

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Matter of D.D. v. Village of Great Neck

2018 NY Slip Op 03358 (App. Div. 2018) · No. 2017-03396 · Decided May 9, 2018

SUMMARY

The Appellate Division, Second Department affirmed an order granting petitioners leave to serve a late notice of claim against a school district and related entities. The court held that the district had actual knowledge of the facts constituting the claim and failed to demonstrate substantial prejudice from the delay. The absence of a reasonable excuse was not fatal where actual knowledge and lack of prejudice were shown.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Per curiam; Mark C. Dillon, J.P.; Leonard B. Austin, J.; Robert J. Miller, J.; Sylvia O. Hinds-Radix, J.
JURISDICTION	New York
DECIDED	May 9, 2018
DOCKET	2017-03396
DISPOSITION	affirmed
PROCEDURAL POSTURE	The school district entities appealed from an order granting the petitioners leave to serve a late notice of claim pursuant to General Municipal Law § 50-e.
STANDARD OF REVIEW	Abuse of discretion; whether Supreme Court providently exercised its discretion in granting leave to serve a late notice of claim.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	Great Neck Union Free School District, Great Neck Public Schools, Great Neck Public School District, Lakeville Elementary School v. D.D., Renee Holstein, other petitioners

TOPICS

civil procedure

municipal law

negligence

appellate procedure

standard of review

PRACTICE AREAS

municipal law

torts

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether leave should be granted to serve a late notice of claim against the school district entities where they had actual knowledge of the essential facts constituting the claim and the petitioners made an initial showing that the delay would not substantially prejudice the district.
2. Whether the petitioners' lack of a reasonable excuse for failing to timely serve the notice of claim required denial of the petition despite actual notice and lack of prejudice.
3. Whether the district's remaining argument could be considered when raised for the first time on appeal.

HOLDINGS

1. Leave to serve a late notice of claim was properly granted because the school district had actual knowledge of the facts constituting the claim within the statutory period, the petitioners initially showed that the district would not suffer substantial prejudice, and the district failed to rebut that showing with particularized indicia of prejudice.
2. The absence of a reasonable excuse for failing to timely serve the notice of claim was not fatal because the district had actual notice of the claim and the delay did not result in substantial prejudice.
3. The district's remaining contention was not considered because it was raised for the first time on appeal.

KEY QUOTATIONS

“Timely service of a notice of claim is a condition precedent to an action sounding in tort and commenced against a municipality” ([*2])

“Even if the petitioners' reason for failing to timely serve the District was not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and the absence of prejudice” ([*2])

FACTUAL BACKGROUND

Six-year-old D.D. fractured his left arm while taking a class at a private gym. His mother provided Lakeville Elementary School with a doctor's note stating that he needed assistance traveling from the bus to class, using stairs, and carrying his backpack. D.D. allegedly later tripped and fell in the school hallway while carrying his coat and backpack on the way to an after-school program, while unsupervised, further injuring his arm. The school district had actual knowledge of the accident and the alleged circumstances through communications with D.D.'s mother.

PROCEDURAL HISTORY

D.D. was injured in a fall at Lakeville Elementary School after sustaining an earlier arm fracture and receiving a doctor's note requiring assistance at school. The petitioners timely served a notice of claim on the Village of Great Neck but not on the school district entities. After discovering the omission while preparing a summons and

complaint, they commenced a proceeding in Supreme Court, Nassau County, for leave to serve a late notice of claim. Supreme Court granted the petition, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Ramos v. Board of Educ. of the City of N.Y., 148 AD3d 909, 910
- Matter of Zaid v. City of New York, 87 AD3d 661, 662
- Matter of Ramirez v. City of New York, 148 AD3d 908, 908
- Vallejo-Bayas v. New York City Tr. Auth., 103 AD3d 881, 882
- Kellman v. Hauppauge Union Free Sch. Dist., 120 AD3d 634, 635-636
- Claud v. West Babylon Union Free Sch. Dist., 110 AD3d 663, 664
- Matter of Viola v. Ronkonkoma Middle Sch., 107 AD3d 1009, 1010
- Matter of Funkhouser v. Middle Country Cent. Sch. Dist., 102 AD3d 689, 690
- Matter of Whittaker v. New York City Bd. of Educ., 71 AD3d 776, 777
- Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 NY3d 455, 466-467
- Matter of Joy v. County of Suffolk, 89 AD3d 1025, 1026-1027
- Matter of McLeod v. City of New York, 105 AD3d 744, 746
- Matter of Lavender v. Garden City Union Free School Dist., 93 AD3d 670, 671

OPINION

PER CURIAM.

Matter of D.D. v Village of Great Neck (2018 NY Slip Op 03358) Matter of D.D. v Village of Great Neck 2018 NY Slip Op 03358 Decided on May 9, 2018 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on May 9, 2018 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P. LEONARD B. AUSTIN ROBERT J. MILLER SYLVIA O. HINDS-RADIX, JJ. 2017-03396 (Index No. 608954/16) [*1]In the Matter of D.D., etc., et al., petitioners- respondents, vVillage of Great Neck, respondent, Great Neck Union Free School District, et al., appellants.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, NY (Kathleen D. Foley of counsel), for appellants. Leav & Steinberg LLP, New York, NY (Daniel T. Leav and Brett J. Nedick of counsel), for petitioners-respondents. DECISION & ORDER In a proceeding pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim, Great Neck

Union Free School District, Great Neck Public Schools, Great Neck Public School District, and Lakeville Elementary School appeal from an order of the Supreme Court, Nassau County (Anthony L. Parga, J.), entered February 28, 2017.

The order granted a petition for leave to serve a late notice of claim against them. ORDERED that the order is affirmed, with costs. On February 24, 2016, the then-six-year-old infant petitioner (hereinafter D.D.) fractured his left arm while taking a class at a private gym.

The arm was put in a cast, and D.D. was given a doctor's note that his mother, the petitioner Renee Holstein, provided to the respondent Lakeville Elementary School (hereinafter the school). The note stated that D.D. needed assistance while going from the bus to class, while using stairs, and while carrying his backpack.

The petitioners allege that on March 4, 2016, while carrying his coat and backpack and walking or running in the hallway of the school en route to an after-school program located within the school, D.D. tripped and fell, further injuring his left arm. According to the petitioners, at the time of the accident, D.D. was unsupervised and traveling in the hallway with two of his friends.

Following the accident, Holstein sent emails and spoke with various employees of Great Neck Union Free School District (hereinafter collectively, with the respondents Great Neck Public Schools, Great Neck Public School District, and the school, the District) about how the accident occurred and the extent of D.D.'s injuries. Holstein also inquired about who was supervising D.D. on behalf of the District at the time of the accident and why D.D. was carrying his backpack.

In April 2016, counsel for the petitioners served a notice of claim upon the Village [*2]of Great Neck, indicating that the petitioners intended to pursue a claim to recover damages stemming from negligence in, among other things, allowing D.D. and other students to be unsupervised and to run through the halls of the school, and in failing to escort D.D. to the after-school program despite the fact that his doctor's note indicated that D.D. required special assistance.

At that time, the petitioners did not serve a notice of claim on the District. While drafting a summons and complaint related to the accident, the petitioners' counsel realized that the District had not been served with the notice of claim. Thereafter, in November 2016, the petitioners commenced this proceeding pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim against the District relating to claims sounding in negligence for injuries sustained by D.D.

The Supreme Court granted the petition and the District appeals. Timely service of a notice of claim is a condition precedent to an action sounding in tort and commenced against a municipality (see General Municipal Law § 50-e[1][a]; *Matter of Ramos v Board of Educ. of the City of N.Y.*, 148 AD3d 909, 910; *Matter of Zaid v City of New York*, 87 AD3d 661, 662).

This requirement also applies to tort actions commenced against, among others, school districts and school boards (see Education Law § 3813[2]; *Matter of Ramos v Board of Educ. of the City of N.Y.*, 148 AD3d at 910).

The purpose of the notice of claim requirement is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available (see *Matter of Ramirez v City of New York*, 148 AD3d 908, 908; *Vallejo-Bayas v New York City Tr. Auth.*, 103 AD3d 881, 882).

Here, the District had actual knowledge of the facts constituting the claim within the statutory period (see *Kellman v Hauppauge Union Free Sch. Dist.*, 120 AD3d 634, 635-636; *Claud v West Babylon Union Free Sch. Dist.*, 110 AD3d 663, 664; *Matter of Viola v Ronkonkoma Middle Sch.*, 107 AD3d 1009, 1010; *Matter of Funkhouser v Middle Country Cent. Sch. Dist.*, 102 AD3d 689, 690; *Matter of Whittaker v New York City Bd. of Educ.*, 71 AD3d 776, 777).

Furthermore, the petitioners made an initial showing that the District would not suffer any substantial prejudice by the delay, and the District failed to rebut the petitioners' showing with particularized indicia of prejudice (see *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466-467; *Matter of Viola v Ronkonkoma Middle Sch.*, 107 AD3d at 1010; *Matter of Joy v County of Suffolk*, 89 AD3d 1025, 1026-1027).

Even if the petitioners' reason for failing to timely serve the District was not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and the absence of prejudice (see *Matter of Viola v Ronkonkoma Middle Sch.*, 107 AD3d at 1010; *Matter of McLeod v City of New York*, 105 AD3d 744, 746; *Matter of Lavender v Garden City Union Free School Dist.*, 93 AD3d 670, 671).

The District's remaining contention is improperly raised for the first time on appeal. Accordingly, the Supreme Court providently exercised its discretion in granting the petition for leave to serve a late notice of claim. DILLON, J.P., AUSTIN, MILLER and HINDS-RADIX, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court