

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 62

In the Matter of the Claim of YOMAIRA GUTIERREZ, Individually and as Parent and Natural Guardian of JASSELL FRANCO, an Infant under the age of 12 years,

Petitioners,

For leave to serve a late Notice of Claim pursuant to G.M.L § 50-e (5)

INDEX NO. 108631/05
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL.NO.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

- v -

THE NEW YORK CITY BOARD OF EDUCATION,
THE NEW YORK CITY DEPARTMENT OF
EDUCATION and THE CITY OF NEW YORK,

Respondents.

The following papers, numbered 1 to 3 were read on this motion to/for : serve late notice of claim.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	

Cross Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is granted, for the reasons set forth below.

Background

Petitioner Yomaira Gutierrez seeks to bring an action to recover damages for personal injuries allegedly sustained by her infant son, Jassell Franco, on or about April 20, 2004, when his head was injured by metal protruding from playground equipment at P.S. 152, also known as the Dyckman Valley School, located at 93 Nagle Avenue in New York, New York. Petitioner Gutierrez asserts that Jassell was in the third grade at the time of the accident and that his teacher, whom she believes was named Mr. Kamps, was present in the schoolyard and took him to the school nurse's office. Mrs Gutierrez further asserts that "numerous other teachers and school officials were aware of the accident and were present when it occurred" and, within two weeks of

the accident, unnamed teachers allegedly told her that they knew that the metal protruding from the playground equipment where Jassell was injured was dangerous (Affidavit of Yomaira Gutierrez in Support of Application [Gutierrez Aff.], at ¶¶ 2 - 6). Annexed to the application are numerous detailed color photographs taken by Ms. Gutierrez of the playground equipment where Jassell was injured approximately two weeks after the accident (Gutierrez Aff., Ex. 3). In addition, Ms. Gutierrez has annexed to her affidavit photographs she allegedly took of her son's injuries (*id.*, at Ex. 4).

Petitioners originally brought the instant application on or about June 21, 2005. This Court issued an interim order, dated June 23, 2005, in which it declined to sign the original order to show cause, without prejudice to resubmit along with an affidavit of translation of the affidavit of Ms. Gutierrez, as she stated that she does not speak English, and a statement as to whether the photographs of the playground equipment where Jassell was allegedly injured, annexed to the original application, depict the current condition of this equipment. In accordance with this Court's interim order, petitioner Gutierrez has submitted an affidavit of translation of her affidavit (*see* Affidavit of Susan Ventura, sworn to June 27, 2005). In addition, Ms. Gutierrez has annexed to the instant application copies of photographs of the playground equipment where Jassell was injured, taken on June 27, 2005, which she alleges still show the protruding sharp piece of metal which caused his injuries (*see* Gutierrez Aff., at ¶ 8 and Ex. 5).

Discussion

When deciding whether to grant an application for leave to file a late notice of claim, courts consider various factors, including the following: (1) whether the petitioner has demonstrated a reasonable excuse for the failure to timely serve a notice of claim; (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days after the claim arose or a reasonable time thereafter – a factor that should be accorded great weight, (*see Justiniano v. New York City Hous. Auth. Police*, 191 A.D.2d 252 [1st Dept 1993]); and (3) whether the delay substantially prejudiced the municipality's ability to defend its case on the

merits (*see* General Municipal Law § 50-e[5]; *Diallo v. City of New York*, 224 A.D.2d 339 [1st Dept 1996]; *Strauss v. New York City Tr. Auth.*, 195 A.D.2d 322 [1st Dept 1993]; *Gelles v. New York City Hous. Auth.*, 87 A.D.2d 757 [1st Dept 1982]). No one single factor is determinative (*see Matter of Gerzel v. City of New York*, 117 A.D.2d 549, 551 [1st Dept 1986]; *Rechenberger v. Nassau County Med. Ctr.*, 112 A.D.2d 150, 152 [2d Dept 1985]; *Matter of Morris v. County of Suffolk*, 88 A.D.2d 956, 957 [2d Dept 1982], *affd* 58 N.Y.2d 767 [1982]).

Petitioner Gutierrez asserts that the reason why she delayed over one year in making an application to file a notice of claim is that she does not speak English and that she was unaware of the statutory requirement of filing a notice of claim within 90 days of the occurrence (Gutierrez Aff., at ¶ 11). Ignorance of the statutory requirement, however, has been held not to excuse failure to timely serve a notice of claim (*see Harris v City of New York*, 297 AD2d 473 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]; *Matter of Gofman v City of New York*, 268 AD2d 588 [2d Dept 2000]; *Matter of Embery v City of New York*, 250 AD2d 611 [2d Dept 1998]).

Absence of an acceptable excuse for the delay in serving a notice of claim, however, is not necessarily fatal to an application to serve a late notice of claim (*see Diallo v City of New York*, 224 AD2d at 340). Rather, courts will consider all factors listed in GML § 50-e (5), particularly whether the municipality acquired actual knowledge of the essential facts constituting the claim within the 90-day statutory period, when determining whether to grant an application to serve a late notice of claim (*see Diallo v City of New York*, 224 AD2d at 340; *Justiniano v New York City Hous. Auth. Police*, 191 AD2d at 252; *Matter of Russell v City of New York*, 2003 N.Y. Slip Op. 50872, 2003 WL 21146884 *2 [Sup Ct, NY County March 31, 2003, Ling-Cohan, J.]). For the reasons discussed herein, this Court grants the instant application to serve a late notice of claim.

In this matter, petitioner Gutierrez asserts that Jassell's third grade teacher, whom she identified as Mr. Kamps, was aware of the accident and took him to the school nurse's office. She also asserts that numerous teachers and school officials witnessed the accident or were aware of it and knew that the piece of exercise equipment was dangerous. The above information provides

respondents with sufficient information to locate witnesses to the accident, particularly as this involves a school setting in which there are a finite and limited number of teachers and school officials involved, all of whom are easily identified by respondents as their employees. Significantly, the instant application is further supported by the detailed colored photographs of the playground equipment where Jassell was injured, allegedly taken by Mrs. Gutierrez approximately two weeks after the accident occurred and on or about June 27, 2005, over one year later when the instant application was brought. Such photographs demonstrate that the complained of condition is not transitory in nature. The photographs clearly depict the protruding metal pieces which allegedly caused Jassell's injuries and demonstrate that there was no change in this condition since the accident occurred. Accordingly, petitioners' delay in bringing the instant application, although lengthy, will not prevent respondents from investigating the condition which allegedly caused Jassell's injuries (*see Lozada v City of New York*, 189 AD2d 726 [1st Dept 1993] [allowing service of late notice of claim approximately 8 1/2 months beyond the statutory 90 day period, where Housing Authority police filed a contemporaneous report of the infant plaintiff's fall on a sidewalk, photographs of the accident were taken and eyewitnesses came forth]; *see also Elter v New York City Hous. Auth.*, 260 AD2d 232 [1st Dept 1999] [original notice of claim supported by numerous photographs sufficiently identified location of incident]; *Ali v Bunny Rlty. Corp.*, 253 AD2d 356 [1st Dept 1998] [late notice of claim may be served against Housing Authority on behalf of infant exposed to lead paint in subsidized housing, despite delay of two years since condition was first diagnosed, where Authority had responsibility for inspecting subsidized units for lead paint]).

Although respondents summarily assert that they are prejudiced in investigating this claim by petitioners' lengthy delay in making the instant application, they do not describe any steps they took to undertake an investigation, and how they were specifically hampered by the passage of time. As has been noted above, petitioners have provided sufficient specific information about the school where the accident occurred to enable respondents to conduct an investigation and locate

reports of the incident and witnesses to it. Significantly, the detailed photographs of the playground equipment where the accident allegedly occurred, taken by Ms. Gutierrez both shortly after the accident and at the time of the instant application, should enable respondents to investigate the alleged condition responsible for Jassell's injuries, despite the time which has elapsed (*cf. Young v Board of Educ. of City of New York*, 1 AD3d 194 [1st Dept 2003] [reversing order denying application, made on behalf of infant, to serve late notice of claim for alleged sexual assault which occurred approximately three years before, despite fact respondents produced affidavit from school's current principal that a search of the records in the school and the Board of Education revealed no reports of the incident; petitioner entitled to hearing as to whether respondents timely acquired actual notice of the underlying facts, where the infant's mother submitted an affidavit stating that the school's former principal was notified about the incident several days after it occurred and he interviewed the child shortly thereafter]). Therefore, after considering all of the relevant factors in the context of the facts and circumstances of this matter, this Court grants the instant application to serve a late notice of claim.

Accordingly, it is

ORDERED AND ADJUDGED that petitioners' application to serve a late notice of claim is granted and the proposed notice of claim annexed to the application is deemed to be served, upon service of a copy of this decision, order and judgment, with notice of entry; and it is further

ORDERED that, within thirty days of entry, petitioners shall serve upon respondents a copy of this decision, order and judgment, with notice of entry.

This constitutes the Decision, Order and Judgment of the Court.

Dated: 09/19/05

ENTER: 
Doris Ling-Cohan, JSC

HON. DORIS LING-COHAN

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If Appropriate: DO NOT POST

H:\Supreme Court\notice of claim\Gutierrez.NYC Bd Ed - grant - infant - photographs.wpd