

<b>Fuchs v Town of Cairo</b>
2009 NY Slip Op 31127(U)
May 18, 2009
Supreme Court, Columbia County
Docket Number: 08-1021
Judge: Joseph C. Teresi
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SUPREME COURT  
STATE OF NEW YORK  
FRANCIS FUCHS,

COUNTY OF GREENE

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Plaintiff,

**DECISION and ORDER**  
**INDEX NO. 08-1021**  
**RJI NO. 19-08-3807**

-against-

TOWN OF CAIRO; GREENE COUNTY, NEW YORK; FRANK ALGOZZINE, in his current or former position as DIRECTOR OF REAL PROPERTY TAX SERVICES, and in his Individual Capacity; JOSEPH CALCAVEECHIA, Individually and in his current or former capacity as Supervisor of the TOWN OF CAIRO, and GARY APREA, Individually and in his capacity currently or formerly as Town Council Member of the Town of Cairo,

Defendants.

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Supreme Court Albany County All Purpose Term, May 1, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Galvin and Morgan  
Attorneys for Plaintiff  
Stephen H. Orr, Esq.  
217 Delaware Avenue  
Delmar, New York 12054

Shantz & Belkin  
Attorneys for Defendant Town of Cairo  
Frederick F. Shanz, Esq.  
26 Century Hill Drive, Suite 202  
Latham, New York 12110

**TERESI, J.:**

Defendant, Town of Cairo (“Town”) moves for summary judgment pursuant to CPLR 3212 and seeks the dismissal of the complaint alleging the action is not timely and fails to state a cause of action. The plaintiff opposes the motion.

The plaintiff, as the former Town of Cairo Assessor, commenced this action for malicious prosecution by the defendants after his criminal convictions on two counts of official misconduct were overturned by the Greene County Court (Lalor, J.) on October 27, 2006. The court denied the District Attorneys motion to reargue the prior decision of the Court pursuant to criminal Procedure Law § 470.50(1) on March 21, 2007. Plaintiff served a Notice of Entry on April 2, 2007 of the decision denying reargument. The plaintiff initially commenced this action by filing a Notice of Claim dated July 2, 2007 against the Town of Cairo. On October 16, 2007, the Town conducted a General Municipal Law § 50-h hearing. On June 30, 2008, the plaintiff commenced this action by the filing of a Summons and Complaint with the Greene County Clerk. The plaintiff asserts claims against the Town for malicious prosecution and wrongful termination.

The Town claims it was not involved with the criminal prosecution of the plaintiff by the Greene County District Attorney. The Town claims the plaintiff acknowledges that as a result of his convictions, his position as Town Assessor was automatically vacated pursuant to Public Officers Law § 30(1)(e). The defendant maintains this action is barred by the statute of limitations.

General Municipal Law 50-e(a) requires as a condition precedent, that a Notice of Claim shall be served upon a public corporation within ninety days from the day the claim arises. (Clayton Industries, Inc. v. City of Newburgh, 17 AD 3d 309 [2<sup>nd</sup> Dept. 2005]). Late notice of a claim against a municipal defendant, without leave of court is a nullity. (Laroc v. City of New

York, 46 AD 3d 760 [2<sup>nd</sup> Dept. 2007]). A court, in its discretion, may grant leave to serve a late Notice of Claim. (see, General Municipal Law § 50-e(5)). The key factors which the court must consider are whether the plaintiff has demonstrated a reasonable excuse for the failure to serve a timely Notice of Claim, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days from its accrual or a reasonable time thereafter, and whether the delay would substantially prejudice the public corporation. (Matter of Cotten v. County of Nassau, 307 AD 2d 965 [2<sup>nd</sup> Dept. 2003], lv denied 1 NY 3d 502 [2003]; Brown v. County of Westchester, 293 AD 2d 748 [2<sup>nd</sup> Dept. 2002]).

The tort of malicious prosecution has four elements: (1) commencement of a criminal proceeding, which (2) terminated in favor the accused, and which (3) lacked probable cause and (4) was brought out of actual malice. (Martinez v. City of Schenectady, 97 NY 2d 78 [2001]). The statute of limitations for malicious prosecution against the Town of Cairo is one year and ninety days, and begins to run once there is a favorable termination in the underlying criminal proceeding. (see, General Municipal Law § 50-i; Bosone v. County of Suffolk, 274 AD 2d 532 [2<sup>nd</sup> Dept. 2000]).

The plaintiff alleges he served a copy of the Greene County Court's March 21, 2007 decision which denied the motion to reargue by a Notice of Entry dated April 2, 2007. Petitioner's proposition that April 2, 2007 is the correct date to compute the statute of limitations for the filing of a Notice of Claim and the commencement of the action for malicious prosecution is misplaced.

A Notice of Entry is required in certain situations pursuant to the CPLR. CPLR 2220 requires that orders and opinions of the court be filed by the prevailing party in the office of the

clerk of court and the prevailing party shall serve notice upon opposing counsel. CPLR § 5513(a) requires that “an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.” The statute requires a notice of entry and the requirements must be strictly followed. (Reynolds v. Dustman, 1 NY 3d 559 [2003]).

It is evident that the CPLR governs in civil proceedings (see, CPLR § 101) and the CPL governs in criminal actions. (see, CPL § 1.10). The CPL does not expressly require that orders and judgments be served by a Notice of Entry by the prevailing party in a criminal proceeding. Courts have determined that the CPLR simply has no application to criminal cases. (People v. Slivia, 122 AD 2d 750 [1<sup>st</sup> Dept. 1996]); People v. Holden, 260 AD 2d 233 [1<sup>st</sup> Dept. 1999]); People v. Crisp, 268 AD 2d 247 [1<sup>st</sup> Dept. 2000]); People v. Kyriazas, 2002 N.Y. Slip Op. 40561(U)).

The defendant’s motion seeking the dismissal of this action as untimely is granted. On October 27, 2006, the Greene County Court, upon appeal, reversed a judgment of two convictions against the plaintiff for official misconduct. On November 14, 2006, the Greene County District Attorney moved for reargument of the Decision of the County Court. On March 21, 2007, the Greene County Court affirmed its findings in the prior Decision. The dismissal of the criminal convictions on October 27, 2006 constitutes termination of the criminal proceeding in favor of the accused and the dismissal of the criminal case was a final judgment which cannot be revived by the re-filing of the accusatory instrument. (Smith-Hunter v. Harvey, 95 NY 2d 191 [2000]). The statute of limitations began to run from October 27, 2007 as that was the date the plaintiff received a favorable termination in the underlying criminal proceeding as the charges

were no longer pending against him after the Court issued its decision. (Roche v. Village of Tarrytown, 309 AD 2d 842 [2<sup>nd</sup> Dept. 2003])

Plaintiff should have filed his Notice of Claim on or about January 27, 2007 which is ninety days from the Decision of the Court that granted his appeal and dismissed the convictions. Thereafter, the plaintiff should have commenced his cause of action for malicious prosecution within one year and ninety days on or about January 27, 2008. The plaintiff failed to timely file a Notice of Claim pursuant General Municipal Law § 50-e. In addition, the plaintiff failed to timely commence this action for malicious prosecution pursuant to General Municipal Law § 50-i. (Roman v. Comp USA, Inc., 38 AD 3d 751 [2<sup>nd</sup> Dept. 2007]).

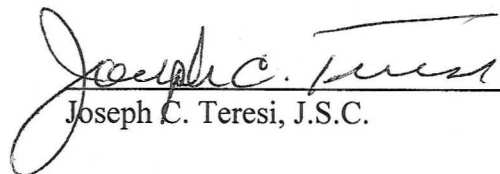
Even assuming *arguendo*, that the criminal proceedings were terminated on March 21, 2007 when the County Court denied the District Attorneys motion to reargue the prior Decision pursuant to CPL § 470.50(1), plaintiff's submissions were untimely. If the criminal proceedings against the plaintiff were considered terminated on March 21, 2007, the Notice of Claim should have been filed on June 21, 2007 and not on July 2, 2007 as alleged by the plaintiff. Moreover, plaintiff's cause of action for malicious prosecution had to be commenced on or about June 21, 2008 and not on June 30, 2008 as proposed by the plaintiff.

Accordingly, the motion for summary judgment is granted.

All papers, including this Decision and Order are being returned to the attorneys for the Town defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
May 18, 2009

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated March 24, 2009;
2. Affidavit of Frederick F. Shantz, Esq. dated March 24, 2009 with Exhibits A-F;
3. Defendant Town's Memorandum of Law dated March 24, 2009;
4. Affidavit of Stephen H. Orr, Jr., Esq. dated April 22, 2009 with Exhibits 1-5;
5. Affidavit of Frederick F. Shantz, Esq. dated April 24, 2009.