

<b>Hernandez v County of Nassau</b>
2008 NY Slip Op 30702(U)
February 27, 2008
Supreme Court, Nassau County
Docket Number: 7972-07/
Judge: Antonio I. Brandveen
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

NURIA HERNANDEZ,  
Plaintiff,

TRIAL / IAS PART 32  
NASSAU COUNTY

- against -

Index No. 17972/07

THE COUNTY OF NASSAU, NASSAU  
COUNTY POLICE DEPARTMENT, VILLAGE  
OF HEMPSTEAD LUIS ZAVALA, GINA  
VILLAMARIN, MANUEL AZANERO, and  
CUBAN TRANSPORTATION CORP., "JOHN  
DOE" and "JANE DOE" being fictitious names of  
unknown defendants,

Motion Sequence No. 001

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant Village of Hempstead moves for an order pursuant to CPR 3211 dismissing the complaint on the ground the plaintiff failed to serve a notice of claim upon this defendant in violation of General Municipal Law § 50-e and § 50-i (1) (a). The plaintiff opposes the motion. The underlying personal injury seeks damages for injuries allegedly sustained by the plaintiff on December 24, 2006, when a motor vehicle allegedly owned by the defendant Gina Villamarin, and allegedly operated by the defendant Luis Zavala on Fulton Avenue and Clinton Street, in the County of Nassau,

collided with another vehicle allegedly owned by the defendant Cuban Transportation Corporation, and allegedly operated by the defendant Manual Azanero, one of which struck the plaintiff causing the injuries.

The Deputy Village Attorney in the Incorporated Village of Hempstead, of counsel to the Village Attorney states, in a supporting affirmation dated December 13, 2007, a notice of claim required by General Municipal Law General Municipal Law § 50-e and § 50-i (1) (a) was never served upon the Incorporated Village of Hempstead. The Deputy Village Attorney points out the notice of claim is needed because Incorporated Village of Hempstead was not involved in the events which gave rise to the plaintiff's alleged injuries. The Deputy Village Attorney notes the plaintiff's contention is that the alleged injuries were brought about by an automobile chase of one of the vehicles by the County of Nassau and the Incorporated Village of Hempstead. The Deputy Village Attorney contends a timely notice of claim would have permitted the Incorporated Village of Hempstead to investigate the claim, and to determine the Incorporated Village of Hempstead was not all involved in the alleged chase, and would have eliminate the Incorporated Village of Hempstead as a defendant.

The defendant Gina Villamarin's attorney requests, in an opposing affirmation dated January 9, 2008, the Court preserve the defendant's right to file a third party action should the plaintiff's action against the defendant Village of Hempstead be dismissed. The defendant Gina Villamarin's attorney challenges the insistent of the Incorporated

Village of Hempstead regarding the need for the notice of claim as magnified in this action because the Incorporated Village of Hempstead was not involved in the automobile chase. The defendant Gina Villamarin's attorney submits the complaint and the notice of claim from a related action, to wit Bayron Gonzalez v. Luis Zavala, Gina Villamarin, Nassau County Police Department, and Hempstead Village Police Department, Supreme Court, Suffolk County Index number 16031/07 establishes the Incorporated Village of Hempstead was on notice of the event, and therefore is not prejudiced by any delay.

The Deputy Village Attorney disputes, in a reply affirmation dated January 16, 2008, the defendant Gina Villamarin's contention that Villamarin should get the benefit of a notice of claim served upon the Incorporated Village of Hempstead in another case simply because that case, in Villamarin's is related to the instant underlying action. The Deputy Village Attorney points out the defendant Gina Villamarin cites no cases nor other relevant materials in support of that proposition rather there is case law against that assertion. The Deputy Village Attorney also states there is no basis for the defendant Gina Villamarin's request that this Court should preserve this defendant's right to file a third party action should the plaintiff's action against the defendant Village of Hempstead be dismissed. The Deputy Village Attorney notes the defendant Gina Villamarin never acquired that right because this defendant never filed a notice of claim against the defendant Village of Hempstead nor proffered any reason in the opposition papers to permit this defendant be granted any such right.

This Court has carefully reviewed and considered all of the papers submitted with respect to this motion. The evidence submitted by the defendant Village of Hempstead is sufficient to establish prima facie entitlement to dismissal of the complaint insofar as asserted against it, and the affirmation of the defendant Gina Villamarin's attorney submitted in opposition to the Village's motion is insufficient.

General Municipal Law § 50-e (1) (a) provides:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

General Municipal Law § 50-i (1) (a) provides:

No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter.

Here, the plaintiff has not responded to the instant motion, and only the defendant Gina Villamarin has interposed opposition to it, but there was no notice of claim filed here by this defendant.

The Second Department has held:

there is no merit to the plaintiff's contention that the MTA and MABSTOA are "united in interest", so that service of a notice of claim and complaint upon the former constitutes service upon the latter (*see, Adams v New York City Tr. Auth.*, 140 AD2d 572, 573 [the MTA is not a proper recipient of service for the NYCTA]; *Reis v Manhattan & Bronx Surface Tr. Operating Auth., supra* [MABSTOA and NYCTA are distinct entities]; *Matter of Crespo*, 123 Misc 2d 862, 865 [MABSTOA and NYCTA are distinct and must be sued in their own names])

*Zaiman v. Metropolitan Transit Authority*, 186 A.D.2d 555, 557, 588 N.Y.S.2d 402 [2<sup>nd</sup>

Dept., 1992]. Moreover, the Second Department has also held:

Timely service of a notice of claim is a condition precedent to a lawsuit sounding in tort and commenced against a municipality (*see* General Municipal Law § 50-e[1][a]; *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61; *O'Brien v City of Syracuse*, 54 NY2d 353, 358). In deciding whether to permit service of a late notice of claim, the court will consider whether the municipality acquired actual notice of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the petitioner has a reasonable excuse for the failure to serve a timely notice of claim, and whether the delay would substantially prejudice the municipality in its defense on the merits (*see* General Municipal Law § 50-e[5]; *Matter of White v New York City Hous. Auth.*, 38 AD3d 675; *Matter of James v City of NY. Dept. of Env'tl. Protection*, 37 AD3d 832; *Matter of Narcisse v Incorporated Vil. of Cent. Islip*, 36 AD3d 920, 921). *National Grange Mut. Ins. Co. v. Town of Eastchester*, --- N.Y.S.2d ----, 2008 WL331463 [2<sup>nd</sup> Dept., 2008]

“What satisfies the statute is not knowledge of the wrong but notice of the claim. The municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed’ (*Matter of Sica v Board of Educ. of City of N.Y.*, 226 AD2d 542, 543 [1996]; *see Pappalardo v City of New York*, 2 AD3d 699, 700 [2003]; *Matter of Nieves v Girimonte, supra*; *Matter of Brown v County of Westchester*,


293 AD2d 748, 749 [2002])” (*Bridgeview at Babylon Cove Homeowners Ass’n, Inc. v. Incorporated Village of Babylon, Respondent, et al.*, 41 A.D.3d 404, 837 N.Y.S.2d 330 [2<sup>nd</sup> Dept., 2007]). The Court finds the defendant Village of Hempstead did not receive actual notice or acquire knowledge of the essential facts constituting the claim asserted by the plaintiff nor this defendant within 90 days after the accident or a reasonable time thereafter. The copies of the police report of the December 24, 2006 accident, the complaint filed May 30, 2007, and the notice of claim are insufficient to impute knowledge of the accident to the defendant Village of Hempstead. There is no showing that the defendant Village of Hempstead was ever served with the notice of claim. Moreover, there is no legal basis to preserve the defendant’s right to file a third party action should the plaintiff’s action against the defendant Village of Hempstead be dismissed.

Accordingly, the motion is granted.

So ordered.

Dated: **February 27, 2008**

ENTER:

  
 \_\_\_\_\_  
 J. S. C.  
 ANTONIO I. BRANDVEER

FINAL DISPOSITION

NON FINAL DISPOSITION ~~XXX~~

**ENTERED**