

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY

Justice.

In the Matter of the Application of
NANCY TERMINI, individually and as
mother and natural guardian of
NICHOLAS TERMINI,

IAS PART 16
NASSAU COUNTY
INDEX NO. 13588/02

Petitioner,

- against -

MOTION DATE: 9/12/02
MOTION SEQUENCE NO. 1
X X X

VALLEY STREAM UNION FREE SCHOOL DISTRICT
NO. 13 and TOWN OF HEMPSTEAD,

Respondent(s).

The following papers read on this motion:

Notice of Motion/Order to show cause	1-5
Answering Affidavits	6,7
Replying Affidavits	
Briefs	8,8a

Upon the foregoing papers, it is ordered that this application by petitioner for an order pursuant to General Municipal Law Sec. 50-e granting leave to serve a late notice of claim is granted. This order concludes this proceeding.

Petitioner brings this special proceeding seeking leave to serve a late notice of claim upon the respondents. Petitioner is the mother of a nine year old infant who it is claimed was injured on December 14, 2001, at approximately 8:45 to 9:00 p.m., at the James A. Dever School, while attending a cub scout meeting. The infant allegedly entered an open playground area and was injured while using a slide which was missing a handrail.

The next day it is alleged that petitioner reported this occurrence to various school district agents, servants and employees.

It is further alleged that petitioner did not retain an

attorney until July 28, 2002, having been unaware of the notice of claim requirement. Counsel moved expeditiously for the instant relief.

"The key factors in determining whether leave to [serve] a late notice of claim should be granted are whether the claimant has demonstrated a reasonable excuse for failing to serve a timely notice of claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual (see, General Municipal Law § 50-e[1]) or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits" (Matter of Brito v. City of New York, 237 AD2d 286, 287).

Moreover, petitioner's excuse, that she was unaware of the requirements of municipal notice does not constitute a reasonable excuse (Matter of Gaffney v. Town of Hempstead, 226 AD2d 721). While the "reasonableness" of petitioner's excuse for the delay is unsupportable, "the statutory amendments to subdivision (5) of General Municipal Law § 50-e are to be liberally construed and ... the absence of an acceptable excuse is not necessarily fatal. Rather, all relevant factors are to be considered, including the prejudice to the municipality and whether it obtained actual knowledge within the 90-day statutory period or shortly thereafter" (Matter of Morgan v. New York City Hous. Auth., 181 AD2d 890, 891).

Although respondent attempts to refute the fact that the school district had knowledge of the facts constituting the petitioner's claim, the absence of any affidavits by the individuals allegedly informed of the occurrence refuting petitioner's allegation that they were told of the occurrence is sufficient to impute said knowledge to the respondent. Therefore, since there was an opportunity to investigate, an inordinate period of time did not pass. Taking into consideration the fact that an infant was injured, it is in the opinion of this court sufficient to hold that there was no prejudice to respondents.

Accordingly, petitioner is granted leave to file a late notice of claim, and the notice annexed to the moving papers is deemed timely served five days after service of a copy of this order with notice of entry upon respondents.

The respondent municipalities shall have their full rights to a General Municipal Law Sec. 50-h hearing and all other discovery prior to the commencement of any action.

Dated: OCT 25 2002


ENTERED

J.S.C.

termini

OCT 30 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE