

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10

Justice

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UMAIR SAEED, BY HIS FATHER AND No. 7779/05
NATURAL GUARDIAN, RAJA SAEED,
AND RAJA SAEED, INDIVIDUALLY,

Plaintiffs, Motion
Date February 7, 2006
-against-

CITY OF NEW YORK AND DEPARTMENT Motion
OF EDUCATION OF THE CITY OF Cal. No. 21
NEW YORK,
Defendants.

PAPERS
NUMBERED

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Plaintiffs commenced this action seeking to recover damages alleged to have been sustained on March 9, 2005 when the infant plaintiff was threatened, harassed and assaulted by students at William Bryant High School located at 48-10 31st Avenue, Long Island City, in the County of Queens, City and State of New York.

Plaintiffs move for an order granting plaintiffs leave to amend their notice of claim, dated March 16, 2005, pursuant to General Municipal Law § 50(e)(6) and to serve such amended notice of claim upon defendants; permitting plaintiffs to amend their verified complaint and to file and serve such upon defendants; and striking defendants' affirmative defenses 10 and 11 as set forth in their answer.

Although served with the motion, defendants have not submitted any papers in opposition thereto.

Plaintiffs assert that on March 18, 2005, they served defendants with a notice of claim which mistakenly noted that the infant plaintiff's injuries occurred on March 9, 2005. It appears that such injuries were actually incurred on March 10, 2005. The emergency department records prepared and maintained by Elmhurst General Hospital set forth the correct date. Further, the infant plaintiff testified at the 50-h hearing on August 16, 2005, that he was stabbed on March 10, 2005. His affidavit stating such date is submitted with the motion. The verified complaint also sets forth the incorrect date of March 9, 2005.

Plaintiffs also assert that the defendants' answer, in paragraphs 10 and 11, sets forth that plaintiffs did not submit to a 50-h hearing prior to commencement of the action and that the action was commenced prematurely and not within the provisions of GML § 50-i. Plaintiffs argue that, although the action was commenced just four months prior to the 50-h hearing and the expiration of the statute of limitations, the defendants have not been prejudiced in any way.

The motion by plaintiffs is denied.

As noted by the court in Perkins v City of New York, 2006 NY Slip Op. 01475, "General Municipal Law § 50-i(1)(b) requires that the complaint allege that at least 30 days have elapsed since the service of the notice and that the adjustment or payment of the claim has been neglected or refused. Although the complaint contained such an allegation, the allegation was inaccurate. The failure to include in the complaint an accurate allegation that at least 30 days have elapsed since the service of the notice and that the adjustment or payment of the claim has been neglected or refused required that the complaint be dismissed. (cf. Davidson v Bronx Municipal Hosp., 64 NY2d

59, 62, 484 NYS2d 533, 473 NE2d 761; Smith v Scott, 294 AD2d 11, 22, 740 NYS2d 425)."

In the instant case, the notice of claim was served on March 18, 2005. The action was commenced on April 8, 2005 by the filing of the summons and verified complaint. Said verified complaint contains only a general statement: "That plaintiffs have complied with all conditions precedent to the bringing of this action, including but not limited to the timely filing of a notice of claim on both defendants on [sic]". Such statement is inaccurate as the action was commenced prior to the expiration of 30 days from the service of the notice of claim.

Accordingly, the motion by plaintiffs is denied.

Dated: March 30, 2006

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HON. DAVID ELLIOT