

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

"Jane Doe," v. Taylor

2018 NY Slip Op 05573 (App. Div. 2018) · No. 2016-01282 · Decided August 1, 2018

SUMMARY

The Appellate Division, Second Department, affirmed an order denying leave to serve a late notice of claim and dismissing a personal-injury action against a school principal and Rockland BOCES. The court held that the defendants lacked actual knowledge of the essential facts constituting the claim, the plaintiff lacked a reasonable excuse for the delay, infancy did not causally explain the delay, and the defendants would be substantially prejudiced in defending the claim.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Sheri S. Roman, J.P.; Jeffrey A. Cohen, J.; Robert J. Miller, J.; Joseph J. Maltese, J.
JURISDICTION	New York
DECIDED	August 1, 2018
DOCKET	2016-01282
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiff appealed from an order of the Supreme Court, Rockland County, that denied her petition for leave to serve a late notice of claim or to deem the notice timely served nunc pro tunc and granted the defendants' motion to dismiss the personal-injury complaint for failure to timely serve a notice of claim.
STANDARD OF REVIEW	The court applied the statutory factors governing whether to grant leave to serve a late notice of claim or deem a late notice timely served nunc pro tunc, including actual knowledge of the essential facts, reasonable excuse, infancy and its causal nexus to the delay, and substantial prejudice.
PRECEDENTIAL VALUE	published

PARTIES

"Jane Doe," v. Kimberly Taylor, Rockland County Board of Cooperative Educational Services

TOPICS

municipal liability

personal injury

civil procedure

motions to dismiss

appellate procedure

PRACTICE AREAS

municipal liability

personal injury

civil procedure

QUESTIONS PRESENTED

1. Whether the plaintiff satisfied the requirements of General Municipal Law § 50-e(5) for leave to serve a late notice of claim or to deem the late notice timely served nunc pro tunc.
2. Whether the defendants acquired actual knowledge of the essential facts constituting the claim through the employee's direct involvement in the alleged incident.
3. Whether the plaintiff demonstrated a reasonable excuse for failing to timely serve the notice of claim.
4. Whether the plaintiff's infancy and the defendants' lack of substantial prejudice supported late-notice relief.
5. Whether dismissal of the personal-injury complaint for failure to timely serve a notice of claim was proper.

HOLDINGS

1. Leave to serve a late notice of claim, or to deem the late notice timely served nunc pro tunc, was properly denied because the plaintiff failed to establish the statutory factors supporting relief.
2. The direct involvement of Taylor, an employee of Rockland BOCES, in the incident itself, without more, did not establish that the defendants had actual knowledge of the essential facts constituting the claim.
3. The plaintiff failed to demonstrate a reasonable excuse for failing to timely serve the notice of claim because the proffered excuses were conclusory or contradicted by the record.
4. Although infancy is a factor in deciding whether to grant leave to serve a late notice of claim, the absence of a causal nexus between the child's infancy and the delay militated against granting relief.
5. The plaintiff failed to make the required initial showing that the delay would not substantially prejudice the defendants' ability to defend the claim.

KEY QUOTATIONS

*"Actual knowledge of the essential facts constituting the claim means "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the [proposed] notice of claim; the [municipality] need not have specific notice of the theory or theories themselves" (*2)*

FACTUAL BACKGROUND

The plaintiff alleged that Kimberly Taylor, principal of the Hilltop School, physically assaulted and verbally demeaned the plaintiff's child during a hallway encounter on February 28, 2014. Taylor was employed by the Rockland County Board of Cooperative Educational Services. No incident report or other record describing the facts underlying the proposed liability theories was provided to the defendants, and the defendants lacked an opportunity to examine the child or document the alleged injuries near the time of the incident.

PROCEDURAL HISTORY

The alleged assault occurred on February 28, 2014. The plaintiff served a notice of claim on or about February 19, 2015, commenced the personal-injury action on or about March 6, 2015, and later commenced a General Municipal Law § 50-e(5) proceeding for leave to serve a late notice of claim or to deem the notice timely served nunc pro tunc. The Supreme Court denied the petition and dismissed the complaint, and the Appellate Division affirmed insofar as appealed from.

DISPOSITION

affirmed

CASES CITED

- Matter of Bhargava v City of New York, 130 AD3d 819
- Matter of Murray v Village of Malverne, 118 AD3d 798
- Matter of Felice v Eastport/South Manor Cent. School Dist., 50 AD3d 138, 148
- Matter of D'Agostino v City of New York, 146 AD3d 880
- Matter of Thill v North Shore Cent. Sch. Dist., 128 AD3d 976
- Matter of Romeo v Long Is. Power Auth., 133 AD3d 667
- Matter of Fouto v City of Yonkers, 83 AD3d 708
- Matter of Julie F. v City of New York, 50 AD3d 794
- Williams v Nassau County Med. Ctr., 6 NY3d 531, 538
- Matter of Newcomb v Middle County Cent. Sch. Dist., 28 NY3d 455

OPINION

PER CURIAM.

"Jane Doe," v Taylor (2018 NY Slip Op 05573) "Jane Doe," v Taylor 2018 NY Slip Op 05573 Decided on August 1, 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 August 1, 2018 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department SHERI S. ROMAN, J.P.

JEFFREY A. COHEN ROBERT J. MILLER JOSEPH J. MALTESE, JJ. 2016-01282 (Index Nos. 30854/15, 32076/15) [*1]"Jane Doe," etc., appellant, vKimberly Taylor, et al., respondents. (Matter No. 1) In the Matter of "Jane Doe," etc., appellant, vKimberly Taylor, et al., respondents. (Matter No. 2) The Ahearne Law Firm, PLLC, Warwick, NY (Allan J. Ahearne, Jr., of counsel), and Slavin & Slavin, New York, NY (Barton L. Slavin of counsel), for appellant (one brief filed).

Lemire, Johnson & Higgins, LLC, Malta, NY (Gregg T. Johnson and Bradley J. Stevens of counsel), and Greenberg Wanderman & Fromson, Nanuet, NY (Stephen M. Fromson of counsel), for respondents (one brief filed). DECISION & ORDER In an action to recover damages for personal injuries, and a related proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim, "Jane Doe," the plaintiff in Matter No. 1 and the petitioner in Matter No. 2, appeals from an order of the Supreme Court, Rockland County (Victor J. Alfieri, Jr., J.), dated January 29, 2016.

The order, insofar as appealed from, denied the petition in Matter No. 2 and granted the motion of the defendants in Matter No. 1 to dismiss the complaint for failure to timely serve a notice of claim. ORDERED that the order is affirmed insofar as appealed from, with costs. "Jane Doe," the plaintiff in Matter No. 1 and the petitioner in Matter No. 2 (hereinafter the plaintiff), alleges that Kimberly Taylor, the principal of the Hilltop School, where the plaintiff's child had been placed in an Intensive Day Treatment (hereinafter IDT) program, physically assaulted and verbally demeaned the child during an encounter in the school's hallway on February 28, 2014.

On or about February 19, 2015, the plaintiff served a notice of claim dated February 13, 2015, on Taylor's employer, the Rockland County Board of Cooperative Educational Services (hereinafter Rockland BOCES), and thereafter commenced an action to recover damages for personal injuries against Taylor and Rockland BOCES (hereinafter together the defendants) on or about March 6, 2015.

The defendants moved to dismiss the complaint, inter alia, for failure to serve a timely notice of claim. The plaintiff opposed the motion and, on or about May 13, 2015, commenced a proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim or to deem served nunc pro tunc the notice of claim served on or about February 19, [*2]2015.

In the order appealed from, the Supreme Court, inter alia, denied the petition and granted the defendants' motion to dismiss the complaint. The plaintiff appeals. In determining whether to grant leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc, a court must consider whether (1) the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days after the accrual of the claim or within a reasonable time thereafter, (2) 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, (3) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (4) the

municipality was substantially prejudiced by the delay in its ability to maintain its defense on the merits (see General Municipal Law § 50-e[5]; *Matter of Bhargava v City of New York*, 130 AD3d 819; *Matter of Murray v Village of Malverne*, 118 AD3d 798).

Actual knowledge of the essential facts constituting the claim means "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the [proposed] notice of claim; the [municipality] need not have specific notice of the theory or theories themselves" (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 148).

Contrary to the plaintiff's contention, the direct involvement of Taylor, Rockland BOCES's employee, in the incident itself, without more, is not sufficient to establish that the defendants had actual knowledge of the essential facts constituting the claim (see *Matter of D'Agostino v City of New York*, 146 AD3d 880; *Matter of Thill v North Shore Cent. Sch. Dist.*, 128 AD3d 976).

Here, there was no incident report by the defendants or record by any individual or entity provided to the defendants that described the facts underlying the legal theories on which liability is predicated. The plaintiff also failed to proffer a reasonable excuse for the failure to timely serve a notice of claim.

The plaintiff's proffered excuses were conclusory or contradicted by the record (see *Matter of Romeo v Long Is. Power Auth.*, 133 AD3d 667; *Matter of Fouto v City of Yonkers*, 83 AD3d 708; *Matter of Julie F. v City of New York*, 50 AD3d 794). Furthermore, while infancy is a factor to be considered in determining whether to grant leave to serve a later notice of claim, the lack of a causal nexus between the infancy and the delay in service of the late notice of claim herein is a factor militating against granting leave (see *Williams v Nassau County Med.*

Ctr., 6 NY3d 531, 538; *Matter of Felice v Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d at 151-152). The plaintiff also did not make an initial showing that the failure to timely serve the notice of claim would not substantially prejudice the defendants' ability to defend against the claim (see generally *Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455).

The defendants did not have the opportunity to conduct any physical or mental health examinations of the child or to photograph or record his alleged physical injuries at or near the time of the incident. The plaintiff's remaining contention is without merit. ROMAN, J.P., COHEN, MILLER and MALTESE, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court