

<b>Sherb v Monticello Cent. Sch. Dist.</b>
2017 NY Slip Op 33131(U)
July 11, 2017
Supreme Court, Sullivan County
Docket Number: 1499-2016
Judge: Mark M. Meddaugh
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At a term of the Supreme Court of the  
State of New York, held in and for the  
County of Sullivan, at Monticello,  
New York, on March 30, 2017

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN**

-----X  
**SAMANTHA SHERB,**

**Plaintiffs,**

**-against-**

**MONTICELLO CENTRAL SCHOOL DISTRICT,**

**Defendants.**  
-----X

**Present: Hon. Mark M. Meddaugh,  
Acting Justice, Supreme Court**

**Appearances: The Post Law Firm, PLLC  
By: Craig A. Post, Esq.  
Attorneys for the Plaintiff  
4 Executive Blvd., Suite 204  
Suffern, NY 10901**

**Catania, Mahon, Milligram & Rider, PLLC  
By: Mark L. Schuh, Esq.  
Attorneys for the Defendants  
P.O. Box 1479  
Newburgh, NY 12550**

**MEDDAUGH, J.:**

The Defendant has applied for an Order dismissing the Plaintiff's complaint against the School District in its entirety, with prejudice.

This action is upon a claim that the Defendant School District allowed the Plaintiff to be bullied, intimidated and harassed by a fellow student, Terrell Gray, and that the School District failed to take the proper steps to address the bullying and to protect the Plaintiff. The claim arises out of an incident which occurred on June 15, 2015.

By Decision and Order and Order dated December 28, 2016, this Court denied Plaintiff's

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application, brought by Notice of Motion dated September 6, 2016, which had sought leave to file a late Notice of Claim.

The Defendant now argues that the failure to file a Notice of Claim within 90 days of the accrual of the cause of action, requires that the action be dismissed. It is further argued that when a Plaintiff's motion for leave to file a late Notice of Claim is denied, the complaint should also be dismissed.

The Plaintiff argues in opposition that the Plaintiff filed a Notice of Appeal to the Court's prior Decision and Order, and if this Court dismisses the action in response to the instant action, it will prevent the Plaintiff from pursuing her action if the prior order is reversed. Therefore, it is requested that any order granting dismissal should indicate that the Plaintiff should not be prevented from reinstating her complaint if the prior Order is reversed. Finally, it is argued that any dismissal should be without prejudice, to allow the Plaintiff to take advantage of the savings provision of CPLR §205(a) which permit the commencement of a new action within six(6) months of the date of dismissal.

In reply, the Defendant argues that the prior Decision and Order indicates that, by failing to timely file a Notice of Claim, the Defendant was not made aware that the Plaintiff was claiming that her injuries were caused by the Defendant failing to take the proper steps to address the bullying and to protect the Plaintiff. Therefore, the Defendant was found to have suffered substantial prejudice, in that it was deprived of its opportunity to promptly and thoroughly investigate the incident, based not only upon the delay after the expiration of the 90-day statutory period, but also on the fact that the alleged bully had since graduated from high school. The Court further found that the Plaintiff failed to proffer an excuse for her delay in filing the Notice of Claim.

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**CONCLUSIONS OF LAW**

Timely service of a Notice of Claim is a condition precedent to an action against a municipal corporation (*Herrera v Duncan*, 13 AD3d 485, 787 N.Y.S.2d 88 [2d Dept 2004]), and since the Plaintiff's request to late file her Notice of Claim was denied, the Defendant's motion to dismiss the complaint should be granted (*Weaver v City of New York*, 138 AD3d 873, 29 N.Y.S.3d 539 [2d Dept 2016]; *Troy v Town of Hyde Park*, 63 AD3d 913, 882 N.Y.S.2d 159 [2d Dept 2009]; *De Jesus v County of Albany*, 267 AD2d 649, 699 N.Y.S.2d 563 [3d Dept 1999]).

The Court also finds that the dismissal should be with prejudice, since the Plaintiff may not recommence the action without first timely serving a Notice of Claim (see, *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 484 N.Y.S.2d 533 [1984]), and the time to seek leave to file a late notice of claim has expired (General Municipal Law §§ 50-e(5), 50-i[1][c]; *Croce v City of New York*, 69 AD3d 488, 893 N.Y.S.2d 48 [1st Dept 2010]). Furthermore, any application seeking leave to file a late notice of claim will be barred by the law of the case doctrine (see, generally, *People v. Evans*, 94 N.Y.2d 499, 706 N.Y.S.2d 678 [2000]).

The Court further finds that the Defendant's request that the Plaintiff's motion be denied, based on the pending appeal is misplaced. If the Appellate Division determines that the Plaintiff should have been granted leave to file her late Notice of Claim, the Appellate Division can also direct that the complaint be reinstated (see, e.g., *Ali ex rel. Ali v Bunny Realty Corp.*, 253 AD2d 356, 676 N.Y.S.2d 166 [1st Dept 1998]; *Quirk v Morrissey*, 106 AD2d 498, 483 N.Y.S.2d 34 [2d Dept 1984]).

**WHEREFORE**, based on the foregoing, it is hereby

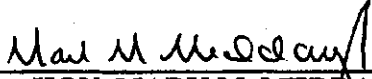
**ORDERED** that the Defendant's motion to dismiss Plaintiff's claims against the

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Defendant is granted, and the complaint in this action is dismissed, with prejudice.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: July 11, 2017  
Monticello, New York

ENTER:   
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HON. MARK M. MEDDAUGH  
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated January 10, 2017
2. Affirmation of Mark L. Schuh, Esq., dated January 10, 2017
3. Affirmation in Opposition of Craig A. Post, dated March 9, 2017
4. Reply Affirmation of Mark L. Schuh, Esq., dated March 28, 2017