

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D20627  
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Submitted - September 17, 2008

REINALDO E. RIVERA, J.P.  
ANITA R. FLORIO  
DANIEL D. ANGIOLILLO  
WILLIAM E. McCARTHY  
CHERYL E. CHAMBERS, JJ.

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2007-10679

DECISION & ORDER

Donna October, et al., plaintiffs-respondents,  
v Town of Greenburgh, appellant, Edward October,  
defendant-respondent.

(Index No. 4063/07)

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Timothy W. Lewis, Town Attorney, Greenburgh, N.Y. (David R. Fried of counsel),  
for appellant.

Rosenbaum & Rosenbaum P.C., New York, N.Y. (Matthew T. Gammons of  
counsel), for plaintiffs-respondents.

In an action to recover damages for personal injuries, the defendant Town of  
Greenburgh appeals from so much of an order of the Supreme Court, Westchester County (Donovan,  
J.), entered October 29, 2007, as denied its motion to dismiss the complaint and all cross claims  
insofar as asserted against it for failure to comply with General Municipal Law § 50-h.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Generally, a plaintiff who has failed to comply with a demand for a hearing served  
pursuant to General Municipal Law § 50-h(2) is precluded from commencing an action against a  
municipality (*see* General Municipal Law § 50-h[5]; *Scalzo v County of Suffolk*, 306 AD2d 397;  
*Matter of Pelekanos v City of New York*, 264 AD2d 446). When, however, the hearing has been  
postponed indefinitely beyond 90 days after service of the demand and the municipality does not  
reschedule the hearing, a plaintiff's failure to appear for a hearing will not warrant dismissal of the

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complaint (*see* General Municipal Law § 50-h[5]; *Southern Tier Plastics, Inc. v County of Broome*, 53 AD3d 980; *Belton v Liberty Lines Transit, Inc.*, 3 AD3d 334; *Page v City of Niagara Falls*, 277 AD2d 1047, 1048; *McCormack v Port Wash. Union Free Sch. Dist.*, 214 AD2d 546). Here, the plaintiffs' first request for an adjournment of the hearing was granted by the appellant and the hearing was rescheduled to a date more than 90 days after service upon them of the demand. Prior to the second scheduled hearing date, the parties agreed to postpone the hearing without setting another date. Since the appellant failed in its obligation to reschedule the hearing for the earliest possible date available, the plaintiffs' failure to appear for a hearing did not warrant the dismissal of the complaint insofar as asserted against the appellant (*see Southern Tier Plastics, Inc. v County of Broome*, 53 AD3d 980; *McCormack v Port Wash. Union Free School Dist.*, 214 AD2d 546). Accordingly, the appellant's motion to dismiss the complaint and all cross claims insofar as asserted against it was properly denied.

RIVERA, J.P., FLORIO, ANGIOLILLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court