

## New York State Court of Claims



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### SALERNO v. THE CITY UNIVERSITY OF NEW YORK, #2006-036-551, Claim No. None, Motion No. M-71759

#### Synopsis

Late filing motion granted . . . defendant had timely notice of accident and proposed claim has the appearance of merit.

#### Case Information

|                                    |  |
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| <b>UID:</b>                        | 2006-036-551   |
| <b>Claimant(s):</b>                | GARY SALERNO and DEBRA WERNER<br>1 1.The court has, sua sponte, stricken the unnecessary reference to the College of Staten Island from the caption. |
| <b>Claimant short name:</b>        | SALERNO  |
| <b>Footnote (claimant name) :</b>  |  |
| <b>Defendant(s):</b>               | THE CITY UNIVERSITY OF NEW YORK<br>The court has, sua sponte, stricken the unnecessary reference to the College of Staten Island from the caption.   |
| <b>Footnote (defendant name) :</b> |  |
| <b>Third-party claimant (s):</b>   |  |
| <b>Third-party defendant(s):</b>   |  |
| <b>Claim number(s):</b>            | None   |
| <b>Motion number(s):</b>           | M-71759  |
| <b>Cross-motion number(s):</b>     |  |
| <b>Judge:</b>                      | MELVIN L. SCHWEITZER   |
| <b>Claimant's attorney:</b>        | LEVENTHAL & KLEIN, LLPBy:<br>Jason Leventhal, Jr. Esq.   |

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| <b>Defendant's attorney:</b>                   | ELIOT SPITZER, ATTORNEY<br>GENERAL<br>By: Ellen Matowik<br>Russell, Assistant Attorney<br>General |
| <b>Third-party defendant's attorney:</b>       |   |
| <b>Signature date:</b>                         | September 5, 2006   |
| <b>City:</b>                                   | New York  |
| <b>Comments:</b>                               |   |
| <b>Official citation:</b>                      |   |
| <b>Appellate results:</b>                      |   |
| <b>See also</b><br><b>(multcaptioned case)</b> |   |

## Decision

Claimants seek permission to file a late claim arising out of a September 6, 2005 incident in which Gary Salerno (hereinafter "claimant") allegedly tripped and fell in a hole behind a backstop on a softball field on the campus of the College of Staten Island, a senior college in the CUNY system (see Education Law § 6224[4]). The claim of Debra Werner, his wife, is for loss of services. Defendant opposes the motion. [2]

Court of Claims Act § 10(6) grants the court the discretion to allow the filing of a late claim, upon consideration of certain factors, including whether claimant's delay in proceeding against the State is excusable, whether the State had timely notice of and the opportunity to investigate the pertinent allegations, whether the State would suffer substantial prejudice from an order allowing late filing, whether the proposed claim appears meritorious and whether claimant has an alternate remedy.

Claimants' counsel advises that the failure to timely serve and file a claim or notice of intention (i.e., within 90 days of accrual; Court of Claims Act § 10 [3]), was the result of his office's failure to properly diary the matter. He concedes that this law office failure is not excusable within the meaning of the statute, but maintains, correctly, that it is not dispositive but rather only one factor to consider (*Bay Terrace Coop. Section IV v New York State Employees' Retirement System Policemen's and Firemen's Retirement System*, 55 NY2d 979, 981 [1982]; *Donaldson v State of New York*, 167 AD2d 805 [1990]; *Ledet v State of New York*, 207 AD2d 965 [1994]).

Claimant advises that he was attending a Little League practice with his son's team when he went to retrieve a ball from about 45 feet behind the backstop. He states the area was covered by freshly-placed topsoil, and appeared to be safe to traverse, but when he stepped on a spot about 30 feet behind the backstop (shown on photographs annexed to the proposed claim), the topsoil gave way and his foot fell into a hole, injuring his ankle. Campus police arrived within minutes, took photographs and statements from claimant and witnesses, called for an ambulance and completed an accident report (Exhibit "B" to Notice of Motion).

It is apparent that defendant had timely notice of the relevant facts and the opportunity to investigate and, in fact, it did investigate. The court finds that defendant would not suffer substantial prejudice--or any prejudice for that matter--from the five-month delay between the expiration of the statutory 90-day period and the service of the motion papers.

Arguing that claimant has failed to show apparent merit to the claim, defendant contends the alleged defect was open and obvious and the claim should therefore be barred under the doctrine of primary assumption of risk (see *Morgan v State of New York*, 90 NY2d 471, 484; *Dobert v State of New York*, 8 AD3d 873; *Josefs v State of New York* [UID No. 2006-029-588]). Nevertheless, it is far from apparent that claimant, a spectator at an athletic event, assumed the risk of sustaining injury as described in the submitted papers or that the alleged defect was open and obvious. While defendant has raised factual and legal issues that would need to be resolved in claimant's favor in order to support a finding of liability, at this point in the litigation claimant has met his burden of demonstrating that the proposed claim is not patently groundless, frivolous or legally defective (*Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1 [1977]) and the court is satisfied that a valid cause of action may well exist (see also *Marcus v State of New York* 172 AD2d 724 [2d Dept 1991]). In view of the absence of prejudice stemming from defendant's prompt investigation, claimant has presented enough to allow his claim to proceed to a determination on the merits (*Jomarron v State of New York*, 23 AD3d 527 [2d Dept 2006]).

Accordingly the motion is granted. Claimants should modify the proposed claim to remove the unnecessary reference to the College of Staten Island from the caption, indicate the nature of Debra Werner's damages, and replace the inappropriate language that the claim is presented for adjustment and payment with a demand for relief, and serve and file the claim, in accordance with the relevant provisions of the Court of Claims Act and the Uniform Rules for the Court of Claims, including manner of service and payment of the filing fee, within 30 days of entry of this decision and order.

September 5, 2006  
New York, New York

HON. MELVIN L. SCHWEITZER  
Judge of the Court of Claims

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[2].The court considered the Notice of Motion, Affirmation and Exhibits, the Affirmation in Opposition and the Reply Affirmation and Exhibit.