

Barbaro v County of Nassau

2007 NY Slip Op 33596(U)

October 30, 2007

Supreme Court, Nassau County

Docket Number: 0833-07/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

ROSE BARBARO and DANIEL BARBARO,

Plaintiffs,

Index No. 010833/07

-against-

**COUNTY OF NASSAU, TOWN OF HEMPSTEAD,
INCORPORATED VILLAGE OF VALLEY
STREAM, VALLEY STREAM CENTRAL HIGH
SCHOOL, VALLEY STREAM CENTRAL HIGH
SCHOOL DISTRICT,**

**Motion Dated: 8/27/07
Motion Submitted: 9/24/07
Motion Sequence: 001, 002,
003, 004**

Defendants.

_____x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXXX
- Answering Papers.....X
- Reply.....XXX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion by defendant Incorporated Village of Valley Stream (hereinafter "Village of Valley Stream") to dismiss the complaint on the ground of statute of limitations and failure to state a cause of action is denied. Cross-motion by defendant Valley Stream Central High School District for summary judgment on the ground of statute of limitations is denied. Cross-motions, by defendants Town of Hempstead and County of Nassau for summary judgment dismissing the complaint as against them are granted.

This is an action for personal injury arising from a trip and fall accident. Plaintiff Rose Barbaro (hereinafter "Rose") was an employee of Aramark Food Corporation, the food service company for Valley Stream Central High School. On March 21, 2006, Rose tripped

on a wooden plank located near the sink in the kitchen area of the cafeteria of the high school. As a result of the fall, Rose sustained various injuries including a full-thickness tear of her shoulder.

By Order to Show Cause dated June 1, 2007, plaintiff moved for leave to serve a late notice of claim upon the defendants (General Municipal Law § 50-e[5]). The proposed notice of claim asserted a claim for personal injury sustained by Rose but did not assert any derivative claim on behalf of her husband, Daniel Barbaro (hereinafter "Daniel"). The Order to Show Cause was served on the Village of Valley Stream on June 6, 2007 and on the Valley Stream Central High School District on June 8, 2007. The action was commenced by filing a summons and complaint on June 20, 2007. In the complaint, plaintiffs alleged that a motion to file a late notice of claim had been made, but a decision had not yet been rendered. The complaint asserts a cause of action for Rose's personal injury as well as a claim for loss of services on the part of Daniel. By Order dated August 7, 2007, Hon. Joseph Spinola granted plaintiff's application for leave to serve a late notice of claim.

Defendant Village of Valley Stream moves to dismiss the complaint pursuant to CPLR § 3211(a)(5) on the ground of the statute of limitations and pursuant to CPLR § 3211(a)(7) for failure to state a cause of action. Defendant Valley Stream Central High School District concedes that the filing of the complaint was timely as to Rose's claim but moves for summary judgment dismissing her husband's derivative claim on the ground of statute of limitations. Defendant Town of Hempstead moves for summary judgment dismissing the complaint on the ground that it does not exercise any ownership or control over the cafeteria or any other part of Valley Stream Central High School. Defendant County of Nassau moves for summary judgment dismissing the complaint on the ground of lack of ownership or control as well as the statute of limitations. Although the County has moved pursuant to CPLR § 3211(a)(2) to dismiss for lack of jurisdiction, the Court construes the motion as made pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

Pursuant to General Municipal Law § 50-I, no action shall be prosecuted or maintained against a city, county, town, village, or school district for personal injury alleged to have been sustained by reason of negligence unless (a) a notice of claim shall have been served in compliance with General Municipal Law § 50-e, (b) 30 days have elapsed since the service of the notice, and (c) the action is commenced within one year and ninety days after the incident. Since the accident occurred on March 21, 2006, the period of limitations would have expired on June 19, 2007. Plaintiffs argue, nonetheless, that the action is timely because the statute of limitations is tolled while a motion for leave to serve a late notice of claim is pending.

Because the one year and 90-day period contained in General Municipal Law § 50-I is a statute of limitations as opposed to a condition precedent, tolling provisions must be applied to determine the timeliness of plaintiff's claim. (*Campbell v. City of New York*, 4 N.Y.3d 200, 825 N.E.2d 121, 791 N.Y.S.2d 880 [2005]). Among the tolling provisions is CPLR § 204(a), which provides that where the commencement of an action has been stayed by a Court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced. Since General Municipal Law § 50-I provides that an action may not be prosecuted or maintained unless a notice of claim has been filed and 30 days elapsed, the pendency of a motion for leave to serve a late notice of claim gives rise to a statutory stay that tolls the statute of limitations. (*Giblin v. Nassau County Med. Ctr.*, 61 N.Y.2d 67, 459 N.E.2d 856, 471 N.Y.S.2d 563 [1984]). Thus, the effect of a motion for leave to file a late notice of claim is to extend the period of time in which an action against the municipality must be commenced.

Ironically, the present action, far from being untimely, was commenced prematurely, because leave to serve the late notice of claim had not yet been granted. Prior to *Campbell, supra*, a complaint, which did not allege compliance with General Municipal Law §50-(I) failed to state a cause of action. (See, e.g. *Melito v. Canastota Cent. School Sys.*, 192 A.D.2d 754, 596 N.Y.S.2d 182 [3d Dept., 1993]). While the Court of Appeals held in *Campbell, supra*, that the one year and 90 day period was a statute of limitations, it did not address the question whether the filing of a notice of claim continues to be a condition precedent to bringing an action. Nonetheless, it appears that despite the provisions of General Municipal Law § 50-(I), the summons and complaint may be served before the notice of claim and may in fact provide sufficient notice of the claim so that leave to serve a late notice of claim must be granted. (See *Miller v. County of Sullivan*, 36 A.D.3d 994, 827 N.Y.S.2d 750 [3d Dept., 2007]). Thus, this Court concludes that failure to allege compliance with General Municipal Law § 50 -(I) does not render the complaint facially insufficient when leave to serve a late notice of claim is subsequently granted. The Court notes that the School District's answer asserted plaintiffs' failure to comply with the notice of claim statute as an affirmative defense. The Village's pre-answer motion to dismiss raises both the timeliness of the action and the facial sufficiency of the pleading.

General Municipal Law § 50-e(6) provides, "At any time after the service of a notice of claim and at any stage of an action..., a mistake, omission, irregularity or defect made in good faith in the notice of claim..., not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby." The proper practice where a notice of claim omits a derivative claim is to move to amend the notice of claim to assert a derivative cause of action. (*Burgarella v. City of New York*, 265 A.D.2d

361, 697 N.Y.S.2d 68, [2d Dept., 1999]). However, as the Court noted in *Burgarella, supra*, a derivative claim by its nature is predicated upon the same facts as the primary claim, which are included in the notice. Thus, even though the notice of claim failed to disclose the claimant's marital status, the omission of a claim for loss of services did not prejudice the defendants.

Accordingly, as a matter of discretion, the Court will disregard the omission of Daniel's derivative cause of action in the notice of claim filed by plaintiffs. Defendant Village of Valley Stream's motion to dismiss the complaint on the ground of statute of limitations and for failure to state a cause of action is denied. Cross-motion by defendant Valley Stream Central High School District for summary judgment dismissing Daniel's derivative claim is denied. The branch of defendant County of Nassau's motion for summary judgment based upon the statute of limitations is similarly denied.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 384, 828 N.E.2d 604, 795 N.Y.S.2d 502 [2005]). If this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]).

The affidavit of Thomas Dauscher, the First Deputy Commissioner of the Department of General Services, establishes *prima facie* that the Town of Hempstead did not exercise ownership or control over Valley Stream Central High School. The affidavit of James Corcoran, a Real Estate Inspector for Nassau County, makes a similar showing on behalf of the County. Upon the denial of ownership or control by a municipality, the burden shifts to the plaintiff to submit facts showing responsibility for maintenance of the premises. (*Kenworthy v. Town of Oyster Bay*, 116 A.D.2d 628, 497 N.Y.S.2d 712 [2d Dept., 1986]). Since plaintiffs have failed to carry their burden, the motions for summary judgment dismissing the complaint by defendants Town of Hempstead and Nassau County are granted.

The foregoing constitutes the Order of this Court.

Dated: October 30, 2007
Mineola, N.Y.

ENTERED
NOV 02 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

J. S. C.

Karen V. Murphy