Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Jahmir Dockery, an infant by his mother and natural guardian, Shantay Dickenson, and Shantay Dickenson, individually,

Petitioners,

- against -

City of New York and The Board of Education of the City of New York,

Respondents.

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Index Number: 703413/13

Motion Date: 10/8/13

Motion Cal. Number: 41

Motion Seq. No.: 1

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

	Papers Numbered
Notice of Petition-Petition-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Reply-Exhibit	8-10

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

Application by petitioner for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), is denied.

Infant petitioner allegedly sustained injuries on May 23, 2012 when he tripped and fell in the cafeteria of P.S. 151 in Queens County.

A condition precedent to commencement of a tort action against a municipality or a municipal entity 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]). Since infant petitioner's cause of action accrued on May 23, 2012, his mother had until August 20, 2012 to file a notice of claim. A notice of claim was filed on August 23, 2012. By letter dated August 28, 2012, the office of the Comptroller of the City of

New York informed petitioner and petitioner's counsel that the claim was disallowed because it was not timely filed within the 90-day statutory period required by General Municipal Law §50-e. The instant petition for leave to file a late notice of claim was served on August 16, 2013, over one year after the expiration of the 90-day deadline and almost one year from the date petitioner and counsel were apprised that the late claim had been disallowed.

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]).

Petitioner has failed to offer any excuse for her failure to serve a timely notice of claim within the statutory period, failed to demonstrate that respondents 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 at this late juncture would not substantially prejudice respondents.

No excuse whatever has been proffered by infant petitioner's mother, co-petitioner Shantay Dickenson, for her failure to serve a timely notice of claim on infant petitioner's and her own behalf. Counsel merely represents that she did not come to their office until the August 20, 2012 deadline for filing a notice of claim. No affidavit of petitioner is annexed explaining her delay and none is offered by counsel. But in any event, even had petitioner annexed an affidavit articulating a reasonable excuse for waiting until the 90-day deadline to seek legal counsel, no excuse whatsoever is proffered by counsel for her additional delay of almost one year from the date of being informed of the rejection of her untimely notice of claim in seeking leave to serve a late 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 respondents 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 contend that respondents acquired actual knowledge of the essential facts by virtue of the annexed FDNY prehospital Care Report and emergency room medical records produced by Elmhurst Hospital. However, these records merely relate that petitioner complains that he fell and hit his eyebrow on the corner of a desk in the school cafeteria, and inform that infant petitioner sustained a laceration at the base of his nose and left eyebrow and facial fractures.

"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 nothing in the medical reports annexed to the petition that apprises respondents of any connection between infant petitioner's accident and injuries and any negligence on the part of the City or the DOE.

Moreover, even if they did, they would still not be sufficient to impart actual notice to respondents where there was no evidence that they were "ever filed with or otherwise brought to the attention of the officer of the City designated by law to accept service of a notice of claim" (Caselli v. City of New York, 105 AD 2d 251, 255 [2nd Dept 1984]). A notice of claim involving a City agency or entity must be served upon the Corporation Counsel of the City of New York or the New York City Comptroller (see Knox v. NYC Bureau of Franchises, 48 AD 3d 756 [2nd Dept 2008]). There is no evidence that these documents, prepared by the FDNY and Elmhurst Hospital, came to the attention of the office of the Comptroller within the statutory period or a reasonable time thereafter. There is no showing, and it is not alleged, that these medical records

were annexed to the late notice of claim that was served.

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

The only other argument proffered by petitioner's counsel is that the mere three-day delay in serving the notice of claim would not substantially prejudice respondents.

In the first instance, this Court may not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant petition 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 respondents acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see National Grange Mutual Ins. Co. v. Town of Eastchester,48 AD 3d 467, supra; Hebbard v. Carpenter, 37 AD 3d 538 [2nd dept 2007]; 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]).

In any event, petitioner has failed to meet her affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138, [2nd Dept 2008]). The untimely notice of claim served without leave of court, albeit three days late, was a nullity (see Chicara v, City of New York, 10 AD 2d 862 [2nd Dept 1960, appeal denied 8 NY 2d 1014 [1960]; Wollins v. NYC Board of Education, 8 AD 3d 30 [1st Dept 2004]). Since it was a nullity, petitioner may not rely upon it to establish actual knowledge (see Mack v. City of New York, 265 AD 2d 308 [2nd Dept 1999]). Moreover, respondents rejected the untimely notice of claim and did not conduct a 50-h hearing or otherwise investigate the claim. Petitioner did not seek leave to serve a late notice of claim until one year later. It is the opinion of this Court that the passage of over one year from the deadline for filing a notice of claim has prejudiced respondents' ability to investigate the alleged claim effectively (see Lefkowitz v. City of New York, 272 AD 2d 56 [1st Dept 2000]).

Finally, this Court notes that P.S. 151 is a public school under the New York City Department of Education. The Department of Education of the City of New York (also known as the Board of Education) is a separate and distinct entity from the City of New York (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education, recreation and other public uses. Moreover, New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Since the City does not operate, maintain or control P.S. 151, and since suits involving public school property may only be brought against the DOE, no claim lies against the City for the cafeteria injuries allegedly sustained by infant petitioner, as a matter of law (see generally Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]).

Although the courts should not ordinarily delve into the merits in determining an application for leave to serve a late notice of claim, the Court may deny leave to serve a late notice of claim where the claim is patently meritless and it would make no sense to grant leave to serve a notice of claim under such circumstances (see Besedina v New York City Transit Authority, 47 AD 3d 924 [2nd Dept 2008]; Katz v. Town of Bedford, 192 AD 2d 707 [2nd Dept 1993]). Therefore, even had petitioner demonstrated a reasonable excuse for the delay in filing a late notice of claim, and even if the City acquired timely actual notice of the underlying facts of the claim, and even if petitioner additionally demonstrated that there would be no prejudice, it would still be an improvident exercise of the Court's discretion to allow the filing of a late notice of claim against the City, since such claim is without merit as a matter of law.

Under the totality of the circumstances, it would be an improvident exercise of this Court's discretion to allow the filing of a notice of claim at this late juncture based upon the record presented on this petition.

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

Dated: October 23, 2013

KEVIN J. KERRIGAN, J.S.C.