

Mulvaney v County of Westchester
2019 NY Slip Op 34793(U)
April 18, 2019
Supreme Court, Westchester County
Docket Number: Index No. 67063/2016
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
DEVAN MULVANEY, as Executor of the Estate of
DONALD MULVANEY, deceased, as Executor of
the Estate of LEDELL MULVANEY, deceased,
and as Administrator of the Estate of
KATHERINE MULVANEY, deceased,

DECISION AND ORDER
Index No: 67063/2016
Seq# 6 & 7

Plaintiffs,

-against-

COUNTY OF WESTCHESTER and
TOWN OF YORKTOWN,

Defendants

-----X
Town of Yorktown,

Third-Party Plaintiff,

-against-

Empress Ambulance Service, Inc.,

Third-Party Defendant

-----X
The following papers were reviewed on the motions seeking an order dismissing the action as against Somers Fire District s/h/a Somers Volunteer Fire Department, Inc. ("Somers FD"), and Millwood Fire District s/h/a The Millwood Fire Company Number One, Inc. ("Millwood FD"):

Notice of Motion/Affirmation/Exhibit A-C
Affirmation in Opposition
Reply Affirmation
Notice of Motion/Affirmation/Exhibits A-B
Affirmation in Opposition
Reply Affirmation

1-5
6
7
8-10
11
12

Based on the foregoing papers the motions are granted.

Factual and Procedural Background

The plaintiff commenced this action on November 14, 2016, stemming from a vehicular accident which occurred on August 15, 2015, resulting in personal injuries and the deaths of his father, mother and sister, Donald, Ledell and Katherine Mulvaney. The plaintiff alleges that the Mulvaney's vehicle was traveling southbound on the Taconic State Parkway, when an SUV owned and operated by Nerim Sinanovic traveling northbound on the Taconic crashed into the center embankment, going airborne and striking the Mulvaney's vehicle. The complaint alleges that the Millwood and Somers FD were negligent in rendering aid, extricating, and providing proper emergency treatment to the decedents.

Prior to the commencement, the plaintiff served the defendants County of Westchester (the "County") and Town of Yorktown (the "Town") with Notices of Claim, pursuant to New York General Municipal Law § 50-e. Town of Yorktown (the "Town") filed a third-party summons and complaint on November 17, 2017, against Empress Ambulance Service, Inc.

Somers FD and Millwood FD now file the instant motions seeking dismissal of the action against them. They argue that the complaint should be dismissed due to failure to comply with General Municipal Law § 50-e and General Municipal Law § 50-i; and failure to comply with the statute of limitations required to bring a wrongful death claim. Somers FD also argues for dismissal due to failure to state a cause of action and based on documentary evidence.

The plaintiff's attorney filed an affirmation in opposition, arguing that Somers and Millwood FD failed to meet their burden and the requirements of demonstrating that they are entitled to judgment as a matter of law and are not entitled to summary judgment. The attorney further argues that the motion is premature and that even if the wrongful death cause of action is untimely, a cause of action exists for conscious pain and suffering, for which the statute of limitations has not expired.

DISCUSSION

General Municipal Law §50-e provides that in order to commence an action against a municipality/public corporation the claimant must serve a notice of claim upon the entity within 90 days from the date the claim arises. The purpose of this statute is to protect the public corporation against "stale or unwarranted claims" and afford the municipality 'adequate opportunity to investigate the circumstances surrounding the accident,' while the information is likely to be available, (*see Altmayer v City of New York*, 149 AD2d 638 [2d Dept 1998]; *see also Walston v City of New York*, 229 AD2d 485 [2d Dept 1996]).

General Municipal Law § 50-e tolls the service of a notice of claim in wrongful death actions to 90 days after the appointment of a representative of the decedent's estate (*see* General Municipal Law § 50-e[1][a]).

Further General Municipal Law § 50-i states, in pertinent part, that "[n]o action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property of such city, county, town, village, fire district or school district...unless a notice of claim shall have been made and served upon the city, county, town, village, fire

district or school district in compliance with section fifty-e of this article" (see General Municipal Law § 50-i[1])

Somers FD and Millwood FD are municipal entities and therefore, are required to be served with a notice of claim pursuant to General Municipal Law § 50-e and 50-l. Katherine and Ledell Mulvaney died on August 15, 2015 and Donal Mulvaney died on September 15, 2015. The Letters of Testamentary were issued on April 5, 2016. Both Somers FD and Millwood FD aver that to date, the plaintiff has not filed a notice of claim with either fire district and the time to do so has expired. The plaintiff has not rebutted this assertion, nor has he filed for permission to file a late notice of claim. The plaintiff's attorney used an incorrect standard of law in opposing the motion, arguing for a denial of summary judgment, while the plaintiff filed a motion to dismiss for failure to comply with a condition precedent, expiration of the statute of limitations and failure to state a cause of action¹.

Accordingly, based on the foregoing, it is

ORDERED that the motions to dismiss are granted and it is further

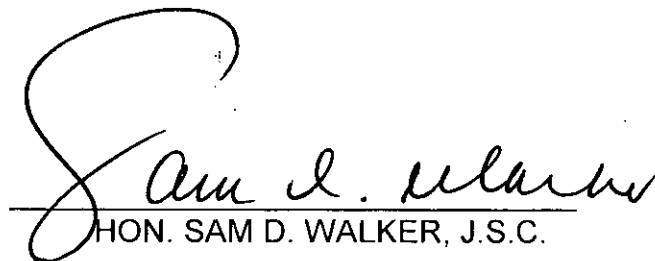
ORDERED that the action against Somers Fire District s/h/a Somers Volunteer Fire Department, is dismissed; and it is further

ORDERED that the action against Millwood Fire District s/h/a The Millwood Fire Company Number One, Inc., is dismissed.

¹In the interest of judicial economy, since the Court is dismissing the case based on the failure to file a notice of claim, it will not address the bases for dismissal raised by the defendants.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
April 18, 2019


HON. SAM D. WALKER, J.S.C.