

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

D56813  
T/htr

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

Argued - April 26, 2018

ALAN D. SCHEINKMAN, P.J.  
REINALDO E. RIVERA  
CHERYL E. CHAMBERS  
HECTOR D. LASALLE, JJ.

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2017-05228

DECISION & ORDER

Witold Moroz, respondent, v City of New York,  
et al., appellants.

(Index No. 500168/17)

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Lewis Brisbois Bisgaard & Smith, LLP, New York, NY (Nicholas P. Hurzeler and Meghan Cavalieri of counsel), for appellants.

The Perelman Firm, PLLC, New York, NY (Peter D. Rigelhaupt of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Johnny L. Baynes, J.), dated April 20, 2017. The order denied the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to timely serve a notice of claim and granted the plaintiff's oral application for leave to serve an amended complaint within 90 days.

ORDERED that on the Court's own motion, the appeal from so much of the order as granted the plaintiff's oral application for leave to serve an amended complaint within 90 days is deemed a motion for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed, on the law, with costs, the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint is granted, and the plaintiff's oral application for leave to serve an amended complaint within 90 days is denied as academic.

The plaintiff commenced this action while a proceeding he commenced pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim was still pending. The

October 10, 2018

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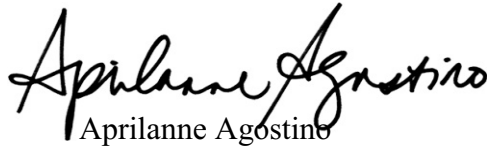
MOROZ v CITY OF NEW YORK

defendants moved pursuant to CPLR 3211(a)(7) to dismiss the action for failure to serve a timely notice of claim. Upon granting the plaintiff's petition in the separate proceeding and deeming the notice of claim timely served nunc pro tunc, the Supreme Court denied the defendants' motion to dismiss this action and instead granted an oral application by the plaintiff for leave to serve an amended complaint within 90 days. The defendants appeal.

In light of our determination on the companion appeal from the order granting the petition in the separate proceeding (*see Matter of Moroz v City of New York*, \_\_\_\_\_ AD3d \_\_\_\_\_ [decided herewith]), the order appealed from must be reversed, the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint granted, and the plaintiff's oral application for leave to serve an amended complaint within 90 days denied as academic.

SCHEINKMAN, P.J., RIVERA, CHAMBERS and LASALLE, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court