

**MacLeod v County of Nassau**

2008 NY Slip Op 33605(U)

September 16, 2008

Sup Ct, Nassau County

Docket Number: 10045/08

Judge: Antonio I. Brandveen

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.

S

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

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

VIRGINIA MACLEOD and WILLIAM  
MACLEOD,  
  
Plaintiffs,

TRIAL / IAS PART 32  
NASSAU COUNTY

Index No. 10045/08

- against -

Motion Sequence No. 001

COUNTY OF NASSAU, KEYSpan  
CORPORATION, KEYSpan GAS EAST  
CORPORATION d/b/a KEYSpan ENERGY  
DELIVERY LONG ISLAND, REX CORP.,  
RECKSON ASSOCIATES, RECKSON  
ASSOCIATES REALTY CORP., RECKSON  
OPERATING PARTNERSHIP, L.P., RECKSON  
FS LIMITED PARTNERSHIP and BANCKER  
CONSTRUCTION CORP.,

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 plaintiffs move for an order directing the date to be used as and for the commencement of the instant action be deemed August 14, 2007, *nunc pro tunc* as against all of the defendants; and, for an order directing the date to be used as the service of process upon each of the defendants be the dates each of the defendants was served in 2007, as evidenced by the affidavits of service attached as exhibits to the moving papers, *nunc pro tunc*. The defense opposes the motion. The underlying personal injury action arises from a

November 8, 2006 slip and fall incident in a parking lot located at 60 Charles Lindberg Boulevard, Uniondale, New York. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to this motion.

The plaintiffs' attorney states, in detail, in a supporting affirmation dated May 30, 2008, the allegations about the incident, the procedural history of the litigation, and legal argument. The defense attorney states, in an opposing affirmation dated July 17, 2008, the Court must deny this motion, and dismiss the action for the plaintiffs' failure to timely serve the summons and complaint on the defendant County of Nassau within the prescribed statutory period. The plaintiffs' attorney states, in detail, in a reply affirmation dated July 21, 2008, the defense legal arguments ignore the arguments and case law submitted by the plaintiffs which support the legal principal of recognizing the purchase of an index number *nunc pro tunc*. The plaintiffs' attorney avers the facts in the instant matter do not relate to the cases provided by the defense. The plaintiffs' attorney asserts the summons and complaint were timely filed. The plaintiffs' attorney points out the plaintiffs have now paid the requisite filing fee for a new index number; served the County of Nassau with the exact same summons and complaint on August 17, 2007; the County of Nassau appeared in the action, filed an answer containing no jurisdictional defenses, and engaged in discovery with the plaintiff. The plaintiffs' attorney contends there is no prejudice to the County of Nassau by granting this relief, and there is no legal impediment to granting it.

CPLR 304 provides:

An action is commenced by filing a summons and complaint or summons with notice. A special proceeding is commenced by filing a petition. Where a court finds that circumstances prevent immediate filing, the signing of an

order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action. For purposes of this section, and for purposes of sections two hundred three and three hundred six-a of this chapter, filing shall mean the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose together with any fee required as specified in rule twenty-one hundred two of this chapter for filing. At such time of filing, the original and a copy of such papers shall be date stamped by a court clerk who shall file the original and maintain a record of the date of the filing and who shall immediately return the copy to the party who brought the filing.


The Second Department holds “[a]lthough General Municipal Law § 50-e (5) permits a court to grant an application to extend the time in which to serve a notice of claim, the court may not entertain such a request filed after the one year and 90-day statute of limitations has expired [citations omitted] (Porcaro v. Town of Beekman, 15 A.D.3d 377, 378, 790 N.Y.S.2d 58 [2005]).

Accordingly, the motion is denied in all respects.

So ordered.

Dated: **September 16, 2008**

ENTER:

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

FINAL DISPOSITION

NON FINAL DISPOSITION ~~XXX~~

**ENTERED**

SEP 19 2008

NASSAU COUNTY

Page ~~COUNTY~~ CLERK'S OFFICE