

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

856

CA 15-01956

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

JANE FIXTER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF LIVINGSTON, LIVINGSTON COUNTY PROBATION
DEPARTMENT, LIVINGSTON COUNTY SHERIFF DEPARTMENT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JANE FIXTER, PLAINTIFF-APPELLANT PRO SE.

WEBSTER SZANYI LLP, BUFFALO (JEREMY COLBY OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Evelyn Frazee, J.), entered March 11, 2015. The order granted the motion of defendants County of Livingston, Livingston County Probation Department and Livingston County Sheriff Department to dismiss the complaint against them and dismissed the complaint against those defendants.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff appeals from an order granting the pre-answer motion of the County of Livingston, the Livingston County Probation Department, and the Livingston County Sheriff Department (defendants) to dismiss the complaint against them based on plaintiff's failure to serve a timely notice of claim. In the complaint, plaintiff sought damages for injuries sustained as a result of being wrongfully incarcerated following alleged violations of probation. We reject plaintiff's contention that Supreme Court erred in granting defendants' motion. Service of a notice of claim within 90 days after the claim arises is a condition precedent to commencement of a negligence action against a county or its officers, agents, servants, or employees (see County Law § 52 [1]; General Municipal Law § 50-e [1] [a]; see generally *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61), but the plaintiff may seek and obtain leave to serve a late notice of claim (see General Municipal Law § 50-e [5]). Here, plaintiff concedes that she served an untimely notice of claim without first obtaining leave of the court. We therefore conclude that the untimely notice of claim was "a nullity, requiring dismissal of the complaint" (*Wollins v New York City Bd. of Educ.*, 8 AD3d 30, 31; see *Wall v Erie County*, 26 AD3d 753, 753). Contrary to

plaintiff's contention, defendants' failure to reject plaintiff's late notice of claim did not constitute a waiver of the defense of failure to serve a timely notice of claim (see *Wollins*, 8 AD3d at 31; see generally *Wall*, 26 AD3d at 753).

Entered: October 7, 2016

Frances E. Cafarell
Clerk of the Court