

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

ROLF SACHS, as Proposed Guardian Ad Litem of
MARC SACHS, His Son, and ROLF SACHS
Individually,

Plaintiff(s),

-against-

INDEX No. 2637/05

COUNTY OF NASSAU and PETRINA DELUCA,

Defendant(s).

MOTION DATE: 8/26/05

MOTION SEQ. No. 2-MG

The following papers read on this motion:

Notice of Motion/Affirmation/Exhibits

Affirmation in Opposition/Exhibits

Reply

Plaintiffs seek an Order permitting them to file a late Notice of Claim in this action sounding in negligence against the COUNTY pursuant to General Municipal Law § 50-e. Defendant COUNTY OF NASSAU opposes.

In this action plaintiff seeks damages for injuries allegedly sustained by MARC SACHS on November 23, 2003 when he allegedly sustained serious physical injuries as a result of falling out of his wheelchair when it rolled over a sidewalk defect near the intersection of South Oyster Bay Road and Dove Street. Plaintiffs allege that this fall resulted in plaintiff suffering a stroke which left him unable to speak.

In the previous application plaintiffs offered the affidavit of the child's father who was not a witness to the occurrence, despite the contention that there were eyewitnesses. Further, the letter written by MARC SACH's physician, did not state that the plaintiff is suffering from a mental disability. Plaintiffs argued that they were ignorant of any need to file a Notice of Claim.

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Counsel for plaintiff argued that the plaintiffs did not consult him until 2004, and after immediately investigating potential liability by the COUNTY, he made this application. The excuse for not filing the Notice of Claim was the inability of the injured plaintiff to verbally communicate what happened, as well as having to investigate ownership and control of the area for the accident. Counsel argued that these facts should excuse the plaintiffs for not filing a timely Notice of Claim. Counsel attempted to serve a late Notice of Claim on defendants dated October 1, 2004. The initial application was brought on February 23, 2005.

Counsel for plaintiffs argued that permission should be granted as there is a toll due to plaintiff's incapacity pursuant to CPLR § 208.

Defendant opposed plaintiffs' application to file a late Notice of Claim, arguing that plaintiffs failed to offer sufficient proof to excuse them from failing to file a Notice of Claim in a timely fashion pursuant to General Municipal Law ("GML") § 50-e.

The earlier application was Denied with leave to renew with additional proof. In the current application, plaintiffs provide an additional affidavit from the eyewitness to the event, plaintiff's mother, as well as an additional medical affidavit attesting to MARC SACH's cognitive disabilities.

Pursuant to GML§ 50-e, a plaintiff must provide a Notice of Claim to a public corporation within ninety days of when the claims arise. Pursuant to GML § 50-e (5), the Court may in its discretion, extend the time to serve a late Notice of Claim. In deciding whether to do so, the Court must consider whether the Plaintiff has demonstrated a reasonable excuse for his failure to serve the Notice in a timely fashion, and whether the municipality had actual notice of the essential facts within 90 days of when the claim arose or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining a defense on the merits. *Robertson v. New York City Housing Authority*, 237 A.D.2d 501 (2nd Dept. 1997).

Counsel for the plaintiff has now established a nexus between the infancy and the delay. *Goldstein v. Clarkstown CSD* 208 AD2d 537 (2nd Dept 1994). Further, the plaintiff has offered evidence that the COUNTY had actual knowledge of the defective condition. The affidavit of Doreen Sachs avers that the Defendant COUNTY had written notice of the defect four weeks prior to the accident.

Based on the proof presented, the undersigned denied the motion of the plaintiff to file a late Notice of Claim with leave to renew on proper papers, including evidence supporting the merits of the cause of action and of MARC SACH's cognitive disability by a physician's affirmation. The plaintiff has done so. The

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eyewitness testifies to a defective condition in the sidewalk which caused the plaintiff's wheelchair to tip over and resulted in plaintiff's falling onto the sidewalk and allegedly suffering head injuries, a fractured left femur resulting in fat emboli and a cerebral vascular accident, or stroke, with brain damage.(Motion, Exh B). Plaintiff physician attests that since this incident he suffers cognitive disability among various other serious physical disabilities. (Motion, Exh C)

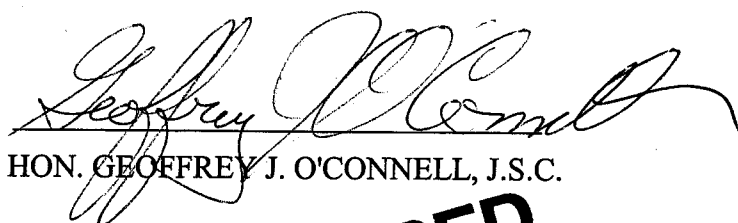
Based on the proof and arguments presented, the application is Granted and the Notice of Claim filed October 1, 2004, is deemed filed timely nunc pro tunc.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 31st of October, 2005 at 2:30 p.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

It is, SO ORDERED.

Dated:

OCT 4, 2005


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

OCT 06 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE