[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe **PART** -
Justice

Index Number : 111598/2011
SAXON, SHAMEAH CAL.# 103
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOT. OF CLAIM

INDEX NO. 111598/11
MOTION DATE 11/22/11
MOTION SEQ. NO. _____

The following papers, numbered 1 to 1 **, were read on this motion to/for** leave to serve late notice of claim

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
FEB 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/27/12
FEB 27 2012

BARBARA JAFFE, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

In the Matter of the Application of:
SHAMEAH SAXON, Infant by her mother and natural guardian, MONIQUE BERRY, and MONIQUE BERRY, individually,

Petitioners,

For Leave to Serve a Late Notice of Claim, *Nunc Pro Tunc*,

-against-

DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK and GYL-MARIA BARTHOLOMEW,

Respondents.

----------x

Index No. 111598/11

Motion date: 11/22/11
Calendar no.: 103

DECISION & ORDER

BARBARA JAFFE, JSC:

For petitioners:
Victor Goldblum, Esq.
Rimland & Associates
225 Broadway, Suite 1606
New York, NY 10007
212-374-0680

By notice of petition dated October 26, 2011, and submitted on default, petitioners move pursuant to General Municipal Law (GML) §§ 50-e(5) and 50-e(6) for an order deeming their notice of claim timely served and granting them leave to amend it.

I. BACKGROUND

On December 17, 2010, infant petitioner, Shameah Saxon, was allegedly assaulted at CS 200, located at West 147th Street and Seventh Avenue in Manhattan, by respondent Gyl-Maria Bartholomew, a teacher at the school. (Affirmation of Victor Goldblum, Esq., dated Oct. 10, 2011).

The same day, a complaint about the incident was made to the New York City Police Department, and in the corresponding police report, the incident is described as follows:

> At t/p/o deft did grab c/v by shirt and did pull and push while sitting on chair. Deft then did slap c/v in back of head with open hand. C/v was fearful and did complain of headache. Incident was witnessed by two classmates who did write a not[e] now in possession of princip[al] Mr. Bolton. Mr. Martino, after school program YMCA, was informed of incident by c/v. Ms. Wilson, a teacher at CS200, also informed by c/v. Deft is part of ATR, after school teacher reserve program . . . .

(*Id.*, Exh. A).

On April 29, 2011, petitioners served respondents with a notice of claim, describing the incident as follows:

> On December 15, 2010 at [ap]proximately 2:00 p.m., at CS 200, located at 147th Street and 7th Avenue, New York, NY, infant claimant was assaulted/battered by teacher Gyl-Maria Bartholomew. Intentional and/or reckless/wanton act of Gyl-Maria Bartholomew. Claim of negligent hiring, retention, and failure to monitor by Board of Education. Also failure to properly supervise/protect infant claimant as loco parentis. Copy of NYPD Complaint Report annexed hereto.

(*Id.*, Exh. B).

By letter dated May 31, 2011, the Office of the Comptroller of the City of New York acknowledged receipt of petitioners' notice of claim.

II. CONTENTIONS

Petitioners assert that respondents will be prejudiced by neither their late filing nor their error as to the date of the incident in their notice of claim, as respondents obtained actual knowledge of the facts underlying petitioners' claims through their employees' involvement in and knowledge of the incident.

III. ANALYSIS

A. Leave to serve late notice of claim

Pursuant to GML §§ 50-e(l)(a) and 50-i, in order to commence a tort action against a municipality or a municipal agency, a claimant must serve it with a notice of claim within 90 days of the date on which the claim arose. The court may extend the time to file a notice of claim, and in deciding whether to grant the extension, it must consider, *inter alia*, whether the municipality or agency acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced the municipality or agency in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]). In considering these factors, none is dispositive (*Pearson ex rel Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 93 [1st Dept 2007], *affd* 10 NY3d 852 [2008]), and given their flexibility, the court may take into account other relevant facts and circumstances (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

1. Actual knowledge

A claimant bears the burden of demonstrating the public entity's actual knowledge of the essential facts underlying her claim. (*Walker v New York City Tr. Auth.*, 266 AD2d 54, 54-55 [1st Dept 1999]). A public entity has such knowledge when it has knowledge of the facts underlying the theory on which liability is predicated. (*Matter of Grande v City of New York*, 48 AD3d 565, 566 [2d Dept 2008]). Generally, the facts are those which demonstrate a connection between the injury or event and any wrongdoing on the part of the entity. (*Matter of Werner v Nyack Union*

Free School Dist., 76 AD3d 1026, 1027 [2d Dept 2010]). The entity must have notice or knowledge of the specific claim and not merely general knowledge that a wrong has been committed. (*Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009]; *Arias v New York City Health & Hosps. Corp.*, 50 AD3d 830, 832-833 [2d Dept 2008], *lv denied* 12 NY3d 738 [2009]; *Pappalardo v City of New York*, 2 AD3d 699, 700 [2d Dept 2003]; *Chattergoon v New York City Hous. Auth.*, 161 AD2d 141, 142 [1st Dept 1990], *lv denied* 76 NY2d 875 [1990]).

As actual knowledge may be imputed to a municipality where its employees engaged in the conduct giving rise to a claim (*Gibbs v City of New York*, 22 AD3d 717, 719-20 [2d Dept 2005]; *Picciano v Nassau County Civil Serv. Comm'n*, 290 AD2d 164, 174 [2d Dept 2001]; *Ayala v City of New York*, 189 AD2d 632, 633 [1st Dept 1993]), respondents obtained actual knowledge of the facts underlying petitioners' claims within 90 days of their accrual.

Moreover, as petitioners served respondents with their notice of claim one and one-half months after expiration of the 90-day period, respondents obtained actual knowledge at that time, as well. (*See Matter of Gershanow v Town of Clarkson*, 88 AD3d 879 [2d Dept 2011] [notice of claim served without leave one month after deadline provided agency with actual knowledge]; *Bertone Commissioning v City of New York*, 27 AD3d 222 [1st Dept 2006] [notice of claim served without leave less than two months after expiration of 90-day period provided agency with actual knowledge]; *Matter of Harrison v New York City Hous. Auth.*, 188 AD2d 367 [1st Dept 1992] [agency obtained actual knowledge from notice of claim received one month after expiration of 90-day period]).

2. Prejudice

As petitioners established that City obtained actual knowledge of the facts underlying her claims, she has also demonstrated the absence of prejudice. (*See Williams ex rel Fowler v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006] ["Proof that the [respondent] had actual knowledge is an important factor in determining whether [it] is substantially prejudiced by . . . a delay."]).

3. Reasonable excuse

As petitioners established both actual knowledge and the absence of prejudice, and as "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Ansong,* 308 AD2d 333), petitioners are entitled to an order deeming their notice of claim timely served, *nunc pro tunc*, regardless of their failure to explain their delayed filing.

B. Leave to amend notice of claim

Pursuant to GML § 50-e(6):

> [a]t any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

Petitioners are entitled to amend their notice of claim to correct the date of the accident for the reasons set forth above. (*See supra*, III.A.1, 2).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioners' motion for an order deeming her notice of claim timely

served, *nunc pro tunc*, is granted; and it is further

ORDERED, that petitioners' motion for an order granting them leave to amend their notice of claim is granted.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 27, 2012
New York, New York

FEB 27 2012

FILED

FEB 29 2012

NEW YORK
COUNTY CLERK'S OFFICE