

<b>Vollkommer v County of Saratoga</b>
2013 NY Slip Op 34137(U)
June 18, 2013
Supreme Court, Saratoga County
Docket Number: 2012-3757
Judge: Ann C. Crowell
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SUPREME COURT  
STATE OF NEW YORK

COUNTY OF SARATOGA

KARIN VOLLKOMMER,

Plaintiff,

- against -

**DECISION and ORDER**  
RJI # 45-1-2013-0616  
Index #2012-3757

COUNTY OF SARATOGA,

Defendant.

APPEARANCES

Finkelstein & Partners, LLP  
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ANN C. CROWELL, J

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FILED

Plaintiff requests an order of this court pursuant to General Municipal Law § 50-e(5) and 50-e(6) granting plaintiff leave to file a late/amended notice of claim. Plaintiff also requests an order pursuant to CPLR § 3025(b) and CPLR § 1003 authorizing plaintiff to serve an Amended Summons and Complaint. Defendant has opposed the motion.

Before making a determination whether the plaintiff's motion may be granted the court must consider the following factors (1) whether the claimant presented a reasonable excuse for the delay, (2) whether the respondent or its agents "acquired actual knowledge of the essential facts constituting the claim within [90 days after the claim arose] ... or within a reasonable time thereafter," (3) whether the claimant is an infant, and (4) "whether

the delay in serving the notice of claim substantially prejudiced the respondent in maintaining its defense on the merits.” General Municipal Law § 50-e [5]; see, *Matter of Scuteri v Watkins Glen Cent. School Dist.*, 261 AD2d 779, 779-780 [1999]; *Matter of Salyer v Valley Cent. School Dist.*, 163 AD2d 782, 783 [1990], lv denied 78 NY2d 851 [1991]. No single factor is controlling in making the determination of whether or not to grant leave to file a late notice of claim. *Matter of Esposito v Carmel Cent. School Dist.*, 187 AD2d 854, 855 [1992]. “Absent an abuse of discretion, Supreme Court’s determination of an application to file a late notice of claim will not be disturbed.” *Matter of Jensen v City of Saratoga Springs*, 203 AD2d 863 [1994].

On May 14, 2012 at approximately 4:00 p.m., Karin Vollkommer fell down a set of exterior stairs at the Saratoga County Municipal Center. Plaintiff claims her fall was the result of negligence on the part of defendant. She sustained various personal injuries including fractures of her left wrist, left knee and left leg. On August 9, 2012, plaintiff served a Notice of Claim upon the defendant. On September 17, 2012, plaintiff gave testimony at a GML Section 50-h hearing providing some amount of notice that plaintiff’s husband may have a derivative claim.

Due to miscommunication and clerical error attributable to plaintiff’s counsel, a derivative claim on behalf of plaintiff’s husband was not asserted. The proposed late or amended notice of claim attached to plaintiff’s motion papers (Exhibit B) is the same as the Notice of Claim served on August 9, 2012 with the addition of a derivative claim on behalf of plaintiff’s husband. Defendant received actual timely notice of the underlying facts regarding plaintiff’s and her husband’s claims and has not alleged any prejudice in opposition to plaintiff’s motion. *Lariviere v New York City Tr. Auth.*, 82 AD3d 1165 [2d

Dept. 2011]. Accordingly, plaintiff's application to file a late notice of claim asserting a derivative claim on behalf of plaintiff's husband is granted.

It is well settled that leave to amend a pleading pursuant to CPLR § 3025(b) should be freely given provided that there is no prejudice and the proposed amendment is not plainly lacking in merit. *Nelson v State of New York*, 67 AD3d 1142, 1143 [3d Dept 2009]; *Ciarelli v Lynch*, 46 AD3d 1039, 1039-1040 [3d Dept 2007]. In the absence of an abuse of discretion, a court's decision as to whether to grant leave to amend a pleading shall remain undisturbed. *Pagan v Quinn*, 51 AD3d 1299, 1300 [3d Dept 2008]. Plaintiff's derivative claim is not devoid of merit. Defendant has failed to allege any prejudice in opposition to the motion. Accordingly, plaintiff's motion to amend the Summons and Complaint to assert a derivative claim on behalf of plaintiff's husband is granted. *Lariviere v New York City Tr. Auth.*, *supra*.

Defendant's contention that plaintiff should not be allowed to amend the Summons and Complaint because plaintiff's husband has not been produced or offered to be produced for a GML § 50-h hearing is premature. Should plaintiff's husband fail to comply with a demand for examination pursuant to GML § 50-h, defendant may move to dismiss plaintiff's husband's derivative claim. *Bernoudy v County of Westchester*, 40 AD3d 896 [2d Dept. 2007].

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 Decision and Order shall be forwarded to the attorney for the plaintiff for filing and entry. The underlying papers will

be filed by the Court.

Dated: June 18, 2013  
Ballston Spa, New York

  
ANN C. CROWELL, J.S.C.

Papers Received and Considered:

Notice of Motion dated April 12, 2013

Affirmation of Andrew L. Spitz, Esq., dated April 12, 2013, with Exhibits A-F

Affirmation of Thomas J. Reilly, Esq., dated May 7, 2013

Reply Affirmation of Andrew L. Spitz, Esq., dated May 14, 2013

ENTERED  
Peter R. Martin  
  
Saratoga County Clerk

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