

C

Supreme Court, Appellate Division, Second Department,
New York.

BRI-DEN CONSTRUCTION COMPANY, INC.,
Appellant,

v.

BOARD OF EDUCATION, HEMPSTEAD SCHOOL
DISTRICT, Respondent.

Jan. 18, 1994.

Contractor brought action against school district to recover sums due and owing under construction contract. The Supreme Court, Nassau County, Kohn, J., denied contractor's motion for summary judgment and leave to file late notice of claim, and granted school district's cross motion to dismiss complaint for failure to serve timely notice of claim. The Supreme Court, Appellate Division, held that contractor would be granted leave to file late notice of claim, considering that it failed to file timely notice by reason of its justifiable reliance upon representations by district's authorized representatives and agents that its bill would be paid, and that delay did not prejudice school district.

Reversed and remitted.

West Headnotes

Schools  86(2)

[345k86\(2\) Most Cited Cases](#)

Contractor would be granted leave to serve late notice of claim against school district, where contractor failed to file timely notice of claim by reason of its justifiable reliance upon representations by district's authorized representatives and agents that its bill would be paid; moreover, because school district had actual knowledge of essential facts constituting claim at time it accrued, delay did not prejudice school district. [McKinney's Education Law § 3813](#), subds. 1, 2-a, 2-b.

**717 Moritt, Hock & Hamroff, Hempstead (Neil J. Moritt and Sharon I. Feder, of counsel), for appellant.

Berkman, Henoch, Peterson & Peddy, Garden City (Michelle Gapinski and Thomas Stagg, of counsel), for respondent.

Before [BRACKEN](#), J.P., and [SULLIVAN](#), ROSENBLATT and [MILLER](#), JJ.

MEMORANDUM BY THE COURT.

*605 In an action to recover sums due and owing under a construction contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Kohn, J.), entered September 9, 1991, which denied its motion for summary judgment and leave to serve a late notice of claim, and granted the defendant's cross motion to dismiss the complaint for failure to serve a timely notice of claim pursuant to [Education Law § 3813](#).

ORDERED that the order is reversed, on the law, with costs, the defendant's cross motion is denied, the complaint is reinstated, the plaintiff's motion is granted, the plaintiff is granted leave to serve a late notice of claim upon the defendant, the notice of claim dated September 13, 1990, is deemed served, and the matter is remitted to the Supreme Court, Nassau County, for entry of an appropriate judgment in the principal sum of \$43,503.82 **718 plus interest to be determined by the Supreme Court, Nassau County.

Having completed work on a construction contract entered into with the defendant on July 31, 1986, the plaintiff submitted a final requisition for payment of \$43,503.82 on November 14, 1989. Over the ensuing months the plaintiff received numerous assurances in response to its calls and letters that payment was forthcoming. However, no check was ever sent. On September 14, 1990, the plaintiff served a notice of claim, and commenced this action.

According to [Education Law § 3813\(1\)](#), a plaintiff is obliged to file a notice of claim against a school district within three months from the accrual of the "claim" under a contract. For contracts entered into before July 17, 1992, a "claim" accrued when the amount of money due was ascertained or ascertainable (see, [Matter of Board of Educ. / Wager Constr. Corp.](#), 37 N.Y.2d 283, 372 N.Y.S.2d 45, 333 N.E.2d 353; [G.A. Contractors v. Board of Educ.](#), 176 A.D.2d 856, 575 N.Y.S.2d 334; [Prote Contracting Co., Inc. v. Board of Educ.](#), 171 A.D.2d 621, 622, 567 N.Y.S.2d 687; [Philson Painting Co., Inc. v. Board of Educ.](#), 133 A.D.2d 619, 519 N.Y.S.2d 727; *606 [Amsterdam Wrecking and Salvage Co., Inc. v. Greater Amsterdam School District](#), 83 A.D.2d 654, 442 N.Y.S.2d 197, *affd*, 56 N.Y.2d 828, 452 N.Y.S.2d 571, 438 N.E.2d 104). In consequence, because the amount of the plaintiff's "claim" was ascertained on November 14, 1989, its service of a notice of claim on September 14, 1990, was untimely.

However, the plaintiff did move for leave to serve a late notice of claim within the one-year period of limitations set forth in [Education Law § 3813\(2-a\)](#) and (2-b) (see, [Matter of Prote Contr. Co. v. Board of Educ.](#), 198 A.D.2d 418, 603 N.Y.S.2d 583). The defendant had actual knowledge of the essential facts constituting the claim in November 1989. The plaintiff failed to file a timely notice of claim by reason of its justifiable reliance upon representations by the

606 N.Y.S.2d 717

88 Ed. Law Rep. 1137

(Cite as: 200 A.D.2d 605, 606 N.Y.S.2d 717)

defendant's authorized representatives and agents that its bill would be paid, and the delay did not prejudice the defendant (see, [Education Law § 3813\[2-a\]](#); [Gordon Dana Madris Realty, Inc. v. Eastchester Union Free School Dist.](#), 125 A.D.2d 541, 542, 509 N.Y.S.2d 619; [Nyack Bd. of Educ. v. K. Capolino Design & Renovation](#), 114 A.D.2d 849, 494 N.Y.S.2d 758, *affd.*, 68 N.Y.2d 647, 505 N.Y.S.2d 74, 496 N.E.2d 233). Additionally, among the "other relevant facts and circumstances" deserving of consideration under [Education Law § 3813\(2-a\)](#) is the fact that the defendant does not contest the plaintiff's right to the \$43,503.82 for work performed under the contract, arguing *only* that the plaintiff waited too long to sue (see, [Quirk v. Morrissey](#), 106 A.D.2d 498, 483 N.Y.S.2d 34). Accordingly, we grant the plaintiff leave to serve a late notice of claim, deem the notice of claim timely served, and grant the plaintiff summary judgment.

606 N.Y.S.2d 717, 200 A.D.2d 605, 88 Ed. Law Rep. 1137

END OF DOCUMENT