

Dodge v South Country Cent. Sch. Dist.
2024 NY Slip Op 35468(U)
May 21, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 602415/2024
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 602415/2024

CAL. No.

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE: 02/27/24
MOT. SEQ. # 1 – MD;CASEDISP

-----X
SKYE DODGE,

Petitioner,

- against -

THE SOUTH COUNTRY CENTRAL SCHOOL
DISTRICT,

Respondent.
-----X

Upon the following papers e-filed (documents # 1 through #8) it is,

ORDERED that the application by petitioner for an order granting leave to serve a late notice of claim upon respondent, is **DENIED**; and it is further

ORDERED that upon Entry of this Order, movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This proceeding was commenced pursuant to Education Law § 3813(2-a) and General Municipal Law § 50-e (5) for leave to serve a late notice of claim. Petitioner alleges the

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following. In or around 2014 to 2016 she attended school at Frank P. Long in the respondent school district. Frank P. Long school is near the Town of Brookhaven landfill where toxic substances and/or odors were emitted and penetrated said school. On or about May 15, 2023 petitioner was diagnosed with thyroid cancer. Then, on or about July 20, 2023, petitioner filed a notice of claim against the Town of Brookhaven but not against respondent. On or about November 22, 2023 petitioner became aware of a wrongful death lawsuit by the Estate of J.C. against respondent wherein it is alleged that a now deceased former student (J.C.) at Frank P. Long school had been diagnosed with non-Hodgkin's lymphoma. Now, petitioner seeks an order granting leave to serve a late notice of claim.

Petitioner argues that respondent became aware in 2017 and 2018 of various relevant complaints. Specifically, petitioner states respondent was aware of health issues and testing levels of volatile organic compounds ("VOCs") in a few classrooms at the Frank P. Long school. Petitioner also argues that in the unrelated lawsuit by the Estate of J.C., the June 22, 2023 50-h hearing provided respondent with an opportunity to investigate the underlying facts and circumstances of petitioner's claim in this case. Additionally, petitioner claims that respondent will not be prejudiced by petitioner's delay in serving a late notice of claim because it had actual knowledge of the essential facts and circumstances of petitioner's claim.

In opposition, respondent argues that petitioner does not establish a reasonable excuse for failing to serve a timely notice of claim. Further, respondent states that they did not have actual knowledge of the instant claim through the unrelated lawsuit of the Estate of J.C., and petitioner has not demonstrated that the delay in serving a late notice of claim will not substantially prejudice respondent in maintaining its defense on the merits.

This Court must look to both Education Law § 3813 (2) and (2-a) and General Municipal Law § 50-e (1)(a) and (5) to determine petitioner's application for leave to serve a late notice of claim.

Education Law § 3813 (2) requires a claimant to serve a notice of claim upon a school district or any school. General Municipal Law § 50-e (1)(a) provides that such notice shall be served within 90 days after the claim arose. However, if petitioner fails to serve a notice of claim within the 90 days after the claim arose, Education Law § 3813[2-a] and General Municipal Law § 50-e (5) permit the court to extend the time to serve a late notice of claim (*Brunson v New York City Health and Hospitals Corporation*, 144 AD3d 854, 42 NYS3d 34 [2d Dept 2016]), and such application is addressed to the court's sound discretion after considering specific factors (*Metzger v Town of Warwick*, 294 AD2d 503, 742 NYS2d 861 [2d Dept 2002]). The request for an extension to file a late notice of claim must be made within one year and 90 days after the claim arose. Such an application made within one year and 90 days is a condition precedent to commencement of this action and then the application must also satisfy specific factors (General Municipal Law § 50-e [5]).

Initially, for purposes of commencing this action, the Court must determine when the claim arose in a case of exposure to a harmful substance such as toxic substances and/or odors.

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CPLR 214-c (2) provides that the time to commence an action for injuries resulting from exposure to a harmful substance shall be computed from the date that the “injury” was discovered or the date the injury should have been discovered with reasonable diligence.

More specifically, within the meaning of CPLR 214-c (2), an injury from exposure to a harmful substance is discovered when the injured party learns of the primary condition on which the claim is based (*Matter of New York County DES Litigation v Eli Lilly & Company et al.*, 89 NY2d 506, 655 NYS2d 862 [1997]; *Potanovic v County of Rockland*, 267 AD2d 291, 700 NYS2d 195 [2d Dept 1999]). “Discovery of the injury refers to the discovery of the physical condition and not the more complex concept of discovery of both the condition and the nonorganic [origin] of that condition.” (*Scheidel v A.C. and S. Inc.*, 258 AD2d 751, 752, 685 NYS2d 829, 830-31 [3d Dept 1999]; *Matter of Seekings v Jamestown Public School System*, 224 AD2d 942, 637 NYS2d 897 [4th Dept 1996]; see also *Wells v 3M Co.*, 137 AD3d 1556, 28 NYS3d 746 [3d Dept 2016]).

Here, the primary manifestation of petitioner’s condition was on May 15, 2023 when petitioner was diagnosed with thyroid cancer. It is not on November 22, 2023 when petitioner claims she became aware of the cause of an injury in an unrelated lawsuit by the Estate of J.C. Therefore, here, petitioner’s claim arose on May 15, 2023, and it is clear that she did not file a notice of claim within 90 days. However, her application to file a late notice of claim was made on January 29, 2024 – within one year and 90 days of when the claim arose. Accordingly, petitioner’s application to file a late notice of claim is timely. The condition precedent allowing the Court to consider the General Municipal Law § 50-e (5) factors has been met.

The Court will now consider the specific factors under General Municipal Law § 50-e (5). In determining the application under General Municipal Law § 50-e (5), factors to be considered are: “whether the petitioners demonstrated a reasonable excuse for the failure to serve a timely notice of claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter¹, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits” (*Nieves v Girimonte* 309 AD2d 753, 754, 765 NYS2d 64 [2d Dept 2003]; see also *Welch v Bd. of Educ.*, 287 AD2d 761, 762-63, 731 NYS2d 94, 97 [3d Dept 2001] [no one factor is dispositive of the issue (of leave to file a late notice of claim)]).

With respect to the factor of whether the petitioner demonstrated a reasonable excuse for the failure to serve a timely notice of claim, here, petitioner never specifically addressed or articulated any reasonable excuse for the failure to serve a timely notice of claim (*Saponara v Lakeland Cent. School Dist.*, 138 AD3d 870, 29 NYS3d 491 [2d Dept 2016]; *Anderson v New York City Dept. of Educ.*, 102 AD3d 958, 958 NYS2d 746 [2d Dept 2013]). Therefore,

¹ A delay of four months following the expiration of the 90-day notice period did not constitute a reasonable time under the circumstances of that case (*Moroz v City of New York*, 165 AD3d 799, 85 NYS3d 566 [2d Dept 2018]).

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petitioner fails to provide a reasonable excuse for failing to timely serve a notice of claim upon the respondent.

With respect to whether the municipality acquired actual knowledge of the essential facts constituting this claim, petitioner fails to demonstrate that respondent had actual knowledge of petitioner's claim based upon the unrelated wrongful death lawsuit and the June 22, 2023 50-h hearing relating to same. Such information about an unrelated lawsuit may impart general knowledge of a wrong but fails to give respondent actual knowledge of the essential facts constituting this instant claim (*see Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 855 NYS2d 265 [2d Dept 2008] [general knowledge that a wrong has been committed is insufficient to provide actual knowledge of the essential facts]; *see also Pappalardo v City of New York*, 2 AD3d 699, 768 NYS2d 660 [2d Dept 2003]; *Candino v Starpoint Central School District*, 115 AD3d 1170, 982 NYS2d 210 [4 Dept 2014] [constructive knowledge of the claim is insufficient to provide actual knowledge of the essential facts]). Indeed, petitioner's instant injury/diagnosis of thyroid cancer and the injury/diagnosis of non-Hodgkin's lymphoma in the unrelated lawsuit are not the same injury² and petitioner's application is devoid of any relationship between the two separate and distinct diagnoses. Therefore, respondent has not received timely actual knowledge of the essential facts constituting this claim.

In any event, with respect to the factor of whether the delay would substantially prejudice the municipality, petitioner has not met her burden of showing that the delay in serving the notice of claim will not substantially prejudice respondent in maintaining its defense on the merits (*Felice v Eastport/South Manor Central School District*, 50 AD3d 138, 851 NYS2d 218 [2d Dept 2008]; *see also Hendrix v City of New York*, 76 AD3d 613, 905 NYS2d 910 [2d Dept 2010]; *Matter of Morris v City of New York*, 132 AD3d 997, 18 NYS3d 702 [2d Dept 2015] [petitioner failed to establish that a four month delay after expiration of the 90 day statutory period would not substantially prejudice the City in maintaining a defense on the merits]; *Troy v Town of Hyde Park*, 63 AD3d 913, 882 NYS2d 159 [2d Dept 2009] [plaintiffs failed to establish that a nine month delay after expiration of the 90 day statutory period would not substantially prejudice the municipality in maintaining a defense on the merits]; *Purifoy v County of Suffolk*, 61 AD3d 873, 877 NYS2d 420 [2d Dept 2009] [petitioner failed to establish that an eleven month delay after expiration of the 90 day statutory period would not substantially prejudice the County in maintaining a defense]; *see also Hernandez v County*, 90 AD3d 1049, 934 NYS2d 863 [2d Dept 2011] *lv. denied* 19 NY3d 801, 957 NYS2d 285 [2012] ["petitioner failed to

² Thyroid cancer is a growth of cells that starts in the thyroid (Thyroid cancer, Diseases & Conditions Overview <https://www.mayoclinic.org/diseases-conditions/thyroid-cancer/symptoms-cause/syc-20354161> [last accessed May 8, 2024]). Non-Hodgkin's lymphoma is a type of cancer that begins in your lymphatic system, which is part of the body's germ-fighting immune system (Non-Hodgkin's lymphoma, Diseases & Conditions Overview <https://www.mayoclinic.org/diseases-conditions/non-hodgkins-lymphoma/symptoms-cause/syc-20375680> [last accessed May 8, 2024]).

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demonstrate that the respondents had not been prejudiced by the delay” (in seeking leave to serve a late notice of claim))).

Considering all of the foregoing, the application by petitioner for an order granting leave to serve a late notice of claim is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.



LINDA KEVINS, JSC

Dated: 5.21.24

 X FINAL DISPOSITION NON-FINAL DISPOSITION