

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

Matter of Fox v. New York City Dept. of Educ.

124 A.D.3d 887 (2d Dep't 2015) · No. 2014-07183 · Decided January 28, 2015

SUMMARY

The Appellate Division, Second Department, held that the petitioner’s individual claim was time-barred, but that infancy tolled the limitations period for her child’s claims. The court concluded that the New York City Department of Education had actual knowledge of the essential facts and failed to demonstrate prejudice from the delay. It therefore granted leave to serve a late notice of claim on behalf of the child and otherwise affirmed the lower court’s order.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Reinaldo E. Rivera, J.P.; L. Priscilla Hall, J.; Leonard B. Austin, J.; Jeffrey A. Cohen, J.
JURISDICTION	New York
DECIDED	January 28, 2015
DOCKET	2014-07183
DISPOSITION	other
PROCEDURAL POSTURE	Proceeding under General Municipal Law § 50-e(5) seeking leave to serve a late notice of claim against the New York City Department of Education. The petitioner appealed from an order denying the petition and dismissing the proceeding.
STANDARD OF REVIEW	Whether the Supreme Court improvidently exercised its discretion in determining the application for leave to serve a late notice of claim; legal issues were reviewed on the law.
PRECEDENTIAL VALUE	published
PARTIES	Jeanette Fox, individually and as mother and natural guardian of Jazmeene Fox v. New York City Department of Education

TOPICS

municipal law

civil procedure

appellate procedure

preservation of error

PRACTICE AREAS

municipal law

civil procedure

education law

QUESTIONS PRESENTED

1. Whether Jeanette Fox could obtain leave to serve a late notice of claim in her individual capacity more than one year and 90 days after the cause of action accrued.
2. Whether infancy tolled the limitations period for Jazmeene Fox's claims and whether leave to serve a late notice of claim on her behalf should be granted under General Municipal Law § 50-e(5) and Education Law § 3813(2-a).
3. Whether the absence of a reasonable excuse for the late filing was fatal when the school district had actual knowledge of the essential facts and suffered no prejudice.

HOLDINGS

1. Leave to serve a late notice of claim was properly denied as to Jeanette Fox individually because the application was made more than one year and 90 days after the cause of action accrued.
2. Leave to serve a late notice of claim on behalf of Jazmeene Fox should be granted because her infancy tolled the limitations period, the Department of Education acquired actual knowledge of the essential facts within the statutory period, and the Department failed to demonstrate substantial prejudice.

KEY QUOTATIONS

“While the petitioner failed to provide a reasonable excuse for the failure to timely comply with the provisions of General Municipal Law § 50-e, the absence of an excuse is not fatal where the DOE had actual knowledge of the essential facts constituting the claim, and there was an absence of prejudice” ([*2])

FACTUAL BACKGROUND

Jeanette Fox sought permission to serve a late notice of claim against the New York City Department of Education arising from an accident involving her daughter, Jazmeene Fox. A notice of claim dated February 16, 2011, was served on the City of New York within 90 days after the accident. The same attorney from the New York City Corporation Counsel's office represented the Department of Education in defending identical claims against the City, giving the Department actual knowledge of the essential facts. The Department did not demonstrate prejudice from the delay.

PROCEDURAL HISTORY

The Supreme Court, Queens County, denied the petition in both Jeanette Fox's individual capacity and her representative capacity for Jazmeene Fox and dismissed the proceeding. The Appellate Division affirmed the denial as to Jeanette individually but modified the order to grant leave to serve a late notice of claim on behalf of Jazmeene.

DISPOSITION

other

REMAND INSTRUCTIONS

The order was modified to grant the branch of the petition seeking leave to serve a late notice of claim on behalf of Jazmeene Fox; as modified, the order was affirmed, with costs to the petitioner.

CASES CITED

- Bazile v. City of New York, 94 A.D.3d 929, 930
- Cohen v. Pearl Riv. Union Free Sch. Dist., 51 N.Y.2d 256, 259
- Matter of Felice v. Eastport/South Manor Cent. Sch. Dist., 50 A.D.3d 138, 143
- Williams v. Nassau County Med. Ctr., 6 N.Y.3d 531, 535
- Matter of Billman v. Town of Deerpark, 73 A.D.3d 1039, 1039-1040
- Matter of Guminiak v. City of Mount Vernon Indus. Dev. Agency, 68 A.D.3d 1111
- Matter of Gobardhan v. City of New York, 64 A.D.3d 705, 706
- Matter of Bonaguro v. City of New York, 122 A.D.3d 731
- Matter of Viola v. Ronkonkoma Middle Sch., 107 A.D.3d 1009, 1010

OPINION

PER CURIAM.

Matter of Fox v New York City Dept. of Educ. (2015 NY Slip Op 00759) Matter of Fox v New York City Dept. of Educ. 2015 NY Slip Op 00759 Decided on January 28, 2015 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 January 28, 2015 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department REINALDO E. RIVERA, J.P. L. PRISCILLA HALL LEONARD B. AUSTIN JEFFREY A. COHEN, JJ. 2014-07183 (Index No. 2131/14) [*1]In the Matter of Jeanette Fox, etc., appellant, vNew York City Department of Education, respondent. Siler & Ingber, LLP, Mineola, N.Y.

(Maria Nanis of counsel), for appellant. Zachary W. Carter, Corporation Counsel, New York, N.Y. (Francis F. Caputo and Terri Feinstein Sasanow of counsel), for respondent. DECISION & ORDER In a proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim, Jeanette Fox, individually and as mother and natural guardian of the infant Jazmeene Fox, appeals from an order of the Supreme Court, Queens County (Kerrigan, J.), entered May 16, 2014, which denied the petition and dismissed the proceeding.

ORDERED that the order is modified, on the law and in the exercise of discretion, by deleting the provision thereof denying that branch of the petition which was for leave to serve a late notice of claim on behalf of Jazmeene Fox and substituting therefor a provision granting that branch of the petition; as so modified, the order is affirmed, with costs to the petitioner.

The petitioner commenced this proceeding for leave to serve a late notice of claim against the New York City Department of Education (hereinafter the DOE) in her individual capacity and as mother and natural guardian of her child, Jazmeene Fox (hereinafter Jazmeene).

The Supreme Court denied the petition and dismissed the proceeding. The Supreme Court correctly denied that branch of the petition which was for leave to serve a late notice of claim on behalf of the petitioner, individually, since it was made more than one year and 90 days after the cause of action accrued (see General Municipal Law § 50-i[1][c]; *Bazile v City of New York*, 94 AD3d 929, 930).

However, with respect to the claims made by the petitioner on behalf of Jazmeene, the limitations period was tolled by reason of Jazmeene's infancy (see CPLR 208; *Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 259).

In order to maintain a tort action against a school district, a claimant must serve a notice of claim within 90 days of the alleged injury (see Education Law § 3813[2]; General Municipal Law § 50-i[1]; *Bazile v City of New York*, 94 AD3d at 929; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 143).

In determining whether to grant leave to serve a late notice of claim, the court must consider whether (1) the school district or its attorney or insurance carrier acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the injured party was an infant at the time the claim arose and, if so, whether there was a nexus between the infancy and the failure to serve a timely notice of claim, (3) the petitioner demonstrated a reasonable excuse for the [*2]failure to serve a timely notice of claim, and (4) the school district was substantially prejudiced by the delay in its ability to maintain its defense on the merits (see Education Law § 3813[2-a]; General Municipal Law § 50-e[5]; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535). Upon consideration of these factors in the instant case, the Supreme Court improvidently exercised its discretion in denying that branch of the petition which was for leave to serve a late notice of claim on behalf of Jazmeene. A notice of claim dated February 16, 2011, was served on the City of New York within 90 days after the subject accident.

Under the circumstances of this case, the DOE acquired actual knowledge of the essential facts constituting Jazmeene's claim within 90 days after the accident because the same attorney from the office of the New York City Corporation Counsel who represented the DOE was involved in

defending the identical claims asserted against the City (see Education Law § 3813[2-a]; *Matter of Billman v Town of Deerpark*, 73 AD3d 1039, 1039-1040).

Thus, the petitioner met her initial burden of showing a lack of prejudice (cf. *Williams v Nassau County Med. Ctr.*, 6 NY3d at 539; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d at 152), and the DOE failed to demonstrate that it was prejudiced by the delay in commencing this proceeding (see *Matter of Billman v Town of Deerpark*, 73 AD3d at 1040).

While the petitioner failed to provide a reasonable excuse for the failure to timely comply with the provisions of General Municipal Law § 50-e (see *Matter of Guminiak v City of Mount Vernon Indus. Dev. Agency*, 68 AD3d 1111; *Matter of Gobardhan v City of New York*, 64 AD3d 705, 706), the absence of an excuse is not fatal where the DOE had actual knowledge of the essential facts constituting the claim, and there was an absence of prejudice (see *Matter of Bonaguro v City of New York*, 122 AD3d 731; *Matter of Viola v Ronkonkoma Middle Sch.*, 107 AD3d 1009, 1010).

Accordingly, that branch of the petition which was for leave to serve a late notice of claim on behalf of Jazmeene should have been granted. RIVERA, J.P., HALL, AUSTIN and COHEN, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court