

Robinson v Board of Educ. of City of the City School Dist. of the City of N.Y.
2012 NY Slip Op 30429(U)
February 7, 2012
Supreme Court, Nassau County
Docket Number: 00744/11
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 13

-----X
CYNTHIA ROBINSON,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 00744/11

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Motion Sequence No: 001 & 002
Original Return Date: 10-16-11

Defendant.

-----X

P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 6 were submitted on these two Motions on November 9, 2011:

	<u>Papers numbered</u>
Notice of Motion and Affirmation (Seq. 1)	1-2
Affidavit in Opposition	X
Notice of Motion, Affirmation and Affidavit (Seq..2)	3-5
Affirmation in Opposition	6

The motion by defendant The Board/Department of the City of New York s/h/a Board of Education of the City School District of the City of New York (hereafter defendant or the Board) for an order pursuant to CPLR 3211(a)(7) dismissing the verified complaint on the ground that plaintiff did not timely file a notice of claim pursuant to General Municipal Law §50-e, or in the alternative, for an order pursuant to CPLR 504(3) and 510(3) changing the venue of this action to Queens County is denied with respect to dismissal and granted without opposition with respect to the change

of venue.

The motion by plaintiff Cynthia Robinson for an order declaring the notice of claim filed on or about September 29, 2010 timely filed *nunc pro tunc* is granted and it is so declared. The County Clerk of the County of Nassau is directed to transfer the file in this matter to the Clerk of the Supreme Court in Queens County.

This is an action for personal injuries allegedly sustained by plaintiff Cynthia Robinson, a New York City teacher, on January 21, 2010 at approximately 8:00 a.m. in classroom 1-302 of Public School 70, which is located at 30-45 42nd Street, Long Island City, County of Queens, New York. Plaintiff alleges that when she was entering the classroom, she tripped over a garbage bin and was caused to fall. A notice of claim was filed on or about September 29, 2010, eight months after the claim accrued.

General Municipal Law §50-e requires that a notice of claim be filed within ninety days after the claim arises. This notice of claim is a condition precedent to bringing a tort claim against a municipality (*O'Brien v. City of Syracuse*, 54 NY2d 353 [1981]). The requirement of notice “is one of the safeguards devised by law to protect municipalities against fraudulent and stale claims for injuries to person and property” and “is designed to afford the municipality opportunity to make an early investigation of the claim while the facts surrounding the alleged claim are still ‘fresh’ ” (*Adkins v City of New York*, 43 NY2d 346, 350 [1977]).

Plaintiff avers that the defendant had actual notice of her accident by way of a written Comprehensive Injury Report which was completed on the day of the accident, January 21, 2010. An employee of defendant also completed a Written Statement Form the same day. On March 23, 2010 a New York City Department of Education Division Human Resources Form was also

completed, indicating all the necessary information regarding plaintiff's identity and the nature and time of the accident. Subsequent notice was also provided with respect to plaintiff's three month leave due to her injuries.

Plaintiff also alleges that defendant's representatives wrongly advised her that her only remedy was her Line of Duty Injury Benefits, and that she could not sue. She avers the defendant misled her regarding her rights. Plaintiff contends that the foregoing constitute sufficient grounds for leave to file a notice of claim *nunc pro tunc*, i.e., that defendants "acquired actual knowledge of the essential facts constituting the claim" (*Heiman v. City of New York*, 85 AD2d 25, 28 [1st Dept 1982]), and that therefore defendant was not prejudiced by her delay. She also avers that defendant's erroneous legal advice delayed commencement of her action and filing the notice of claim and that this constitutes a reasonable excuse for her delay.

Defendant does not address plaintiff's contentions regarding actual knowledge and misleading advice. Rather, defendant contends that the Court has no discretion to grant plaintiff's application because the one year and ninety day statute of limitations has expired (*Zimmerman v City of New York*, 161 AD2d 591 [2d Dept 1990]). The Court rejects defendant's argument, finding it without legal merit.

Plaintiff commenced this action on January 18, 2011, within the limitations period, and after the notice of claim was filed with defendant. Although the notice of claim was filed outside the 90 day period of General Municipal Law § 50-e, the action itself was timely.

When a claim is interposed, the statute of limitations stops running (CPLR 203[a]; McKinney's Consolidated Laws of New York Annotated, Practice Commentaries, C203:2A - Statute of Limitations Stops Running Upon Filing in Supreme Court Vincent Alexander, p 184 [2003]).

Thus, plaintiff's application to approve the notice of claim *nunc pro tunc* in this action is not outside the one year ninety day period (cf., *Iazzetta v. State*, 105 Misc.2d 567, 571 [N.Y.Ct.Cl. 1980]; *Mastandrea v. State*, 57 AD2d 679 [3d Dept 1977]). In *Iazzetta*, a cause of action for malicious prosecution was timely interposed for purposes of the statute of limitations, but not as to subdivision (3) of section 10 of the Court of Claims Act, which requires that a claim or notice of intention be filed within ninety days of accrual. The court in *Iazzetta* reasoned that the interposition of a timely claim tolls both the statute of limitations and section 10 of the Court of Claims Act, and that this interpretation "is in accord with the purpose of the statute of limitations which is to foreclose stale claims, but not to punish litigants for technical defects in pleading" (*Iazzetta, supra* at p 572). Accordingly the Court finds the statute of limitations was tolled upon interposition of plaintiff's claim on January 18, 2011 and does not constitute a defense to this application (see also *Mastandrea v. State*, 57 AD2d 679 [3d Dept 1977] ["Since we conclude that the claim for malicious prosecution is not time-barred, the question of whether leave should have been granted to file a late claim is rendered moot"]).

Defendant's authority fails to support its contention that the Court is without discretion to consider the application for *nunc pro tunc* relief. In *Pierre v. City of New York*, the Supreme Court was held to have erred in deeming plaintiff Kerby Pierre's notice of claim timely served *nunc pro tunc* only because he had made no application for such relief. "[T]he Supreme Court erred in deeming the notice of claim insofar as asserted on behalf of Kerby Pierre timely served *nunc pro tunc* in the absence of a motion for such relief" (*Pierre v City of New York*, 22 AD3d 733, 734 [2d Dept 2005]). Clearly the issue could have been considered on the merits had the plaintiff made application, as plaintiff here has done. Rather than being precluded from considering plaintiff's

claim, the authority submitted supports this Court's determination that, under the circumstances, the decision whether to grant leave rests in this Court's "sound discretion" (*Henry v Aguilar*, 282 AD2d 711 [2d Dept 2001], *lv app den* 97 NY2d 602 ["*exercise of discretion* affirmed denying leave to serve notice of claim over five years after claim accrued"]*[emphasis supplied]*).

The circumstances considered to approve leave include Cynthia Robinson's filing of the notice of claim and service of process within the one year and ninety days of accrual, actual notice to defendant shortly after the claim arose, defendant's failure to raise the late notice defense in its answer to alert plaintiff of its intention to raise the defense, defendant's failure to move to dismiss within one year and ninety days, and most significantly, the interposition of the claim before the time expired, thus halting the running of the statute. Accordingly, after due deliberation, it is

ORDERED, that plaintiff's motion for an order declaring the notice of claim filed on or about September 29, 2010 timely filed *nunc pro tunc* is **granted**, and defendant's motion for an order dismissing the complaint on the ground that plaintiff did not timely file a notice of claim is **denied**; and it is further

ORDERED, that the venue of the above entitled action be and is hereby changed from the County of Nassau to the County of Queens; and it is further

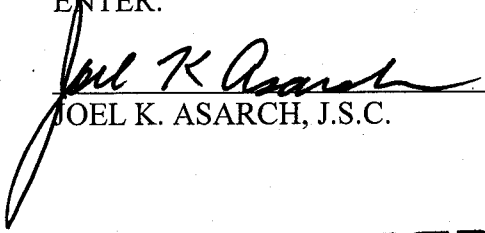
ORDERED, that upon the entry of this Order, the County Clerk of the County of Nassau shall forthwith deliver to the County Clerk of the County of Queens all papers filed in the above entitled proceeding and the County Clerk of the County of Queens shall assign a new index number thereto; and it is further

ORDERED, that all subsequent proceedings be conducted in the Supreme Court, County of Queens as if such jurisdiction had been designated as the original venue.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 7, 2012

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

Roach Bernard, PLLC.
Attorneys for Plaintiff

Michael A. Cardozo, Esq.
Corporation Counsel
Attorneys for Defendant

ENTERED
FEB 10 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE