SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

_____x

NATASHA BOURQUE,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 2018-52734

COUNTY OF DUTCHESS,

Motion Seq. No. 1

Defendant

_____x

The following documents were reviewed and considered by the Court in reaching the within Decision and Order.

NYSCEF Doc. Nos. 1,2,4,8, 9-23, 28-29

RELEVANT HISTORY

This matter arises from a motorcycle accident with no other vehicle involved. The accident allegedly occurred on June 1, 2017 on Dog Tail Corners Road, Hamlet of Wingdale, Town of Dover, Dutchess County, New York. Plaintiff claims a sworn Notice of Claim was served on Defendant DUTCHESS COUNTY on or about August 16, 2017 and Amended Notice of Claim served was served on September 29, 2017. Defendant DUTCHESS COUNTY claims it neither received the September 29, 2017 filing, nor conducted a 50-h hearing. Plaintiff NATASHA BOURQUE (BOURQUE) filed her Summons and Verified Complaint on August 29, 2018 but did not serve it upon the County until December 10, 2018. DUTCHESS COUNTY filed its Answer on January 4, 2019. Plaintiff never sought leave to file a late Notice of Claim or an amended Notice of Claim. Defendant moved on February 12, 2020 by Notice of Motion for Summary Judgment pursuant to CPLR 3212, to dismiss the Verified Complaint. The Notice of Motion has been adjourned to March 27, 2020 and to June 19, 2020. BOURQUE filed her Opposition on June 8, 2020, and a Reply was filed on June 18, 2020.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957), summary judgment is a drastic remedy which should not be granted where there is any doubt as to

the existence of triable issues of fact. (*See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [s, 1978]; *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 [1968]; *Barrett v. Jacobs*, 255 N. Y. 520 [1931]). When a court decides a motion for summary judgment: "…issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." (*Esteve v. Abad*, 271 A.D. 725 [1st Dept, 1947]).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." (*Pullman v. Silverman*, 28 N.Y.3d 1060 [2016]; *quoting Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985), "Bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue. See e.g. *Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25 (1933); if the opposition can show there are questionable issues of fact that require a trial of the action, then summary judgment must be denied. In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is :….even arguably any doubt as to the existence of a triable issue'. (*Baker v. Briarcliff School Dist.*, 205 AD2d 652 [2d Dept., 1994]).

DISCUSSION CONCERNING THE NOTICE OF CLAIM

As the Defendant, DUTCHESS COUNTY, is a municipal organization, certain sections of General Municipal Law are applicable to this matter. The thrust of Defendant's application to dismiss is the allegation that BOURQUE's Notice of Claim filed on or about August 16, 2017 was defective. This action lies in tort, as Plaintiff alleges Defendant was negligent in the design, maintenance and inspection of Dog Tails Corner Road. The relevant statute concerning this type of action and the requirement for a Notice of Claim is General Municipal Law 50-i. Presentation of tort claims; commencement of action which states in relevant part:

1. *No action or special proceeding shall be prosecuted or maintained against a … county, …for personal injury, ..alleged to have been sustained by reason of the negligence or wrongful act of such county…or of any officer, agent or employee thereof, ...unless, (a) 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,*

This section also sets forth other requirements for such a lawsuit, that the complaint contain an allegation that at least thirty days have elapsed since the service of such notice [of claim]; that at least forty days have elapsed and that adjustment or payment has been refused; and the action is commenced within one year and ninety days after the accident. All such prerequisites as to elapsed

time to be set forth in the complaint have been met. The issue concerns the Notice of Claim itself and its content which is controlled by General Municipal law 50-e which states in relevant part:

> *2. Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled, provided, however, that the municipal corporation, other than a city with a population of one million or more persons, may at any time request a supplemental claim setting forth the total damages to which the claimant deems himself entitled. A supplemental claim shall be provided by the claimant within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be provided by the claimant.*

There does not appear to be any issue with the timeliness of the Notice of Claim as it was served within ninety (90) days of the accident. Further, there does not appear to be any issue with the way the Notice of Claim was served upon DUTCHESS COUNTY, other than Plaintiff claiming it served an Amended Notice of Claim on or about September 29, 2017 and Defendant claiming it has no such record. Defendant's position is that the Notice of Claim served August 16, 2017 (NOTICE OF CLAIM) was defective in that it failed to comply with providing the "place" where the accident took place with sufficient particularity. The NOTICE OF CLAIM stated:

> *The place where the occurrence took place was* ***in, on and around Dog Tail Corners Road****, Hamlet of Wingdale, Town of Dover, County of Dutchess, State of New York."* (emphasis added)

IS THE NOTICE OF CLAIM SUFFICIENT?

Plaintiff asks the court to answer the above in the negative and find that the BOURQUE Notice of Claim was defective and not timely corrected, thus the action should be dismissed. The supporting Affirmation of Defendant's counsel (NYSCEF Doc. No. 10) also alleges that although the Notice of Claim stated a photograph was attached to it, there was no such attachment. No 50-h hearing was held due to the purported defective Notice of Claim.

Brown v. City of New York, 265 A.D.2d 284 (2nd Dep't, 1999), rev'd, 95 N.Y.2d 389 (2000), is a very interesting and useful case concerning the sufficiency of descriptions contained in a Notice of Claim. The lower court dismissed the action and stated:

> *"It is well established that a complaint is properly dismissed where the plaintiff fails to identify the location of his accident in his notice of claim with sufficient particularity (see, Caselli v City of New York, 105 AD2d 251, 253; see also, Thomas*

> *v. Town of Oyster Bay, 190 AD2d 731; Cappadonna v New York City Tr. Auth., 187 AD2d 691). Here, the plaintiff's complaint was properly dismissed because the plaintiff failed to notify the City in his notice of claim of the location of the defect which he claimed at trial was the cause of his accident. Where a municipality is misled by an erroneous notice of claim to conduct an investigation at the wrong site, this circumstance by itself constitutes "serious prejudice" to the defendant, warranting dismissal of the complaint (Setton v City of New York, 174 AD2d 723; Konsker v City of New York, 172 AD2d 361; Krug v City of New York, 147 AD2d 449)".*

The Appellate Division affirmed. However, in *Brown v. City of New York*, 95 N.Y.2d 389 (2000) the Court of Appeals said:

> *"The test of the sufficiency of a Notice of Claim is merely "whether it includes information sufficient to enable the city to investigate" (see, O'Brien v. City of Syracuse, 54 NY2d 353, 358). "Nothing more may be required" (Schwartz v. City of New York, supra, 250 NY, at 335). Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident (Purdy v. City of New York, supra, 193 NY, at 524; Widger v Central School Dist., No. 1, 18 NY2d 646, 648)."*

> The Notice of Claim in *Brown* was so descriptive that it stated in relevant part:

> *The accident occurred on December 2, 1993, at or about 11:00am, when claimant sustained fractures to his right leg and ankle after tripping on a broken and defective sidewalk and curb, located on West 33rd Street, approximately 65 feet, 7 inches south of the southwest corner of Mermaid Avenue and West 33rd Street…*

The Court of Appeals reversed and remitted the matter to the Appellate Division. The question for this Court is, was the Notice of Claim herein that stated the accident occurred "…*was* ***in, on and around Dog Tail Corners Road****, Hamlet of Wingdale, Town of Dover, County of Dutchess, State of New York."*, sufficient for the Defendant DUTCHESS COUNTY to "…**locate the place**, fix the time and understand the nature of the accident."? (emphasis added).

There are many cases that dismiss actions because the Notice of Claim is defective in describing the location of the incident: *Harper v. City of New York*, 129 A.D.2d 770 (2nd Dep't, 1987) City prejudiced where Notice of Claim was not specific in describing accident location; *Bacchus v. City of New York*, 134 A.D.2d 393 (2nd Dep't, 1987) City unable to promptly and adequately investigate accident location where Notice of Claim provided wrong side of street; *Krug v. City of New York*, 147 A.D.2d 449 (2nd Dep't, 1989) City deprived of opportunity to conduct proper investigation where Notice of Claim provided incorrect address; *Konsker v. City of New York*, 172 A.D.2d 361 (1st Dep't, 1991) municipality unable to conduct proper investigation where Notice of Claim and complaint stated wrong location, *lv denied* 78 N.Y.2d 858(1991);

Setton v. City of New York, 174 A.D.2d 723 (2nd Dep't, 1991) City conducted investigation at wrong site based on misidentification of accident location in original Notice of Claim; *Wai Man Hui v. Town of Oyster Bay,* 267 A.D.2d 233 (2nd Dep't, 1999) municipality unable to locate accident site and conduct timely investigation, *lv denied* 94 N.Y.2d 764 (2000).

The purpose of a Notice of Claim is to give the defendant municipality the ability to quickly investigate the site of the incident and to review what the financial exposure to the defendant might be. It is vital to being able to properly defend an accident. If you can't locate where the accident happened, how can you assess whether it was possible to have occurred in the first place? It's up to the plaintiff in a tort action against a municipality to properly and definitively describe the actual location where the purported accident occurred. However, if the initial Notice of Claim is faulty, the plaintiff can make a timely application for leave to file an amended Notice of Claim. The sooner after the accident the municipality can examine the site, the more likely the information about the site will be readily available. (*See Wai Man Hui, Supra; Altmayer v. City of New York,* 149 A.D.2d 638 [2nd Dep't, 1989]; *see also, Adrian v. Town of Oyster Bay,* 262 A.D.2d 433[2nd Dep't, 1999]; *Yankana v. City of New York,* 246 A.D.2d 645 [2nd Dep't, 1998]). To satisfy the requirements of the statute, the notice of claim must describe the accident with sufficient particularity to enable the defendant to locate the defect, conduct a proper investigation, and assess the merits of the claim (*see, Yankana v. City of New York, supra; Walston v. City of New York,* 229 A.D.2d 485 [2nd Dep't, 1996]; *Wai Man Hui v. Town of Oyster Bay, Supra.).* Depending on the circumstances of the case the description contained in the Notice of Claim may be sufficient or insufficient. (*Casselli v. City of New York,* 109 A.D.2d 251 [2nd Dep't, 1984]).

If the plaintiff is unsure of the actual location, the plaintiff may apply to the court for leave to file a late Notice of Claim. However, such an application for an extension can be made before or even after the commencement of the action, but not more than one year and 90 days after the cause of action occurred, unless the statute has been tolled. (General Municipal Law 50-i[1][c] and 50-e [5]).

The Court of Appeals dealt with three cases that concerned applications to file late notices of claim in a *Pierson v City of New York,* 56 N.Y.2d 950 (1982). One issue involved the relationship between the relevant Statute of Limitations and the timing of the application to file a late Notice of Claim. In the Pierson portion the Court of Appeals stated:

> *"To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50-e which expressly prohibits the court from doing so. In our view, it was the intention of the Legislature, manifested in the amended statute, to relax the objectionably restrictive features of the old statute, but to fix the period of the Statute of Limitations as the period within which any relief must be sought.* ***With the expiration of the period of limitations comes the bar to any claim.*** *(emphasis added)."*

The accident occurred on June 1, 2017 and a Notice of Claim was filed on August 16, 2017 but did not contain any specific information about the location of the alleged accident. A year later, the Summons and Complaint containing specific information about the location was filed on August 29, 2018, but not served upon Defendant DUTCHESS COUNTY until December 10, 2018. Accordingly, Defendant DUTCHESS COUNTY could not locate the accident scene until sometime after December 10, 2018. The accident site was ultimately located by Defendant's counsel on June 7, 2019, (two years after the accident) not by utilizing the defective Notice of Claim, but by using the description of the accident site in the Verified Complaint. Plaintiff failed to avail herself of two (2) statutory applications to change the Notice of Claim and add a more specific location. General Municipal Law 50-e (5) allows an application to be made to file a late Notice of Claim. However, "The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation." Which would be "…within one\year and 90 days after the happening of the event upon which the claim is based…" (see General Municipal Law 50-i [1]). In this case Plaintiff would have had to seek to serve another Notice of Claim by August 29, 2018, and plaintiff failed to do so by that date, instead choosing to file its Verified Complaint.

The Notice of Claim herein was defective. It did not describe the claimed accident scene with sufficient particularity. Plaintiff had ample time to avail itself of the relevant statutes to correct its mistake and did no do so. There are no triable issues of fact that preclude the court from granting Defendant Summary Judgment.

By reason of all the foregoing it is

ORDERED, that THE Motion for Summary Judgment pursuant to CPLR 3212 by Defendant COUNTY OF DUTCHESS to dismiss the Verified Complaint of the Plaintiff NATASHA BOURQUE is **granted,** and the matter herein is dismissed.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Date: September 10, 2020
Poughkeepsie, New York

ENTER:

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do <u>not</u> submit any copies. Submit only the original papers.