

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1365

CA 11-00587

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

TRACY GURNETT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF WHEATFIELD, ROBERT CLIFFE, LARRY HELWIG,
ARTHUR GERBEC, GILBERT DOUCET, KENNETH RETZLAFF
AND ROBERT O'TOOLE, DEFENDANTS-RESPONDENTS.

SPADAFORA & VERRASTRO, LLP, BUFFALO (JOSEPH C. TODORO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered December 13, 2010. The order
denied the application of plaintiff for leave to serve a late and
amended notice of claim.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs and the application is
granted upon condition that the proposed amended notice of claim is
served within 20 days of the date of entry of the order of this Court.

Memorandum: Plaintiff, an employee of defendant Town of
Wheatfield, initially served a notice of claim alleging that she had
been subjected to, inter alia, harassment, retaliation and a hostile
work environment beginning on "December 4, 2009 and continuing
thereafter." Following the hearing conducted pursuant to General
Municipal Law § 50-h, plaintiff sought leave to amend the notice of
claim to reflect that the conduct complained of began on May 29, 2009,
and she also sought leave to serve the amended notice of claim as a
late notice of claim. Supreme Court denied plaintiff's application
based upon her failure to offer a reasonable excuse for failing to
serve a timely notice of claim with respect to the incidents beginning
on May 29, 2009.

"Although courts are vested with broad discretion in determining
whether to grant an application for leave to serve a late notice of
claim," we conclude that the court abused its discretion in denying
plaintiff's application (*Hale v Webster Cent. School Dist.*, 12 AD3d
1052, 1052). Plaintiff established that defendants received actual
notice of the first incidents upon which the claim is based in a
timely manner in June 2009, and "defendants have made no

particularized or persuasive showing that the delay caused them substantial prejudice" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965; see *Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434). Thus, plaintiff's failure to offer a reasonable excuse for the delay in filing a notice of claim with respect to the incidents commencing May 29, 2009 " 'is not fatal where, as here, actual notice was had and there is no compelling showing of prejudice to' [defendants]" (*Matter of Henderson v Town of Van Buren*, 281 AD2d 872, 873). We therefore reverse the order and grant plaintiff's application upon condition that the proposed amended notice of claim is served within 20 days of the date of entry of the order of this Court.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court