

Berlin v Old Brookville Police Dept.

2007 NY Slip Op 33851(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 4247-07/

Judge: William R. LaMarca

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19**

**PRESENT: HON. WILLIAM R. LaMARCA
Justice**

**ROBERT BERLIN and JACQUELINE BERLIN,
Plaintiffs,**

**Motion Sequence #1
Submitted August 20, 2007
XXX**

-against-

INDEX NO: 4247/07

**OLD BROOKVILLE POLICE DEPARTMENT,
INCORPORATED VILLAGE OF OLD BROOKVILLE,
INCORPORATED VILLAGE OF MILL NECK and
SERGEANT "T. EGAN",**

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation and Affidavits in Opposition.....	2
Reply Affirmation.....	3

Defendants, OLD BROOKVILLE POLICE DEPARTMENT, INCORPORATED VILLAGE OF OLD BROOKVILLE & INCORPORATED VILLAGE OF MILL NECK & SERGEANT "T. EGAN" (hereinafter referred to as the "VILLAGE"), move for an order pursuant to CPLR §3211 and General Municipal Law (GML) §50-e(1)(a), dismissing plaintiffs' complaint on the ground that plaintiffs failed to timely file a Notice of Claim prior to the commencement of this action as required by GML §50-e and 50-l, and failed to

attend a GML §50-h hearing prior to commencement of this action, a condition precedent to commencement of an action by the claimant against the municipality. Counsel for plaintiffs, ROBERT BERLIN and JACQUELINE BERLIN, opposes the motion which is determined as follows:

This action arises out of plaintiffs' claim that, on December 9, 2005, ROBERT BERLIN, an elderly man, was wrongfully arrested on his property located at 42 Ski Lane, Mill Neck, New York, and detained by Sergeant THOMAS F. EGAN, causing him to suffer mental and physical distress and damage to his reputation. His wife, JACQUELINE BERLIN, claims a loss of services from her husband. The Notice of Claim issued by plaintiffs' counsel is dated March 10, 2006 and is verified by plaintiffs on March 10, 2006 before notary Anthony F. Decarolis, their attorney. The VILLAGE points out that plaintiffs' Notice of Claim was issued ninety-one (91) days after the alleged incident, not within the required ninety (90) day time period and, additionally, that plaintiffs failed to appear at two (2) scheduled §50-h hearings. Counsel states that, on April 21 2006, notwithstanding the late Notice of Claim, the VILLAGE noticed defendants for a §50-h hearing on May 16, 2006, to which plaintiffs' counsel never responded and at which plaintiffs failed to appear. Thereafter, the VILLAGE rescheduled the §50-h hearing for November 9, 2006, and counsel states that, again, plaintiffs failed to appear. Given that the one (1) year ninety (90) day statute of limitations on the action expired on March 9, 2007, on May 21, 2007, the VILLAGE issued a letter to counsel for plaintiffs stating that it was closing its file as the one (1) year ninety (90) day statute of limitations in the matter had expired and there was no need to reschedule the §50-h hearing. Counsel for the VILLAGE states that, only then, did it learn that plaintiffs had commenced an action in this matter, on March 8, 2007, with

the filing of a summons and complaint on said date, which appears to have been served on the VILLAGE, on July 5, 2007, although no affidavit of service is provided by plaintiffs' counsel. It is the VILLAGE's position that plaintiffs are precluded from commencing an action against the VILLAGE and their complaint should be dismissed in accordance with established case law and GML §50-h(5).

In opposition to the motion, counsel for the plaintiffs acknowledges the requirements of GML §50 with respect to the 90 day period for filing a Notice of Claim and the need to attend a §50-h hearing prior to commencement of an action, but contends that the March 10, 2006 date on the Notice of Claim and the Verification must be an error because the internal office records of the firm reflect that the certified mailings were "processed" on March 9, 2006, within the 90 day time frame. Moreover, counsel claims that the VILLAGE cannot demonstrate any prejudice based on the date of the Notice of Claim being incorrect because if he had served the notice a day late, he could have undertaken the simple procedure of requesting permission to file a late notice, something he states he did not do because he was unaware there was a problem. Counsel asserts that his clients were ready and able to attend the scheduled §50-h hearing when it was adjourned at the request of defendants' attorney, and the rescheduled date for November, was also adjourned at the request of defendants' counsel. Counsel for plaintiffs' states that the March 10, 2006 date on the Notice of Claim was "a mere clerical error" and that the motion should be denied because plaintiffs never requested an adjournment and never failed to attend a scheduled §50-h hearing.

In reply, counsel for the VILLAGE points out that plaintiffs speculative arguments that the Notice of Claim may have been mailed on March 9, 2006 are insufficient to survive

the motion to dismiss. Indeed, the Notice of Claim is sworn to on March 10, 2007, one day after the 90 day time period expired, and the affidavits of the employees of plaintiffs counsel do not affirmatively establish that the Notice of Claim was mailed in a timely fashion. Additionally, counsel for the VILLAGE states that counsel for plaintiffs has misrepresented the facts to the Court in that defense counsel never requested an adjournment of the §50-h hearing , originally scheduled for May 16, 2006 and rescheduled for November 9, 2006, at which plaintiffs simply failed to appear. Nor did counsel for plaintiffs respond to the letter of May 21, 2007 in which counsel for the VILLAGE advised that it was closing its file due to plaintiffs late filing of the Notice of Claim and their failure to attend the scheduled §50-h hearing. Counsel for the VILLAGE argues that plaintiffs tacitly acknowledged the veracity of these representations by their failure to object and now seek to contest facts by self-serving and unsubstantiated allegations.

General Municipal Law (GML) § 50-e requires that before a plaintiff may sue a municipality, a Notice of Claim must be filed within ninety (90) days after the claim arises. Service of the Notice of Claim is a condition precedent to the commencement of an action or special proceeding. GML § 50-e. The statutory pre-condition serves “to enable municipalities to pass upon the merits of a claim before the initiation of a law suit and thereby forestall unnecessary law suits”. *Alford v City of New York*, 115 AD2d 420, 496 NYS2d 224 (1st Dept. 1985) *affd* 67NY2d 1019, 503 NYS2d 324, 494 NE2d 455 (C.A. 1986). Plaintiffs’ failure to file a Notice of Claim within 90 days of accrual of the cause of action, and the failure to seek leave to file a late Notice of Claim prior to the expiration of the one year ninety (90) day period to commence an action against the municipality requires that the Complaint be dismissed. *Hardie v New York City Health and Hospital*

Corp., 278 AD2d 453, 719 NYS2d 256 (2nd Dept. 2000). The Court has no discretion to extend the time past the one year ninety (90) day period. See, *Hall v City of New York*, AD3d 254, 768 NYS2d 2 (1st Dept. 2003). Additionally, GML §50-h(5) directs that, where a hearing has been demanded, no action shall be commenced until the claimant has complied with the demand for examination. "If such examination is not conducted within ninety days of service of the demand, claimant may commence the action. The action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, [the VILLAGE] shall reschedule the hearing for the earliest possible date available".

After a careful reading of counsels' submissions, it is the judgment of the Court that the VILLAGE is entitled to the requested relief. The evidence presented by counsel for plaintiffs is insufficient to demonstrate that he timely served a Notice of Claim or that plaintiffs satisfied the condition precedent to commencing an action by attending the scheduled §50-h hearing. It appears to the Court that commencement of the action on March 8, 2007 was improper. Therefore, it is hereby

ORDERED, that the VILLAGE's motion for an order, pursuant to CPLR §3211 and General Municipal Law (GML) §50-e(1)(a), dismissing plaintiffs' complaint on the ground that plaintiffs failed to timely file a Notice of Claim prior to the commencement of this action as required by GML §50-e and 50-l, and failed to attend a GML §50-h hearing prior to commencement of this action, is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 20, 2007


WILLIAM R. LaMARCA, J.S.C.

TO: Marino & Bernstein, PC
Attorneys for Plaintiffs
Townsend Square, Suite 210
Oyster Bay, NY 11771

Milber Makris Plousadis & Seiden, LLP
Attorneys for Defendants
3 Barker Avenue, 6th Floor
White Plains, NY 10601

ENTERED

NOV 27 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

berlin-oldbrookville,millneck&sgtegan,#1/genmunicipal