

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

D33929  
C/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - January 23, 2012

PETER B. SKELOS, J.P.  
JOHN M. LEVENTHAL  
PLUMMER E. LOTT  
ROBERT J. MILLER, JJ.

2011-03605

DECISION & ORDER

Carmen Otero McCulloch, appellant, v Town of  
Milan Town Board, et al., respondents.

(Index No. 7470/10)

Kenneth J. McCulloch, New York, N.Y., for appellant.

Rice & Amon, LLP, Suffern, N.Y. (Terry Rice of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Dutchess County (Sproat, J.), dated March 25, 2011, which granted those branches of the defendants' motion which were to dismiss the complaint for failure to serve a timely notice of claim and as time-barred.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly granted those branches of the defendants' motion which were to dismiss the complaint for failure to serve a timely notice of claim as required by Town Law § 65(3) and as time-barred. Pursuant to Town Law § 65(3), no action shall be maintained against a town "upon or arising out of a contract entered into by the town unless ... a written verified claim shall have been filed with the town clerk within six months after the cause of action shall have accrued" (*McCulloch v Town of Milan*, 74 AD3d 1034, 1035, quoting Town Law § 65[3]). "The filing of a notice of claim is thus a condition precedent to the maintenance of an action against a town arising out of the contractual relationship between a plaintiff and a town" (*McCulloch v Town of Milan*, 74 AD3d at 1035; see *Mohl v Town of Riverhead*, 62 AD3d 969, 969; *ADC Contr. & Constr., Inc. v Town of Southampton*, 45 AD3d 614, 615). The plaintiff's July 27, 2010, notice of

February 14, 2012

Page 1.

McCULLOCH v TOWN OF MILAN TOWN BOARD

claim was untimely since it was not filed within six months after her causes of action, inter alia, to recover damages for breach of contract accrued. Contrary to her contention, the causes of action did not accrue as of June 23, 2010, when her attorney wrote to the Town requesting the same relief her attorney requested in a letter dated April 8, 2008. Furthermore, the action was time-barred under the applicable statute of limitations since it was commenced more than 18 months after it accrued in 2008 (*see* Town Law § 65[3]; *Schirmer v Town of Harrison*, 294 AD2d 347, 347).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

SKELOS, J.P., LEVENTHAL, LOTT and MILLER, JJ., concur.

ENTER:

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

Aprilanne Agostino  
Clerk of the Court