

**McMorris v Murphy**

2020 NY Slip Op 32206(U)

May 8, 2020

Supreme Court, Suffolk County

Docket Number: 611922/2019

Judge: Carmen Victoria St. George

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SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

*Hon. Carmen Victoria St. George*  
Justice of the Supreme Court

**ORIGINAL**

ALISA MCMORRIS, as the Administratrix of the  
Estate of A.M., Deceased,

Plaintiff,

-against-

THOMAS MURPHY, TOWN OF BROOKHAVEN,  
COUNTY OF SUFFOLK, SAWN LAKE GOLF  
CORP., SWAN LAKE GOLF CLUB, EAGLE'S NEST  
CAFÉ, INC., SWAN LAKE RESTAURANT and  
SWAN LAKE CATERERS, LLC,

Defendants.

Index No. 611922/2019

Motion Seq: 001, 002,  
003

DECISION/ORDER

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	33-40 (001)
	41-46 (002)
	47-60 (003)
Answering Papers.....	61-72 (003)
Reply.....	75
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Plaintiff and defendant County of Suffolk (Suffolk County) move for a default judgment against defendant Eagle's Next Café, Inc. (Eagle's Nest) (001 and 002).<sup>1</sup> Suffolk County moves to dismiss the complaint and the cross-claims made against it (003).

<sup>1</sup> Plaintiff and Suffolk County also moved for a default judgment against defendant Swan Lake Restaurant but have since filed stipulations withdrawing their motions as to Swan Lake Restaurant (docket nos. 80 and 83).

### Facts

On September 20, 2018 defendant Thomas Murphy was operating a motor vehicle when he struck and killed the infant plaintiff. The incident occurred on David Terry Road in the Town of Brookhaven, Suffolk County.

### Motions (001) and (002)

Plaintiff served the summons and complaint on Eagle's Nest on June 25, 2019 by delivering each to a person of suitable age and discretion at Eagle's Nest's actual place of business. On August 22, 2019 plaintiff mailed a default notice, certified mail, to Eagle's Nest advising that Eagle's Nest was in default. Plaintiff filed her motion for a default judgment on September 30, 2019 (001). Eagle's Nest has not appeared or otherwise responded to plaintiff's complaint.

Suffolk County's answer to the plaintiff's complaint asserts cross-claims against Eagle's Nest. The answer and motion were served on Eagle's Nest by mail on July 16, 2019 and October 2, 2019 respectively. Eagle's Nest has not provided any response to the cross-claims or motion.

Both motions for a default judgment are granted. An inquest against Eagle's Nest will be tried with the remaining action.

### Motion (003)

Suffolk County moves to dismiss the complaint and cross-claims against it pursuant to CPLR 3211(a).

### Conditions Precedent

Suffolk County claims plaintiff failed to comply with the conditions precedent to filing a complaint pursuant to Section 50-h of the General Municipal Law.

The purpose of General Municipal Law §50-h is "to pass upon the merits of a claim before the initiation of litigation and thereby forestall unnecessary lawsuits" (*Nasca v. Town of Brookhaven*, 10 AD3d 415, 416 [2d Dept 2004] citing *Alford v. City of New York*, 115 AD2d 420, 421 [1st Dept 1985]). The examination of a claimant serves "to supplement the notice of claim and provides an investigation tool to the municipality, with a view toward settlement" (*Colon v. Martin*, 170 AD3d 1109, 1110 [2d Dept 2019]). "Compliance with a demand for a 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" (*Ross v. County of Suffolk*, 84 AD3d 775, 776 [2d Dept 2011]).

Suffolk County admits that on December 20, 2018 two notices of claim were served on it. One alleged a claim for medical malpractice and one alleged roadway design defects, among other things. On January 10, 2019 Suffolk County was served with an amended notice of claim which again alleged roadway design defects against Suffolk County. On January 21, 2019 Suffolk County sent a letter to plaintiff's attorney stating:

We are in receipt of your Notice of Claim. The Notice of Claim does not state the nature of any claim against the County of Suffolk. The roadway(s) described in the Notice of Claim are neither owned nor maintained by the County of Suffolk. Please proceed accordingly.

On May 30, 2019 a 50-h hearing was held. An excerpted transcript (Exhibit E attached to Suffolk County's and plaintiff's affidavits) is recited below.

Plaintiff's attorney:

Can we just put on the record that you and I clarified that we're not serving a notice with respect to the notice of claim which was rejected solely because of the fact that the roadway where this happened was not within the County's jurisdiction?

Suffolk County's attorney responded:

Correct. The roadway where the incident occurred is not a county road which is why the initial notice of claim was rejected from the County. However, we have accepted the subsequent notice of claim for which we're here today.

Plaintiff's attorney responded:

That would be the one that was marked as Exhibit A which was filed at the same time as the roadway one.

To this Court, the above exchange makes one thing clear-- at the hearing, after discussion between the parties, it was confirmed that the hearing was scheduled in order to examine the medical malpractice claims only. What is not clear is which notice of claim was rejected, or if any were properly rejected. Two notices of claim were served which concerned the roadway. One letter was sent stating the roadway is not owned or maintained by Suffolk County. The letter did not specify that it rejected the initial notice of claim, the amended notice of claim or both. Further confusing the matter, in its Reply Affirmation, Suffolk County states the amended notice of claim was with regard to medical malpractice. However, the amended notice of claim concerns the roadway, not the malpractice claim. This much is undisputed-- on December 20, 2018 plaintiff served two notices of claim upon Suffolk County. One notice of claim concerned claims for medical malpractice and the other included claims for the roadway including its design and construction. On January 20, 2019 plaintiff served an amended notice of claim upon Suffolk County which again concerned the roadway. On January 21, 2019 Suffolk County sent its letter regarding a notice of claim because it does not own or maintain the roadway at issue.

In opposition to Suffolk County's motion, plaintiff states that Suffolk County waived the right to conduct an examination of the plaintiff in connection with the roadway notice of claim. Plaintiff argues that she appeared for the one and only hearing that was noticed, which turned out to be for the medical malpractice claim.

Plaintiff does not address the fact that there was a letter that stated the notice of claim "does not state the nature of any claim against the County of Suffolk" because the roadway is "neither owned nor maintained by the County of Suffolk." But, plaintiff contends the 50-h hearing notice was a general notice such that it required her to ask at the hearing whether both claims (medical malpractice and roadway) would be included. And, she states she was prepared to be questioned on both claims. While Suffolk County may have intended to reject both notices of claim involving the roadway, its January 21st letter has left some amount of confusion, particularly because it says nothing about its role in the design, construction, ownership or control, etc. of the roadway *prior to* the incident, which the notices of claim include. In addition, plaintiff claims that during the 50-h hearing Suffolk County asked about the entire incident in detail and so cannot argue now that they were deprived of an opportunity to promptly investigate plaintiff's claims.

General Municipal Law §50-e requires a notice of claim to be served within 90 days of an occurrence. A rejection of a notice of claim must be made within thirty days. Here, it is not clear that was done, at least for the original notice of claim concerning the roadway, in that Suffolk County acknowledges the original notices of claim were served on December 20, 2018 and the purported rejection letter was mailed on January 21, 2019. Nor can this Court say that the purported rejection itself was sufficient because it did not address the issue of design or construction of the roadway. In addition, Plaintiff did appear for a hearing and alleges the questioning did address all aspects of the incident. And, whether the County designed or constructed the roadway at issue would likely have not been determined at the hearing. On the papers submitted in connection with this motion, this Court cannot determine whether either party, or both, violated the provisions of the General Municipal Law. Therefore, this Court will not order the complaint dismissed on General Municipal Law grounds.

#### Failure to State a Cause of Action

As described above, in its motion to dismiss Suffolk County argues it does not own, operate, maintain, manage or control the roadway where the incident occurred, did not employ the driver of the vehicle involved in the incident and therefore no cause of action can be maintained against it. Suffolk County submitted the affidavit of Jesse Mygland who confirmed that on the date of the incident Suffolk County did not own, operate, maintain, repair or control David Terry Road and that there are no agreements that obligate Suffolk County to supervise, maintain, repair or control the road. In addition, defendant Town of Brookhaven admits in its answer that it *does* maintain David Terry Road and the shoulder of David Terry Road. However, none of this addresses plaintiff's allegation that *prior to* the date of the incident Suffolk County owned, operated, managed, maintained, controlled, supervised, inspected, repaired, designed, performed work on and constructed David Terry Road and the shoulder and that its negligence in connection with the roadway contributed to plaintiff's decedent's death. While plaintiff has sustained its *prima facie* burden concerning current ownership of the roadway (*see Martens v. County of Suffolk*, 100 AD3d 839 [2d Dept 2012]), it has not provided any evidence concerning prior ownership, design or construction of the subject roadway. Thus, Suffolk County has failed to sustain its burden that plaintiff has not stated a cause of action against Suffolk County.

Defendant's motion to dismiss the complaint and cross-claims against it is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: 5/8/2020  
Riverhead, NY

**HON. CARMEN VICTORIA ST. GEORGE** *EH S.C.C.*  
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]