

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN
A.J.S.C.

PART 63

In the Matter of the Claim of Stephanie
Lamontanaro

INDEX NO. 151372/2012
MOTION DATE May 23, 2012
MOTION SEQ. NO. 1
E-FILED

Petitioner,

-v-

City of New York and New York City Department
of Education,

Respondents.

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County
Clerk and notice of entry cannot be served based
hereon. To obtain entry, counsel or authorized
representative must EFile a "Request for Entry of
Judgment", Proposed Judgment, and any supporting
documents on the NYSCEF system.

The following papers, numbered 1 to _____ were read on this motion to/for_

Papers

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Papers Numbered

1

Answering Affidavits - Exhibits

Reply Affidavits

Cross-Motion: Yes No

Petitioner Stephanie Lamontanaro petitions the Court for leave to serve respondent New York City Department of Education (DOE) a late notice of claim. Petitioner allegedly sustained an injury on February 28, 2011 in a public school owned by the DOE. Although petitioner served a notice of claim upon the City of New York, she failed to serve a separate notice of claim upon DOE within the allotted ninety (90) day period. Petitioner is requesting that the Court grant leave for her to serve a late notice of claim on DOE even though the allotted ninety (90) day period has passed. Upon the foregoing papers submitted without opposition and for the following reasons, this petition is granted.

Pursuant to General Municipal Law ("Gen. Mun. Law") § 50-e(1), in an action against a municipality seeking to recover damages for personal injury or property damages, claimant must serve a notice of claim against the municipality within ninety days after the claim arises. (*Alvarez v. City of New York*, 307 AD2d 218, 219 [1st Dep't 2003]). A timely notice of claim is required to proceed against a municipality, and cannot be waived. (*Kroin v. City of New York*,

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210 AD2d 95, 96 [1st Dep't 1994] (municipality may not waive requirements as to matter or time of service of notice of claim)). An "untimely notice of claim, served without leave of court, is a nullity." (*Wollins v. New York City Board of Education*, 8 AD3d 30 [1st Dep't 2004]).

"[A] court may grant the claimant leave to file a late notice of claim within one year and 90 days of accrual." *Nunez*, 307 AD2d at 219 (citing Gen. Mun. Law §50-e(5); *Pierson v. City of New York*, 56 N.Y.2d 950 [1982]). When exercising its discretion to grant leave to file a late notice of claim, the Court must consider (a) whether the application was brought within the time which the action could have been commenced against the municipality; (b) whether the municipality acquired actual knowledge of the essential facts constituting the causes of action within 90 days of their accrual or within a reasonable time thereafter, (c) whether the petitioner's failure to timely serve the notice of claim is excusable and (d) whether the delay in serving the notice of claim substantially prejudiced the municipality in maintaining its defense on the merits. (*See Ragland v New York City Hous. Auth.*, 201 AD2d 7, 10 [2nd Dep't 1994]).

Here DOE and its attorneys had knowledge of the essential facts of the claim. The underlying accident occurred at a school owned by DOE and an occurrence report containing essential facts of the accident was prepared by DOE on the day of the accident. In addition, the New York City Corporation Counsel, which serves as the attorney for both the City of New York and DOE, received a timely notice of petitioner's claim served on the City of New York. As a result of the initial notice of claim, Corporation Counsel conducted a 50-H deposition of petitioner on July 6, 2011. Accordingly, as DOE had timely knowledge of the essential facts constituting petitioner's claim, DOE had an adequate opportunity to investigate the accident shortly after its occurrence and cannot be said to have been prejudiced by the delay.

Petitioner's failure to serve DOE a timely notice of claim was the result of an excusable error. Petitioner mistakenly believed that the City of New York and DOE were one legal entity. Pursuant to New York City Charter § 521, the two are discrete, and it is DOE that is solely responsible for any suits arising out of occurrences on school property. (NYC Charter § 521(b); *see also Gonzalez v City*

of New York, 94 AD3d 559, 559 [1st Dept 2012]). As a result, petitioner served the City of New York a timely notice of claim, but overlooked the formal requirement of a separate notice of claim to be served on Corporation Counsel in DOE's name.

Finally, petitioner has not exceeded the statute of limitations for commencement of its claim. This petition was filed one year and thirty-one days after the occurrence of the accident. As the petition was filed within the statute of limitations of one year and ninety days for tort claims against a school district, it can be granted.

In accordance with the foregoing, it is hereby

ORDERED and ADJUGED that petitioner Stephanie Lamontanaro's petition for leave to serve on respondent New York City Department of Education a late notice of claim is granted, and the notice of claim is deemed served *nunc pro tunc* on the date of the original application; and it is further

ORDERED that petitioner shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

This constitutes the decision and judgment of the Court.

Dated: 7/23/12


Ellen M. Coin, A.J.S.C.

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

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Check One: CASE DISPOSED NON-FINAL DISPOSITION
Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER