SUPREME COURT : STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

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CAROLYN CARNIAUX and LON KAMMERMAN,

Plaintiffs,

-against-

DAVID KEMP, HIGHLANDS SKAYNE, LTD., dba THE COUNTRY GOOSE and dba HIGHLAND BASKETS, the VILLAGE OF COLD SPRING and the VILLAGE OF COLD SPRING ARCHITECTURAL AND HISTORIC DISTRICT REVIEW BOARD aka VILLAGE OF COLD SPRING HISTORIC DISTRICT REVIEW BOARD,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION AND ORDER

Index No. 1268/2016
Return date: Oct. 5, 2016

The following papers numbered 1 to 5 were read on Plaintiffs' application, brought by order to show cause, seeking an order granting leave to serve late notices of claim *nunc pro tunc* against Defendants Village of Cold Spring and the Village of Cold Spring Architectural and Historic District Review Board a/k/a Village of Cold Spring Historic District Review Board:

Order to Show Cause/Affirmation of Jared Altman, Esq./Exhibits A-H 1-2
Affirmation of Charles Smith, Esq. in Opposition/Memorandum of Law/
Exhibits A-C 3-4
Affirmation of Jared Altman, Esq. in Reply 5

Upon reading the foregoing papers, it is ORDERED that Plaintiffs' motion is denied for the reasons set forth below.

BACKGROUND:

On August 23, 2015, Plaintiff Carolyn Carniaux ("Ms. Carniaux") allegedly sustained an injury to her left foot on a "stoop, porch, step-up, landing or raised structure" ("landing") in front of two stores, The Country Goose and Highland Baskets, located at 115 Main Street, Cold Spring, NY. The landing was attached to and projected outward from the premises located at 115-119 Main Street into the sidewalk. A portion of the landing was comprised of several wooden planks

and adjoining stone. Ms. Carniaux alleges that her injuries resulted from her left foot getting caught in the gap between the wooden planks and the adjacent stone, after she and her husband, Plaintiff Lon Kammerman ("Mr. Kammerman"), exited the stores (Plaintiffs' Exhibit A).

Defendant David Kemp ("Mr. Kemp") is the owner of 115-119 Main Street, Cold Spring, NY. Defendant Highlands Skayne, Ltd. does business at 115 Main Street under the names The Country Goose and Highland Baskets.

On August 17, 2016, Plaintiffs[1] filed their summons and verified complaint. On the same day, Plaintiffs served notices of claim on Defendants Village of Cold Spring (the "Village") and the Village of Cold Spring Architectural and Historic District Review Board a/k/a Village of Cold Spring Historic District Review Board (the "Board") (collectively, the "Village Defendants"). On August 18, 2016, Plaintiffs filed the instant order to show cause seeking to serve late notices of claim *nunc pro tunc* against the Village Defendants.

DISCUSSION:

Plaintiffs assert that they believed the landing on which Ms. Carniaux sustained her injuries was owned by Mr. Kemp. Plaintiffs claim that they did not become aware of the possibility that the exterior of the premises might be owned and maintained by the Village Defendants until June 23, 2016. At that time, Plaintiffs received a letter from Travelers Indemnity ("Travelers"), the insurance carrier for Defendant Highlands Skayne, Ltd. d/b/a The Country Goose and Highland Baskets, stating that the area in which Ms. Carniaux was injured is owned and maintained by the Village.

Plaintiffs allege that despite FOIL requests made to the Village on June 24, 2016 and visits to the Putnam County Clerk's office on July 11, 15 and 19, 2016, they were unable to confirm whether the Village Defendants own or maintain the landing. Therefore, in an "abundance of caution", Plaintiffs seek to join the Village Defendants in this action.

Plaintiffs argue that it was not reasonably foreseeable that the Village Defendants might own or maintain the landing. Therefore, Plaintiffs contend that they should be allowed to file late notices of claim against the Village Defendants. Plaintiffs argue that there is no prejudice to the Village Defendants in allowing the late filing of a notice of claim, because the accident site is in

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1 Mr. Kammerman has asserted a cause of action for derivative loss of services, consortium, society, happiness and companionship of his spouse.

the exact same condition as it was on the date of the accident. Plaintiffs also assert that there were no witnesses to the accident, whose recollections might need to be relied upon. Thus, Plaintiffs contend that the Village Defendants' investigation can be conducted just as well now as it could have been earlier.

The Village Defendants argue that Plaintiffs' motion should be denied because they do not own the site of the alleged accident. They also argue that Plaintiffs have no justifiable reason for not complying with General Municipal Law ("GML") § 50-e. They argue that despite plenty of opportunity to do so, Plaintiffs did not attempt to identify the owner of the landing until nearly a year after the accident. They argue that law office failure or Plaintiffs' or their counsel's ignorance of procedural requirements to commence an action against a municipality are not acceptable excuses for their delay in filing a notice of claim. They further argue that it would be unfair and contrary to public policy underlying the GML to allow Plaintiffs to file a late notice of claim. They assert that they have been prejudiced by Plaintiffs' delay, as the defect which allegedly caused injury to Ms. Carniaux is transitory and they did not have the opportunity to investigate the claim until a year after the accident. They assert that they did not have knowledge of the accident prior to the filing of the notice of claim.

In reply, Plaintiffs assert that the issue of Defendants' ownership or maintenance of the landing was not readily ascertainable and, curiously, that the details of their investigation to determine ownership "are not really germane" (Affirmation of Jared Altman, Esq. in Reply, ¶ 8). Plaintiffs argue that the defect at the site is not transitory and even if it were, Defendants have not been prejudiced by an untimely notice of claim because the condition, by its nature, would have dissipated or changed in any event during the notice period. Plaintiffs further argue that Defendants' allegations of prejudice are merely "unidentified boilerplate prejudice of a speculative nature" (Affirmation of Jared Altman, Esq. in Reply, ¶ 29). Relying on a number of First Department Appellate Division cases, Plaintiffs argue that the absence of an excuse is not fatal, that the burden of proving prejudice is on Defendants and that conclusory claims of prejudice are insufficient to meet this burden. Finally, Plaintiffs argue that GML § 50-e(5) should be liberally construed.

GML § 50-e(1)(a) provides that a party seeking to sue a public corporation must serve a notice of claim on the prospective defendant within ninety (90) days after the claim arises. However, a court may, in its discretion, extend the time to serve a notice of claim pursuant to GML § 50-e(5). GML§ 50-e(5) states in relevant part that:

> Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits. GML§ 50-e(5).

"[A] court's decision to grant or deny a motion to serve a late notice of claim is 'purely a discretionary one'. The lower courts have broad discretion to evaluate the factors set forth in GML § 50-e(5). At the same time, a lower court's determinations must be supported by record evidence". *Newcomb v Middle Country Central School District*, 2016 WL 7388787 [Dec. 22, 2016].

"In determining whether to grant leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant made an excusable error concerning the identity of the public corporation, (3) the delay would substantially prejudice the public corporation in its defense, and (4) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim". *Kuterman v City of New York*, 121 AD3d 646, 647 [2nd Dept 2014]. "Neither the presence nor the absence of any one factor is determinative". *Jordan v City of New York*, 41 AD3d 658, 659 [2nd Dept 2007].

The Court of Appeals in *Newcomb* held that the petitioner initially has the burden to show that the late notice will not substantially prejudice the public corporation. "Such a showing need

not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice. . . Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed." *Newcomb, supra.* "[A] finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference". *Newcomb, supra.*

Here, Plaintiffs repeatedly assert that they believe Mr. Kemp is the owner of the landing on which the accident occurred. They seek to join the Village Defendants in this action as a mere precaution, claiming that they were unable to determine whether the Village Defendants own or maintain the landing in any manner.[2] Plaintiffs seek to have the Court disregard GML § 50-(e) and allow them to file late notices of claim against the Village Defendants based on mere suspicion.

The factors set forth in GML § 50-e(5) do not favor Plaintiffs' position. The parties do not dispute that the Village Defendants did not have actual knowledge of the facts constituting Plaintiffs' claim prior to the filing of the notice of claim on August 17, 2016, nearly a year after the date of the alleged accident. *Rojas v New York City Health and Hospitals Corp.*, 127 AD3d 870, 872 [2nd Dept 2015] ("While the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance"); *Whittaker v New York City Bd. of Educ* , 71 AD3d 776 [2nd Dept 2010].

As to whether the Village Defendants would be substantially prejudiced by the delay, Plaintiffs have not submitted sufficient evidence to support their allegations that the site of the accident has not changed or that there were no witnesses to the accident. Plaintiffs submit an undated photograph of the site and affidavits of the Plaintiffs stating that the site has not changed and that there were no witnesses. These submissions amount to no more than self-serving allegations which are not sufficient to meet Plaintiffs' initial burden of showing that Defendants will not be substantially prejudiced.

Moreover, Plaintiffs do not have a reasonable excuse for their delay in filing late notices of claim. Even though Plaintiffs assert that they did not have any reason to believe that the Village

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2 Plaintiffs provide a copy of a survey of "Corridor Improvements Main Street & Ancillary Streets" dated November 23, 2015, which they obtained from the Village Defendants in response to a FOIL request to the Village. A review of the survey reveals that the landing is part of 115-119 Main Street, which is owned by Mr. Kemp.

Defendants may own or maintain the landing prior to their receipt of the letter from Travelers on June 23, 2016, Plaintiffs confirmed through their FOIL requests to the Village that the Village does not own the landing. The fact of the matter is that Plaintiffs do not have any basis to assert a claim against the Village Defendants. This Court declines to grant permission to file a notice of claim on an action that is clearly without merit.

Accordingly, Plaintiffs' motion for leave to file a late notice of claim is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 10, 2017
Carmel, New York

ENTER

HON. PAUL I. MARX, J.S.C.

To:
Jared Altman, Esq.
Law Offices of Jared Altman
Attorney for Plaintiffs
River Valley Corporate Center
2125 Albany Post Rd. Ste. One North
Montrose, NY 10548

Charles Smith, Esq.
O'Connor, McGuinness, Conte, Doyle,
Oleson, Watson & Loftus, LLP
Attorneys for Defendants Village of Cold Spring and Architectural and Historic District Review Board a/k/a Village of Cold Spring Historic District Review Board
One Barker Ave., Ste. 675
White Plains, NY 10601