK & THE NEW YORK CITY
DEPARTMENT OF EDUCATION,Respondent.
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The following efiled papers numbered 12-25 submitted and considered by Petitioner Ivy Mak-Rivera and Aaron Rivera (hereinafter referred to as "Petitioner" or "Mak-Rivera") seeking an Order against The City of New York & The New York City Department of Education (hereinafter as City) pursuant to Education Law § 3813 and Section 50-e(5) of the General Municipal Law for Leave to Serve and file a late Notice of Claim, *nunc pro tunc*.

Papers
Numbered

Notice of petition-Affirmation in Support-

Affidavits-Exhibits.....

EF 12-14

Affirmation in Opposition-Affidavits-Exhibits.....

EF 15-24

Affirmation in Reply.....

EF 25

Relevant Factual and Procedural Background

This Matter arises out of an incident where Ivy Mak-Rivera was struck in the face by a student while teaching at P.S. 305 located at 378 Seneca Avenue, Queens, New York on September 18, 2023. The petitioner acknowledges that the Notice of Claim was not served within the statutory 90-day period, as required by General Municipal Law §50-e. The service was delayed and eventually completed on January 30, 2024, 44 days after the statutory period expired and 134 days after the incident.

Law and Application

General Municipal Law § 50-e provides:

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises...

5. Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, 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 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 public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted...

7. Applications under this section. All applications under this section shall be made to the supreme court or to the county court: (a) in a county where the action may properly be brought for trial, (b) if an

action to enforce the claim has been commenced, in the county where the action is pending, or (c) in the event that there is no motion term available in any of the counties specified in clause (a) or (b) hereof, in any adjoining county. Where the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim.

“A claimant's failure to file a timely notice of claim is not necessarily fatal. Courts have broad discretion to extend the 90-day time limitation “in exceptional cases” upon consideration of all relevant factors, provided the statute of limitations of one year and 90 days has not already expired” (see *Jaime v City of New York*, 2024 NY Slip Op 01581 [Ct App Mar. 21, 2024]). In determining whether to grant leave to serve a late notice of claim under General Municipal Law § 50–e(5), the court, in its discretion, must consider all relevant facts and circumstances, including, but not limited to, whether (1) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, (2) the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) the delay would substantially prejudice the municipality in its defense (see *Dautaj v City of New York*, 208 AD3d 479, 479 [2d Dept 2022]; citing *Matter of Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 461 [2016]; *Matter of Gelish v Dix Hills Water Dist.*, 58 AD3d 841, 841 [2d Dept 2009]; *Williams ex rel. Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). The presence or absence of any factor is not determinative (see *Dautaj v City of New York*, 208 AD3d 479, 479–80 [2d Dept 2022]; *Matter of Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 467 [2016]). However, whether the public corporation acquired timely, actual knowledge of the essential facts underlying the claim within 90 days after the claim arose or a reasonable time thereafter is a factor which should be accorded great weight in determining whether to grant leave to serve a late notice of claim (see *Jaime v City of New York*, –AD3d–, 2024 NY Slip Op 01581 [2024]; *Beary v City of Rye*, 44 NY2d 398, 409 [1978]; *Dautaj v City of New York*, 208 AD3d 479, 479 [2d Dept 2022]; *Etienne v City of New York*, 189 AD3d 1400, 1401 [2d Dept 2020]). The Party seeking leave has the burden of establishing the municipality acquired actual knowledge of the essential facts constituting the claim through the submission of non-speculative evidence (see *Jaime v City of New York*, 2024 NY Slip Op 01581 [Ct App Mar. 21, 2024]; citing *Washington v City of New York*, 72 NY2d 881, 883 [1988]).

In support, Mak-Rivera asserts that the City had detailed knowledge from her incident reports and the witness statement, meeting the requirement for actual knowledge of the essential facts. Mak-Rivera then allege that her injuries prevented her from timely seeking legal counsel and filing the Notice of Claim. The medical advice to refrain from work and her difficulties with vision support this excuse. Mak-Rivera argues that the City cannot demonstrate substantial prejudice from the short delay. The facts of the incident were known to them, and they had ample opportunity to investigate. Mak-Rivera concluded that the statutory notice requirement should not operate to frustrate legitimate claims. Given its remedial nature, it should be liberally construed to allow claimants their day in court.

Here, this Court finds that under the circumstances, Mak-Rivera established that the City acquired actual knowledge of the essential facts constituting the claim through the submission of non-speculative evidence. According to her affidavit, Mak-Rivera reported the incident to the school staff, including the principal immediately after it happened; Mak-Rivera filled out a New York City Department of Education Comprehensive Injury Report and submitted to school staff, a witness statement, part of the New York City Department of Education Comprehensive Injury Report, was also submitted. The NYCDOE here acquired actual knowledge of the facts that underlie the legal theory or theories on which liability is predicated (*see Kellman v Hauppauge Union Free School Dist.*, 120 AD3d 634, 636 [2d Dept 2014]; citing *Leeds v Port Washington Union Free School Dist.*, 55 AD3d 734, 735 [2d Dept 2008]; *Matter of Vasquez v City of Newburgh*, 35 AD3d 621, 623 [2d Dept 2006]; *Gibbs v City of New York*, 22 AD3d 717, 719 [2d Dept 2005]; *Schiffman v City of New York*, 19 AD3d 206, 207 [1st Dept 2005]; *Ayala v City of New York*, 189 AD2d 632, 633 [1st Dept 1993]). Mak-Rivera also had prior communications with the school administrations where she express concerns about the safety of her classroom, further showing that the NYCDOE had actual notice.

By demonstrating that the defendants acquired timely knowledge of the essential facts of the claim, the infant plaintiff met his initial burden of establishing a lack of substantial prejudice to the defendants (*see Kellman v Hauppauge Union Free School Dist.*, 120 AD3d 634, 636 [2d Dept 2014]; citing *Jordan v City of New York*, 41 AD3d 658, 660 [2d Dept 2007]; *Gibbs v City of New York*, 22 AD3d 719, 804 [2d Dept 2005]; *Schiffman v City of New York*, 19 AD3d at 207 [1st Dept 2005]). On the other hand, NYCDOE's conclusory assertion that they will be unable to investigate Mak-Rivera's claims due to the passage of time was insufficient to overcome the Mak-Rivera's showing of a lack of substantial prejudice (*see Kellman v Hauppauge Union Free School Dist.*, 120 AD3d 634, 636 [2d Dept 2014]; citing *Jordan v City of New York*, 41 AD3d at 660 [2d Dept 2007]; *Gibbs v City of New York*, 22 AD3d 720, 804 [2d Dept 2005]).

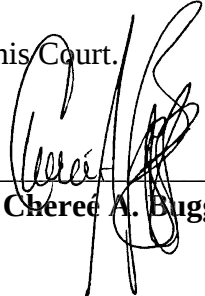
Furthermore, Mak-Rivera demonstrated a reasonable excuse for the failure to serve a timely notice of claim. The Doctor's note by Peter M. Brennen, MD supports Mak-Rivera's Affidavit which claims that due to her injuries she had not been able to retain an attorney prior to December 18, 2023, causing the delayed submission of the late notice of claim. Accordingly, it is hereby

ORDERED, that the Petition is granted; and it is further

ORDERED, Petitioner's proposed Notice of Claim dated January 29, 2024 shall be deemed Petitioner's Notice of Claim and deemed timely served *nunc pro tunc*.

This constitutes the decision and order of this Court.

Dated: May 24, 2024


Hon. Chereé A. Buggs, JSC

