Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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MONICA SERHAN,

Petitioner,

-against-

THE CITY OF NEW YORK and THE ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

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Index Number: 11927/11

Motion Date: 7/5/11

Motion Cal. Number:13

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this petition for leave to serve a late summons and complaint or a late notice of claim.

	Papers Numbered
Notice of Petition-Affirmation-Affidavits-Exhibits.	1-6
Affirmation in Opposition-Exhibits.....	7-8
Reply-Exhibits.....	9-10

Upon the foregoing papers it is ordered that the petition is decided as follows:

As a preliminary matter, since there was no action pending at the time petitioner sought leave to serve a late notice of claim, she was required to proceed by way of a special proceeding (see Billone v. Town of Huntington, 188 AD 2d 526 [2nd Dept 1992]). A special proceeding is commenced by service of a notice of petition and petition or an order to show cause and petition (see CPLR 304, 403[b]). Petitioner's notice of petition was not accompanied by a petition but only by her affidavit, an affidavit of her father, Yahya Serhan, and an affirmation of petitioner's attorney. Nevertheless, this Court finds that the affidavits and affirmation contain all the essential elements of a petition. Therefore, since this defect is an irregularity which may be overlooked (see CPLR 2001; Billone v. Town of Huntington, supra), the Court deems the affidavits and affirmation in support of the notice of petition a petition.

Application by petitioner for leave to serve a summons and complaint beyond the one year and 90-day statute of limitations, in accordance with General Municipal Law §50-e(8), or, in the alternative, for leave to serve a late notice of claim is denied.

Petitioner and her sister were removed from the custody of their parents on November 18, 1997 by order of the Family Court, Queens County, upon a petition under Article 10 of the Family Court Act brought by the Administration for Children's Services (ACS) alleging that petitioner and her sister were abused by their parents. Petitioner was four years old at the time. Petitioner's father, in his affidavit in support of the petition, avers that he and his wife were falsely accused of child abuse by a vindictive individual who had wished to rent an apartment from them and had been rejected, and that petitioner and her sibling were wrongfully removed from his and his wife's household based upon the wrongful acts of the ACS social worker assigned to investigate the allegation of child abuse. Petitioner and her sister were returned to their parents' custody on January 5, 1998, after a psychiatric evaluation conducted on December 2, 1997 found no signs of abuse and recommended that the children be returned to their parents. The petition was subsequently adjourned in contemplation of dismissal pursuant to the order of the Family Court issued on March 9, 1998. Plaintiff's father alleges that his daughters "suffered irreparable physical and mental harm evidenced by Monica's frequent nightmares related to the incident." Petitioner, in her proposed notice of claim, alleges that she sustained psychological trauma. Plaintiff became 18 years of age on February 21, 2011. The instant petition was served on May 17, 2011.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Petitioner concededly did not file a notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, foremost of which are whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a

reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Scolo v. Central Islip Union Free School Dist., 40 AD 3d 1104 [2nd Dept 2007]; Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

The statute also directs the Court to consider all other relevant factors, including, inter alia, whether the claimant was an infant, which, although listed separately, is related to the inquiry as to whether claimant had a reasonable excuse (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]).

Petitioner has failed to offer a cognizable excuse for her failure to serve the City within the statutory period, failed to demonstrate that her infancy was in any way related to the failure to serve a notice of claim, failed to demonstrate that the City acquired actual knowledge of the facts underlying the claim within 90 days of the incident or a reasonable time thereafter and failed to show that a late notice of claim would not substantially prejudice the City.

The only excuse proffered for petitioner's failure to serve a notice of claim is that petitioner, because she was an infant, "was not reasonably situated to be able to ascertain the existence of the claim nor could she prosecute a claim on her behalf." Such, however, is not an adequate excuse.

"[P]etitioner's infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse" (Vicari III v. Grand Avenue Middle School, 52 AD 3d 838, 839 [2nd Dept 2008]). Here, there was no relationship between petitioner's infancy and the failure to file a timely notice of claim.

Petitioner's parents had full and immediate knowledge of the allegedly wrongful removal of petitioner and her sister from their custody. There was nothing about the fact of petitioner's infancy that prevented them from filing a notice of claim within 90 days thereafter. Indeed, plaintiff's father proffers no excuse whatsoever for his failure to serve a notice of claim on petitioner's behalf, either within the 90-day period following her removal from his custody or for the 13 years thereafter until she reached the age of majority. No argument is made, and no evidence is shown, that he was hampered in any way by his

daughter's infancy from timely filing a notice of claim.

Petitioner's counsel proffers as an additional excuse the vague argument that "given the nature of the harm, the petitioner could not determine whether she was harmed, nor could she determine the extent to which she was harmed. In this case, the Court should not penalize the petitioner for waiting to see ascertain the nature of her harm and determine whether her symptoms would resolve themselves" (sic). In this regard, petitioner's affidavit, clearly also of her attorney's authorship and not her own, avers in equally opaque language, "In my capacity as an infant, I did not understand how the circumstances in which I was wrongly thrust would create the harm that it did. It was impossible to discern the future. For that reason, I was unable to ascertain the existence of a claim or request a claim be prosecuted on my behalf."

What petitioner, herself, was or was not able to ascertain concerning her injuries is irrelevant. During the period of her minority the task fell to her parents to file a notice of claim on her behalf. The above-quoted excuses are the contentions of petitioner's counsel and, ostensibly, of petitioner. They are not proffered by petitioner's father as an excuse for his failure to serve a timely notice of claim. As heretofore stated, petitioner's father proffers no excuse whatsoever for his failure to serve a notice of claim. Moreover, no affidavit of petitioner's mother is annexed to the petition explaining why she did not file a notice of claim on petitioner's behalf.

The only harm and symptom alleged is psychological trauma manifesting in nightmares. Such alleged injury would have been sustained on November 18, 1997, when petitioner was removed from her parents' custody and, arguably, during the course of her separation from her parents. Therefore, her injuries, if any, were sustained, and her cause of action accrued, no later than January 5, 1998 when she was returned to her parents. Petitioner's father fails to explain in his affidavit why he was unable to serve a notice of claim during the entire period of petitioner's childhood, given his admission in his affidavit that petitioner was returned to him on January 5, 1998 having sustained physical and mental harm evidenced by her "frequent nightmares related to the incident."

Plaintiff's counsel also contends that petitioner and her parents "could not realize the full impact of the emotional trauma suffered as a result of the complained of ordeal" and that "as has been demonstrated in many people traumatized during their childhoods, the petitioner has only now come to a position in

which she feels she can seek some kind of restitution." In other words, counsel appears to be arguing that petitioner's time to serve a notice of claim should extend to include the time it took for her to discover that she had an injury and a claim.

As heretofore stated, the 90-day time period for serving a notice of claim commences when the claim arises, which is synonymous with the accrual of petitioner's cause of action. The accrual of the cause of action is the date the event occurred upon which petitioner's claim is based (see General Municipal Law § 50-i). "[A]s a general proposition, a tort cause of action cannot accrue until an injury is sustained. . . That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual. . . The Statute of Limitations does not run until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (Kronos, Inc. v. AVX Corp., 81 NY 2d 90, 94 [1993]; Snyder v. Town Insulation, Inc., 81 NY 2d 429 [1993]) (citations omitted).

Petitioner concedes that her injury – psychological trauma – was sustained during the course of her removal and separation from her parents' custody. Therefore, her cause of action accrued no later than December 5, 1998. No medical evidence is proffered, and no argument is made, that petitioner's injuries did not arise until 13 years after she endured her traumatic removal from her household. Indeed, it is petitioner's position that her psychological trauma was sustained when she was removed and kept from her parents. Petitioner's counsel merely contends that petitioner did not "realize" the full extent of her injuries. Indeed, petitioner does not, even at this late juncture, know what, if any, precise injuries she sustained. The Court notes that petitioner alleges in her proposed notice of claim annexed to the petition that she "suffered psychological traumas with permanent effects, the nature of which is not yet known to this claimant".

Petitioner's citation to Porcaro v City of New York (20 AD 3d 357 [1st Dept 2005]) wherein it was held that the petitioner's time to serve a notice of claim commenced from discovery of her injury is inapposite since that case involved the special rules concerning DES litigation where accrual of the cause of action commences from the date of discovery of exposure to toxic substances.

Petitioner's argument that she should have been given 13 years to determine whether her nightmares would resolve themselves and to decide whether she had any psychological injury at all before filing a notice of claim is, thus, without merit.

Therefore, petitioner has failed to proffer a reasonable excuse for the delay in filing a notice of claim.

Although the lack of a reasonable excuse for the delay is not, in and of itself, fatal to an application for leave to file a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]), no such additional factors are present in this case.

Petitioner has also failed to demonstrate that the City acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter. The Appellate Division, Second Department has emphasized that in determining whether to grant leave to file a late notice of claim, the acquisition by the municipality of actual knowledge of the facts constituting the claim is a factor that must be given particular consideration (see Hebbard v. Carpenter, 37 AD 3d 538 [2nd Dept 2007]).

Counsel for petitioners merely contends that the City acquired actual knowledge of the essential facts by virtue of "the circumstances surrounding the children's removal and subsequent return to their parents' home".

"What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed" (Sica v. Board of Educ. Of City of N.Y., 226 AD 2d 542, 543 [2nd Dept 1996]; Vicari III v. Grand Avenue Middle School, 2008 NY Slip Op 05938, supra). There is no evidence that any correspondence or communications between petitioner's father, ACS and the Department of Social Services imparted actual knowledge of the facts underlying the claim. Petitioner fails to demonstrate any nexus between petitioner's removal from her parents' custody and any negligence on the part of the City. Indeed, the March 9, 1998 order of the Family Court adjourning the Article 10 child abuse proceeding in contemplation of dismissal conditioned the dismissal upon petitioner's parents completing a parenting skills program, cooperating with supervision by ACS, continuing family counseling and not inflicting any physical discipline upon their children. Moreover, the ACD was for a period of 12 months during which ACS would supervise the family. Such order not only fails to apprise the City that its employees acted wrongfully or negligently, it is inconsistent with petitioner's claim that ACS acted wrongfully or negligently at all (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]).

Therefore, petitioner has failed to establish that the City acquired actual knowledge of the essential facts constituting the claim, which are those facts supporting petitioner's theory of liability.

In view of the foregoing, the Court need not reach the statutory factor of prejudice where petitioner has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that the City acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

Even were this Court to consider this factor, it is the claimant seeking leave to file a late notice of claim who has the burden of establishing that the municipality would not suffer prejudice if a late notice of claim were allowed (see Felice v. Eastport South Manor Central School Dist., 50 AD 3d 138, supra). Petitioner has failed to demonstrate a lack of prejudice.

Indeed, it is the opinion of this Court that the passage of 13 years from the date petitioner was returned to her parents' custody to the commencement of the instant petition has prejudiced the City's ability to investigate the alleged claim effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]). Therefore, even if the City had acquired actual knowledge of petitioner's claim within 90 days of January 5, 1998, or a reasonable time thereafter, the failure of petitioner's parents to serve a notice of claim for 13 years has now unfairly prejudiced the City.

Petitioner's counsel also argues that petitioner, when she was removed from the custody of her parents upon a determination of abuse, became a ward of the City and, therefore, was exempted from the notice of claim requirement, pursuant to General Municipal Law §50-e(8) which provides, in relevant portion, "This section shall not apply...to claims against public corporations by their own infant wards." Counsel's argument is without merit, as §50-e(8) does not apply to the facts of this case.

Since petitioner's claim is that she suffered psychological trauma as a result of being removed from her home and kept from her parents, her time to serve a notice of claim commenced, not on the date she was removed from her home, but on January 5, 1998, the day she was returned to her parents. Therefore, although petitioner was nominally a ward of the City during the period the City had custody of her, when the 90 days commenced for filing a notice of claim, she was no longer a ward of the City but under the custody of her parents once again.

Even if, arguendo, petitioner's claim for psychological injury were limited solely to that inflicted by the act of removing her from her family on November 18, 1997 and, therefore, her time to file a notice of claim commenced as of that date when

she became a ward of the City, she was still returned to her parents' custody 48 days later, 42 days prior to the expiration of the 90-day deadline for filing a notice of claim. Moreover, petitioner cites no statutory or case law authority that would have precluded her parents from filing a notice of claim on her behalf even while she was in the City's custody.

The scope and purpose of §50-e(8) may be gleaned from the legislative history of the amendment to §50-e adding that section (see L 1967, Ch 252, §1) and from the case law that inspired it.

In Gibbs v City of New York (23 AD 2d 665 [2nd Dept 1965]), the Appellate Division, Second Department, allowed the infant petitioner who had been placed in the custody of the Department of Welfare to commence an action against the City without having to serve a notice of claim, holding, "In view of the extraordinary facts in this case and of the relationship between the infant claimant and the prospective defendant, we believe that no notice of claim was required to be served. Where, as here, the prospective defendant (the city) and its own agency were the only parties reasonably situated to ascertain the existence of the claim and to prosecute the claim, it would be an idle gesture to require that they file a notice of claim against themselves" (id. at 665-666). In the wake of this holding, the Legislature amended §50-e to include subdivision (8), the concern expressed being "to protect the rights of 'infant wards of municipal corporations without known relatives, friends, or diligent guardians ad litem'" (Grover v Martone, 127 Misc 2d 40 [Sup Ct, Chemung County 1985], quoting Mem, at 3, Bill Jacket, L 1967, ch 252]).

Therefore, §50-e(8) was enacted to remedy the inequitable situation where an infant ward of the municipality is held to the notice of claim requirement as a prerequisite to maintaining an action against the municipality, even though there was no one, other than the municipality itself, in a position to ascertain whether the infant had a claim and file a notice of claim on said infant's behalf. In all situations where §50-e(8) has been held to apply, the infant's claim is for negligence or abuse suffered while in the care of the municipal agency, where the infant was in the care and custody of the municipality for longer than the 90-day period for filing a notice of claim and where the infant did not otherwise have an independent guardian who could have either discovered the negligence or filed a notice of claim on the infant's behalf (see e.g. Adam H. v County of Orange, 66 AD 3d 737 [2nd Dept 2009]).

In our case, the injury sustained by petitioner was not the result of some negligent or intentional act committed while she was in the City's custody which her parents were not in a position to discover until it was too late to file a notice of claim, nor is ours the scenario where petitioner had no

independent guardian or responsible individual who could have filed a notice of claim on her behalf. Rather, it is the decision to place petitioner in the City's custody itself that is the basis of petitioner's claim, a claim which petitioner's parents were aware of from the inception and which they were competent to preserve for litigation by filing a timely notice of claim. Moreover, as heretofore stated, petitioner was returned to her parents' custody well before the deadline for filing a notice of claim expired.

Accordingly, the application is denied and the petition is dismissed. Defendants may enter judgment accordingly.

Dated: July 11, 2008

KEVIN J. KERRIGAN,,J.S.C.