Matter of Newcomb v Middle Country Cent. Sch. Dist.
2014 NY Slip Op 31320(U)
May 13, 2014
Supreme Court, Suffolk County
Docket Number: 31807/2013
Judge: Jr., Andrew G. Tarantino

SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 31807/2013
Orig Date: 12/18/2013
Adj Date: 2/18/2014
Motion Dec. **001: MD**

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In re the Matter of the Claim of RAYMOND NEWCOMB, Individually, and as Father and Natural Guardian of AUSTIN NEWCOMB,

Petitioner(s),

ORDER DENYING LEAVE TO FILE A LATE NOTICE OF CLAIM

-against-

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT,

Respondent.

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Upon consideration of the Order to Show Cause for Leave to Deem a Late Notice of Claim as timely served, the Petition of Raymond Newcomb, individually, and as father and natural guardian of Austin Newcomb [collectively "the petitioner"], the proposed notice of claim and the photographs attached thereto, the affirmation and affidavit in support of the Petition and supporting exhibits A through H, the affirmation in opposition on behalf of the respondent, Middle Country Central School District ["the school district"], and the Reply affirmation in further support of the petition, it is now

ORDERED that the petition to deem a Notice of Claim served upon the school district on November 25, 2013, as timely served, is denied.

The underlying facts that form the basis of the requested relief are undoubtedly tragic. On Saturday, March 23, 2013, at 8:30 PM, the then 16 year old infant petitioner, Austin Newcomb ["Austin"], sustained devastating injuries including severe head trauma as he attempted to cross Route 25 and was hit by a westbound motor vehicle. Immediately before the accident, the petitioner was crossing southbound from the northwest corner at the intersection of Marshall Drive and Route 25 in the Town of Brookhaven. The driver fled the scene.

The police investigation later identified the subject vehicle as having been driven by Milissa O'Brien and owned by Anthony Bonella, one of the passengers in the subject vehicle

when the accident occurred. Criminal charges were brought against both O'Brien and Bonella and they ultimately pled guilty. For some period of time after the accident, law enforcement authorities indicated to petitioner's counsel that the criminal case against Bonella remained open and pending delaying the ability of petitioner' counsel to obtain the police investigatory file.

Newfield High School was located on Marshall Drive within the school district a short distance from the accident site. The Petition alleges that some time before the accident, with the knowledge and/or participation of Newfield High School ["the high school" or "Newfield"], some unidentified person or persons positioned an over-sized sign advertising Newfield's school musical in the vicinity of the northwest corner of the subject intersection. The allegation in the Petition is that the sign obstructed either or both of the views of the infant plaintiff as he attempted to cross Route 25 in a southbound direction, and oncoming westbound traffic, contributing to the cause of the accident.

According to Austin's father, petitioner Raymond Newcomb, shortly after the accident he reported the details of the accident and the severity of the injuries to his son's school, Centereach High School, also a part of the school district. According to the petitioner father's supporting affidavit sworn to on November 25, 2013, since the accident to the present time, Austin is unable to feed, dress, or toilet himself, and is unable to verbalize. Although a timely Notice of Intention to File a Claim and timely Notices of Claim were served upon the State of New York, the Town of Brookhaven, and Suffolk County, respectively, a notice of claim was not served on the school district until eight months after the accident.

Due to the ongoing criminal investigation into the accident, and through no apparent lack of diligence on the part of the petitioner's attorney, a photograph of the subject intersection clearly showing the sign was not obtained by the petitioner's attorney until November 5, 2013, more than seven months after the accident. It was only upon receipt of enlarged photographs that the petitioner's attorney was able to decipher the wording on the sign at the northwest corner and connect it to the school district. Thus, on November 25, 2013, five months after the statutory ninety day period to serve a notice of claim upon a school district had elapsed (*see* EDUC. LAW § 3813 and GEN. MUN. LAW § 50 [e]), the petitioner served a notice of claim upon the school district. Shortly thereafter, the petitioner moved by way of Order To Show Cause for leave to deem the notice of claim as timely. The school district opposes the petition.

Under General Municipal Law § 50–e(5), in determining whether to grant leave to serve a late notice of claim, the court must consider various factors, of which the "most important, based on its placement in the statute and its relation to other relevant factors" (*Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 147, 851 N.Y.S.2d 218), is whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter (*see* General Municipal Law § 50–e[5]; *Matter of Whittaker v. New York City Bd. of Educ.*, 71 A.D.3d 776, 777, 896 N.Y.S.2d 171; *Matter of Devivo v. Town of Carmel*, 68 A.D.3d 991, 891 N.Y.S.2d 154).

Additional factors relevant to whether a petition for leave to serve a late notice of claim should be granted include whether the claimant was an infant at the time the claim arose and, if

so, whether there was a nexus between the claimant's infancy and the delay in service of a notice of claim, whether the claimant had a reasonable excuse for the delay, and whether the public corporation was substantially prejudiced by the delay in its ability to maintain its defense on the merits (*see* General Municipal Law § 50–e[5]; *Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535, 814 N.Y.S.2d 580, 847 N.E.2d 1154; *Matter of Diggs v. Board of Educ. of City of Yonkers*, 79 A.D.3d 869, 869–870, 912 N.Y.S.2d 688).

Two of the factors can be dispatched without great difficulty: whether there is a nexus between the petitioner's infancy and the delay in serving the notice of claim, and whether the petitioner had a reasonable excuse for the delay. As to the first factor, it is clear that Austin's infancy has no nexus to the delay in service of the notice of claim.

On the contrary, the severity and continuing nature of Austin's injuries and the petitioner's inability to obtain the complete set of scene photographs and video of the accident scene thereby enabling the petitioner to identify the school district as a potential defendant account for the greatest part of the delay in serving the notice of claim. Thus, as to the first factor, infancy of the petitioner played no part in the delay. As to the second factor, the Court finds that based upon the admissible evidence offered in support of the petition, there was a reasonable excuse for the petitioner' delay in service.

The most important factor for the Court's consideration based on its placement in the statute and its relation to other relevant factors" is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of the accrual of the claim or a reasonable time thereafter (*see* General Municipal Law § 50–e[5]; *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 A.D.3d 138, 147, 851 N.Y.S.2d 218; *see also Matter of Whittaker v. New York City Bd. of Educ.*, 71 A.D.3d 776, 778, 896 N.Y.S.2d 171; *Matter of Devivo v. Town of Carmel*, 68 A.D.3d 991, 891 N.Y.S.2d 154; *Wright v. City of New York,* 66 A.D.3d 1037, 888 N.Y.S.2d 125). As to this most important factor, the Court concludes that the school district did not receive notice of the claim of liability against it within the statutory period or a reasonable time thereafter.

The petitioner confuses the nature of the requisite notice to warrant a court's granting leave to file a late notice of claim. The Court assumes, solely for the purposes of the instant application, that before the accident the school district was possessed of actual or constructive knowledge of the placement of the sign advertising the school musical and its removal some time after the accident. That knowledge, however, is not the "notice" that is required to excuse a late notice of claim. Rather, the critical inquiry is whether the governmental entity acquired actual knowledge of the essential facts constituting the claim against it within the statutory period or a reasonable time thereafter (*Felice v. Eastport/South Manor Cent. School Dist.,* 50 A.D.3d 138, 147, 851 N.Y.S.2d 218 [2d Dept. 2008]; *Wright v. City of New York,* 66 A.D.3d 1037, 888 N.Y.S.2d 125 [2d Dept. 2009]). Awareness of an accident and the severity of the ensuing injuries, without more, does not constitute notice of the claim. *Id.*

Here, there can be little doubt that the school district did not have the requisite knowledge. In fact, the very reason why the Court has concluded that the petitioner' delay in

serving the notice of claim is excusable is because apparently no one, including the petitioner, had actual knowledge of essential facts underlying a legal theory or theories against the school district until the scene photographs became available in November of 2013, many months after the accident at which time petitioner sought to include the school district as a potential defendant in a lawsuit. Because the school district knew about or even participated in the placement of the sign on the subject corner, does not mean that the school district knew that the petitioner would claim that the subject sign contributed to the happening of this tragic accident at a major intersection some distance from the school during non-school hours (*Wright v. City of New York, supra*; *Anderson v. Town of Oyster Bay,* 101 A.D.3d 708, 955 N.Y.S.2d 183 [2d Dept. 2012]; *Werner v Nyack Union Free School District*, 76 A.D.3d 1026, 908 N.Y.S.2d 103 [2d Dept. 2010]; *Padgett v. City of New York,* 78 A.D.3d 949, 912 N.Y.S.2d 75 [2d Dept. 2010]).

The absence of any indication on the police report of the subject sign as a contributing factor in the accident is significant not because the report is evidence of the school district's freedom from negligence, but because it eliminates the police report as a potential source of notice to the school district of the essential facts constituting the claim (*see Wright v. City of New York,* 66 A.D.3d 1037, 888 N.Y.S.2d 125 [2d Dept. 2009]; *Ryan v. New York City Transit Authority,* 110 A.D.3d 902, 973 N.Y.S.2d 312 [2d Dept. 2013]). In order for a police report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the defendant (*Wright, supra, citing Matter of Boskin v. New York City Tr. Auth.*, 44 A.D.3d 851, 843 N.Y.S.2d 454). As the school district correctly points out, there is no indication in the police report that the presence of the sign had anything to do with the subject accident.

The final factor for the Court's consideration is whether the failure to serve a timely notice of claim would substantially prejudice the governmental entity in maintaining its defense on the merits (*Padgett v. City of New York,* 78 A.D.3d at 949-50). The burden is on the respondent, not the petitioner, to demonstrate that there will be no prejudice by the delayed filing (*Id.*; *Hill v. New York City Transit Authority,* 68 A.D.3d 866, 866, 890 N.Y.S.2d 627 [2d Dept. 2009];*Castro ex rel. Sanabria v. Clarkstown Central School Dist.,* 65 A.D.3d 1141, 885 N.Y.S.2d 508 [2d Dept. 2009]).

The petitioner again misapprehends the nature of the requisite showing of prejudice. Petitioner focuses on the school district's exclusive knowledge about the subject sign, rather than the effect of the five month delay on the school district's ability to investigate the merits of the claim about the placement of the sign while information is likely to be available. The accident was over one year ago. Matriculation and graduation of students and personnel changes presumably hinder the school district's ability to gather information about the creation of the sign and the decision about where and how to position it. Where a municipality has not received notice of petitioner's claim within ninety days or a reasonable time thereafter, prejudice in maintaining a defense is inferred since the mere passage of time creates prejudice with respect to fading memories of witnesses (*Felice v. Eastport/South Manor Cent. School Dist.,* 50 A.D.3d 138, 153; *Joseph v. City of New York,* 101 A.D.3d 721, 955 N.Y.S.2d 622 [2d Dept. 2012]); *Matter of Farfan v City of New York,* 101 A.D.3d 714, 955 N.Y.S.2d 365 [2d Dept. 2012]).

The Court finds that the balance of relevant factors, most especially the school district's lack of actual knowledge of the essential facts constituting the petitioner's claim within 90 days or within a reasonable time thereafter, militates against granting the petition. The petition is dismissed.

Dated: 5.13.14

ANDREW G. TARANTINO, JR., A.J.S.C.

_XX_ FINAL DISPOSITION **____NON-FINAL DISPOSITION**