

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

D33490
Y/ct

_____AD3d_____

Submitted - December 14, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
RANDALL T. ENG
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2011-02604

DECISION & ORDER

Sandra Browne, appellant, v New York City Transit Authority, respondent.

(Index No. 28626/09)

Timothy M. Sullivan, New York, N.Y., for appellant.

Wallace D. Gossett, Brooklyn, N.Y. (Lawrence Heisler of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Sherman, J.), dated December 15, 2010, which granted the defendant's motion to dismiss the complaint for failure to serve a timely notice of claim pursuant to General Municipal Law § 50-e(5) and denied her cross motion to deem the notice of claim timely served nunc pro tunc.

ORDERED that the order is affirmed, with costs.

The plaintiff's late service of a notice of claim upon the defendant was a nullity, as it was made without leave of the court (*see Ellman v Village of Rhinebeck*, 27 AD3d 414, 415; *Alston v Aversano*, 24 AD3d 399; *Pierre v City of New York*, 22 AD3d 733). Furthermore, since the plaintiff cross-moved to deem the notice of claim timely served nunc pro tunc after the one-year and 90-day statute of limitations had expired, the Supreme Court did not have the authority to grant such relief (*see* General Municipal Law § 50-e[5]; § 50-i [1]; *Pierson v City of New York*, 56 NY2d 950, 954; *Argudo v New York City Health & Hosps. Corp.*, 81 AD3d 575, 576-577; *Ellman v Village*

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of Rhinebeck, 27 AD3d at 415; *Friedman v City of New York*, 19 AD3d 542, 543; *Small v New York City Tr. Auth.*, 14 AD3d 690, 691).

The plaintiff contends that the defendant was estopped from moving to dismiss the complaint based on her failure to serve a timely notice of claim. Equitable estoppel against a public corporation will lie only when the conduct of the public corporation was calculated to or negligently did mislead or discourage a party from serving a timely notice of claim, and when that conduct was justifiably relied upon by that party (*see Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668; *Dier v Suffolk County Water Auth.*, 84 AD3d 861, 862; *Dorce v United Rentals N. Am., Inc.*, 78 AD3d 1110, 1111; *Vandermast v New York City Tr. Auth.*, 71 AD3d 1127; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677). Here, the plaintiff failed to demonstrate that the defendant engaged in any misleading conduct that would support a finding of equitable estoppel (*see Dier v Suffolk County Water Auth.*, 84 AD3d at 862; *Dorce v United Rentals N. Am., Inc.*, 78 AD3d at 1111; *Vandermast v New York City Tr. Auth.*, 71 AD3d at 1128). The letter by the defendant informing the plaintiff of a defect in the form of the notice of claim did not constitute conduct that would warrant an estoppel (*see Vandermast v New York City Tr. Auth.*, 71 AD3d at 1127, 1128; *Walter H. Poppe Gen. Contr., Inc. v Town of Ramapo*, 280 AD2d 667, 668).

RIVERA, J.P., FLORIO, ENG, HALL and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court