

Boucher v City of Mechanicville
2008 NY Slip Op 33744(U)
March 4, 2008
Supreme Court, Saratoga County
Docket Number: 2007-1705
Judge: Stephen A. Ferradino
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

ANNE MARIE BOUCHER, as Appointed Fiduciary
of the Estate of CARMELLA H. TAGLIONE, deceased,

Plaintiffs,

-against-

DECISION and ORDER

RJI #45-1-2007-1528

Index # 2007-1705

CITY OF MECHANICVILLE, MARY DIRUGGIERO
and JOSEPH DIRUGGIERO,

Defendants.

APPEARANCES

Elizabeth C. Tomson, Esq.
Attorney for the Plaintiff
225 Dolson Avenue, Suite 206A
Middletown, New York 10940

Goldberg Segalla, LLP
Attorneys for the Defendant City of Mechanicville
8 Southwoods Boulevard, Suite 300
Albany, New York 12211

Boeggeman, George & Corde, PC
Attorneys for the Defendants Mary and Joseph Diruggiero
46 Columbia Street
Albany, New York 12207

STEPHEN A. FERRADINO, J.

The defendant City of Mechanicville (hereinafter City) has requested an order of this Court pursuant to CPLR § 3211(a) (5) dismissing the plaintiff's cause of action as time-barred pursuant to General Municipal Law § 50-I. The plaintiff has opposed the motion and cross-moved seeking an order pursuant to CPLR §3025 (b) granting leave to amend her complaint. The defendants Mary and Joseph Diruggiero oppose the

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✓ plaintiff's motion to amend her complaint while taking no position on the City's motion.

This case arises out of an incident that occurred on October 1, 2004 when Carmella H. Taglione slipped and fell in Mechanicville, New York allegedly sustaining personal injuries as a result of her fall. Her original counsel served a notice of claim upon the City on December 22, 2004. Subsequent counsel filed a summons with notice with the Saratoga County Clerk on June 14, 2007. The plaintiff properly filed her notice of claim within 90 days after the claim arose on October 1, 2004. General Municipal Law § 50-e[1]. However the plaintiff has not filed her negligence claim within the applicable limitations period of one year and 90 days from "the happening of the event upon which the claim is based." General Municipal Law § 50-i[1]. The City's motion to dismiss the complaint pursuant to CPLR § 3211(a) (5) is granted.

The plaintiff has requested leave to amend her complaint to add a cause of action for wrongful death. Carmella Taglione's slip and fall injury occurred on October 1, 2004. She died on June 20, 2006. Courts will freely grant parties leave to amend their pleadings absent prejudice or surprise. CPLR 3025(b); *McCaskey, Davies and Assoc., Inc., v New York City Health & Hospitals Corp.*, 59 NY2d 755(1983). However a court will deny leave where the proposed amended pleading is devoid of merit. *Hudock v Village of Endicott*, 28 AD3d 923 (3d Dept. 2006). A trial court is granted great discretion in deciding the granting or denying a motion to amend pleadings. *Smith v Haggerty*, 16 AD3d 967 (3d Dept. 2005).

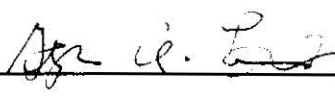
A motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. *Nab-Tern Constructors v City of New York*, 123 A.D.2d 571(1st Dept 1986).

The Court must be satisfied that the proposed claim has merit based upon the contents of the submission. In this case the attorney's affidavit made without personal knowledge of the salient facts, is ordinarily insufficient for the required evidentiary showing. *Pacheco v United Medical Associates, P.C.*, 305 A.D.2d (3d Dept. 2003); *Jackson v Dow Chem. Co.*, 295 A.D.2d 855, 856 (3d Dept. 2002); *Mathiesen v Mead*, 168 A.D.2d 736 (3d Dept. 1990). The Court is also struck by the failure of the plaintiff to supply the Court a copy of the medical reports and/or an affidavit of a physician to establish the connection between the Mrs. Taglione's initial injuries from her slip and fall in October 2004 and her subsequent death in June 2006 to support the merit of the requested amendment. *Smith v Haggerty*, 16 AD3d 967 (3d Dept. 2005). These insufficiencies alone call for denial of the plaintiff's motion to amend the complaint. The Court also notes the plaintiff's failure to comply with CPLR §2214 (b).

Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original papers shall be forwarded to the attorney for the defendant, City of Mechanicville for filing and entry.

Dated: March 4, 2008

Malta, New York



 STEPHEN A. FERRADINO, J.S.C.

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Papers Received and Considered:

Notice of Motion dated November 15, 2007

Affirmation of Jonathan M. Bernstein, Esq., dated November 15, 2007 with attached Exhibits A-B

ENTERED
 Kathleen A. Marchlone

 Saratoga County Clerk

Motion Response and Notice of Cross-Motion dated December 18, 2007

Affirmation of Elizabeth C. Tomson, Esq., dated December 18, 2007 with attached Exhibit A

Reply Affirmation of Jonathan M. Bernstein, Esq., dated December 21, 2007

Affirmation of Thomas A. Sica, Esq., dated December 28, 2007

Affirmation of Paul A. Hurley, Esq., dated January 4, 2008