

Burgess v Bavis

2019 NY Slip Op 34005(U)

January 18, 2019

Supreme Court, Wayne County

Docket Number: 81689

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 19th day of December, 2018.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

SUSAN L. BURGESS,

Plaintiff

DECISION
Index No. 81689

-vs-

TERRI BAVIS, SUPERINTENDENT OF SCHOOLS,
WATERLOO CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,
MICHAEL SHORES, PRESIDENT,
NICOHL SWARTLEY, JOHN BUTLAK,
VICE PRESIDENT, CHARLES BRONSON,
ELLEN HUGHES, COREEN LOWRY,
COLBY O'BRIEN, KATHLEEN OLDFIELD,
TERRI REESE &
WATERLOO CENTRAL SCHOOL DISTRICT

Defendants

The Plaintiff has filed a motion for leave of court pursuant to CPLR 2221(d), to reargue her cross-motion relative to filing a late notice of claim. The Defendants have registered their oppositions to this application.

The Court is permitting the Plaintiff to reargue this motion.

The Court finds that Education Law §3813(2) compels compliance with the procedures relating to filing a Notice of Claim contained in General Municipal Law §§50-I and 50-e. General Municipal Law §50-e(7) directs that in an application for leave to serve a late Notice of Claim, the application shall be accompanied by a copy of the proposed Notice of Claim.

A number of cases have held that the failure to include a proposed Notice of Claim in the application is sufficient justification by itself to deny the petition. (See *Matter of Farfan v City of New York*, 101 A.D. 3d 714 (2d Dep't 2019), *Grasso v Nassau Cnty.*, 109 A.D. 3d 579 (2d Dep't 2019), *Bethune v Nassau Med. Ctr.*, 149 A.D. 3d 798 (2d Dep't 2017)).


CPLR 2221(d)(2) provides the motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

In this application the Court is prohibited from considering the serious health issues counsel has had to endure in August of 2017. This information was not provided in the initial cross-motion.

A reasonable excuse for the delay in serving the Notice of Claim is a key factor in the analysis of whether leave to serve a Late Notice of Claim should be granted. One Fourth Department case has held that factor alone is sufficient to deny a motion to file a Late Notice of Claim, *Winter v City of Geneva*, 203 A.D. 2d 939, (4th Dep't 1994).

The Court has reviewed the submissions of the parties and finds no reason to alter its Decision rendered with respect to the initial cross-motion.

Dated: January 18, 2019
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice