

**Progressive Northwestern Ins. Co. v  
County of Nassau**

2020 NY Slip Op 35344(U)

October 28, 2020

Supreme Court, Nassau County

Docket Number: Index No. 602944/2020

Judge: Denise L. Sher

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DENISE L. SHER**  
Acting Supreme Court Justice

PROGRESSIVE NORTHWESTERN INSURANCE  
COMPANY A/S/O DIANE TISCHER, PETER  
CAMPAGNONE, GERALD STANICK,  
CHRISTOPHER SEBOR  
6300 Wilson Mills Road  
Mayfield Village, OH 44143

And

PROGRESSIVE DIRECT INSURANCE COMPANY  
A/S/O TIMOTHY JOHNSON  
6300 Wilson Mills Road  
Mayfield Village, OH 44143

And

PROGRESSIVE NOTHERN INSURANCE  
COMPANY A/S/O CHRISTOPEHR SEBOR  
6300 Wilson Mills Road  
Mayfield Village, OH 44143

Plaintiffs,

- against -

COUNTY OF NASSAU  
c/o Office of the County Attorney  
One West Street  
Mineola, NY 11501

and

BATTLE ROW CAMPGROUND  
1 Claremont Road  
Old Bethpage, NY 11804,

Defendants.

TRIAL/IAS PART 33  
NASSAU COUNTY

Index No.: 602944/2020  
Motion Seq. No.: 01  
Motion Date: 08/28/2020

**The following papers have been read on these motions:**

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01)	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants move (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiffs' Complaint as it pertains to Peter Compagnone, Gerald Stanick, Christopher Sebor, Timothy Johnson and Christophehr Sebor, as well as any and all cross-claims as against them.

Plaintiffs oppose the motion (Seq. No. 01) and cross-move (Seq. No. 02) for an order allowing them to serve a late Notice of Claim on defendant County of Nassau ("Nassau").

Defendants opposes the cross-motion.

In support of the motion (Seq. No. 01), counsel for defendants submits, in pertinent part, that, "[o]n or about February 8, 2019 and February 26, 2019, Plaintiffs allegedly served a letter purporting to be a Notice of Claim on the Battle Row Campground at 1 Claremont Road, Old Bethpage, NY 11804.... On or about February 27, 2020, Plaintiffs filed a Summons and Complaint against the County.... General Municipal Law Section 50-i provides that '[n]o action... shall be prosecuted and maintained against a... County... for personal injury... alleged to have been sustained by reason of the negligence or wrongful act, agent or employee thereof... unless (a) a notice of claim shall have been made and served upon the... County in compliance with Section 50-e of this article, and (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice...'. In this case, the records of the County Attorney's Office do not reflect the filing of a Notice of Claim by or on behalf of Plaintiffs PROGRESSIVE NORTHWESTERN INSURANCE COMPANY A/S/O PETER COMPAGNONE, GERALD STANICK, CHRISTOPHER SEBOR And PROGRESSIVE DIRECT INSURANCE COMPANY A/S/O TIMOTHY JOHNSON And PROGRESSIVE NORTHERN INSURANCE COMPANY A/S/O CHRISTOPEHR SEBOR....

In the instant action, to date, Plaintiffs have not served a sufficient Notice of Claim upon the COUNTY, now significantly more than 90 days after the date of loss. Therefore, Plaintiffs failed to comply with the requirements of Section 50-e of the General Municipal Law, and the Complaint must be dismissed as a matter of law.” See Defendants’ Affirmation in Support of Motion (Seq. No. 01) Exhibits A-C.

Counsel for defendants further contends, in pertinent part, that, “[p]laintiffs may argue that they did not file a Notice of Claim within the ninety (90) day statutory period or that said Notice of Claim was served upon a Department of the COUNTY Defendants, unauthorized to accept service of same, because he (*sic*) did not know that such a requirement existed. Any such argument does not provide an excuse under the law.... [T]he Second Department has **repeatedly** held that ignorance of the law is not a reasonable excuse for failing to timely serve a notice of claim.... In the instant matter, Plaintiffs served a letter purporting to be a notice of claim upon an improper entity. More specifically, as per (*sic*) address listed for the defendants on the letter ..., the Plaintiff (*sic*) served the letter on Battle Row Campground. The Campground is part of the Nassau County Department of Parks & Recreation and does not have a separate legal identity from the COUNTY itself. CPLR 311(4) states that when making service upon a county, service is proper ‘to the chair or clerk of the board of supervisors, clerk, attorney or treasurer’ not a separate part of the County such as a campground or even the Department of Parks & Recreation. As a result, the Defendant was not properly served with a notice of claim. Further, even if the letter was served on the proper entity, it does not meet the standards of a Notice of Claim described in General Municipal Law § 50-e. The letter is not notarized, barely contain (*sic*) any factual or legal allegations, and fail (*sic*) to even mention the individual whose claim they were subrogating.” See Defendants’ Affirmation in Support of Motion (Seq. No. 01) Exhibit A.

In further support of the motion (Seq. No. 01), defendants submit the Affidavit of Judith Urso, an employee in charge of opening the mail for the Office of the Nassau County Attorney. See Defendants' Affirmation in Support of Motion (Seq. No. 01) Exhibit C.

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for plaintiffs asserts, in pertinent part, that, "[t]his case arises from a large fire that occurred on January 25, 2019 at a campground known as the Battle Row Campground located at 1 Claremont Road, Old Bethpage, Nassau County, NY ('Campground'). The Plaintiffs are insurance companies and they insured Six (6) luxury RVs that were lawfully parked at the Campground at the time of the aforesaid fire and were destroyed as a result of said fire. The Plaintiffs compensated the owners of the RVs for their losses and became subrogated to the rights of said owners. The Plaintiffs then brought this subrogation lawsuit against the County and the Campground. The total amount of Plaintiffs' subrogation claims is over \$480,000.00.... The Plaintiffs initially had different counsel representing them pre-suit and said previous counsel made numerous good faith attempts to put the Defendants on notice of the claim, but the Defendants, for months, ignored all communication from Plaintiffs' previous counsel. After the file was transferred to the undersigned for handling, the undersigned made a FOIL request to the County in an attempt to obtain information about the fire. Unfortunately, the FOIL request was ignored as well. Plaintiffs' previous counsel first placed the Defendants on notice of the claim by sending a letter addressed to the Campground's legal department on February 8, 2019, via certified mail.... Plaintiffs' previous counsel then sent another certified letter on February 26, 2019.... Plaintiffs' previous counsel also made Six (6) attempts to contact the Campground's officials by phone.... It is true that Plaintiffs' previous counsel did not send the initial notice letters to the correct address in that the letters were addressed to the Campground's officials, as opposed to the County Attorney's office. The undersigned respectfully submits that Plaintiffs' previous counsel made an innocent mistake by not realizing that the Campground was not a separate entity and was owned and operated by the County. At the same time, the Plaintiffs

respectfully submits (*sic*) that the Campground's officials, as employees of the County, could have easily advised the county legal department of the letters and Six phone calls. Needless to say, said officials should have realized that the issue was important enough to pay the necessary attention to it. In other words, the notice letters were in the hands of the County's employees within the 90-day notice period. The County's Attorney's office eventually received a notice of claim letter in August 2019.... The fact that the County Attorney's office did not receive a notice letter within 90 days of the fire did not prejudice the County in any way because the County had actual knowledge of the fire and of the damage to several RVs and trailers. For example, Exhibit 8 are two news reports about the fire, according to which the County police and the County fire marshal were investigating the fire and the damage to several RVs/trailers. Therefore, it is undisputed that the County had actual knowledge of the incident and the resulting losses. In fact, given the investigations conducted by the County public sector officials, the County knows more about Plaintiffs' potential claim than the Plaintiffs themselves.... The Plaintiffs respectfully submit that Plaintiffs' previous counsel's mistake in sending (*sic*) notice letter to the Campground officials was an excusable mistake.... Because the County had actual knowledge of Plaintiffs' claim, the County was not prejudiced by the alleged late service of the notice of claim and, therefore, the County's Motion to Dismiss Plaintiffs' Complaint should be denied." See Plaintiffs' Affirmation in Support of Cross-Motion (Seq. No. 02) and in Opposition to Motion (Seq. No. 01) Exhibits 1-8.

In opposition to the cross-motion (Seq. No. 2) and in further support of the motion (Seq. No. 01), counsel for defendants asserts, in pertinent part, that, "[p]laintiffs argue that they did not file a Notice of Claim within the ninety (90) day statutory time period or that said Notice of Claim was served upon a Department of the COUNTY Defendants, unauthorized to accept service of same, because he did not know that such a requirement existed. Any such argument does not provide an excuse under the law.... Further, in Plaintiffs' Exhibit 4, they concede that they were told their claim was untimely back in September of 2019 and have no (*sic*) offered an

excuse as to why they waited almost a year to file for leave for a late notice of claim. Therefore, the New York Courts do not regard ignorance of the filing requirement as a reasonable excuse under General Municipal Law § 50-e. Therefore, this Court should follow the same line of reasoning, and dismiss Plaintiffs' Complaint. Plaintiffs' (*sic*) argue that since an investigation was performed by the Fire Marshall and the Police Department the County acquired knowledge of this claim, however, that is not the applicable standard.... [J]ust because an investigation was conducted regarding the fire does not mean that the County learned of any potential wrongdoing that subjected itself to a claim."

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), 'the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander's Inc.*,

46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. See *Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. See *Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez, supra* at 88.

General Municipal Law §50-e (1)(a) provides that a Notice of Claim must be filed with a municipality within ninety (90) days of the date on which the claim arose. If the Notice of Claim is not filed within that ninety (90) day time period, a claimant must make an application to the Court, within one year and ninety days from the time the cause of action accrued, for permission to file a late Notice of Claim. See General Municipal Law §50-I (1) (c); *Allende v. City of New York*, 69 A.D.3d 931, 894 N.Y.S.2d 472 (2d Dept. 2010).

Pursuant to General Municipal Law § 50-e(5), the court has discretion to permit service of a late Notice of Claim. See *Matter of Romeo v. Long Is. Power Auth.*, 133 A.D.3d 667, 19 N.Y.S.3d 316 (2d Dept. 2015); *Matter of Grant v. Nassau County Indus. Development Agency*, 60 A.D.3d 946, 875 N.Y.S.2d 556 (2d Dept. 2009). While all relevant factors should be considered, key factors in determining whether leave to serve a late Notice of Claim should be granted are whether claimant has demonstrated reasonable excuse for failing to timely serve a Notice of Claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety (90) days after its accrual, or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense

on the merits. *See* General Municipal Law § 50-e; *Russo v. Monroe-Woodbury Cent. School Dist.*, 282 A.D.2d 465, 723 N.Y.S.2d 198 (2d Dept. 2001). The statute is remedial in nature and should, therefore, be liberally construed. *See Camacho v. City of New York*, 187 A.D.2d 262, 589 N.Y.S.2d 421 (1<sup>st</sup> Dept. 1992). It should not operate to frustrate the rights of those with legitimate claims. *See Matter of Porcaro v. City of New York*, 20 A.D.3d 357, 799 N.Y.S.2d 450 (1<sup>st</sup> Dept. 2005).

Neither the presence nor absence of any one of the enumerated factors is necessarily determinative. *See Matter of Lopez v. County of Nassau*, 120 A.D.3d 688, 990 N.Y.S.2d 886 (2d Dept. 2014); *Abrahamson v. Gates at Melville, LLC*, 278 A.D.2d 186, 717 N.Y.S.2d 245 (2d Dept. 2000). Actual knowledge of the essential facts is an important factor in determining whether to grant an extension and “should be accorded great weight.” *See Brownstein v. Incorporated Village of Hempstead*, 52 A.D.3d 507, 859 N.Y.S.2d 682 (2d Dept. 2008); *Matter of Dell’Italia v. Long Is. R.R. Corp.*, 31 A.D.3d 758, 820 N.Y.S.2d 81 (2d Dept. 2006). Actual knowledge of the essential facts underlying the claim means knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the proposed Notice of Claim. The municipality need not have specific notice of the theory or theories themselves. *See Matter of Bhargava v. City of New York*, 130 A.D.3d 819, 13 N.Y.S.3d 552 (2d Dept. 2015).

Nevertheless, the presence or absence of any one of the factors used in determining whether to allow service of a late Notice of Claim against a municipality is not necessarily determinative, and the absence of a reasonable excuse is not necessarily fatal to a claimant’s motion. *See Jordan v. City of New York*, 41 A.D.3d 658, 838 N.Y.S.2d 624 (2d Dept 2007); *Chambers v. Nassau County Health Care Corp.*, 50 A.D.3d 1134, 857 N.Y.S.2d 222 (2d Dept. 2008).

It is noted that the Court's decision to grant or deny a late Notice of Claim is still purely a discretionary one and the Court remains free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. *See Sverdlin v. City of New York*, 229 A.D.2d 544, 645 N.Y.S.2d 843 (2d Dept.1996).

Under the circumstances detailed above, and the legal arguments presented by both parties, the Court finds that plaintiffs have not demonstrated a *reasonable* excuse for failing to timely serve a proper Notice of Claim (emphasis added). Additionally, plaintiffs have failed to present any evidence that defendants acquired actual knowledge of the essential facts constituting the claim within ninety (90) days after its accrual, or a reasonable time thereafter. *See* General Municipal Law § 50-e; *Russo v. Monroe-Woodbury Cent. School Dist., supra*; *Brownstein v. Incorporated Village of Hempstead, supra*. *See also Katsourias v. City of New York*, 106 A.D.3d 916, 965 N.Y.S.2d 533 (2d Dept. 2013). Furthermore, the Court finds that defendants would be substantially prejudiced in maintaining their defense on the merits due to approximate one (1) year and four (4) months delay from the deadline to file the Notice of Claim to the instant application. *See D.M. v. Center Moriches Union Free Sch.*, 151 A.D.3d 970, 54 N.Y.S.3d 161 (2d Dept. 2017); *A.C. v. West Babylon Union School Dist.*, 147 A.D.3d 1047, 48 N.Y.S.3d 422 (2d Dept. 2017); *Hampson v. Connetquot School Dist.*, 114 A.D.3d 790, 980 N.Y.S.2d 132 (2d Dept. 2014).

Therefore, based upon the above, plaintiffs' cross-motion (Seq. No. 02) for an order allowing them to serve a late Notice of Claim on defendant Nassau, is hereby **DENIED**.

Defendants' motion, (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiffs' Complaint as it pertains to Peter Compagnone, Gerald Stanick, Christopher Sebor, Timothy Johnson and Christophehr Sebor, as well as any and all cross-claims against them, is hereby **GRANTED**. And it is further

**ORDERED** that a Preliminary Conference, with respect to the remaining claim, with respect to Diane Tischer, is scheduled to be held on December 14, 2020, by the filing of a Proposed Preliminary Conference Order. The parties are hereby directed to the court website (<http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>) where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

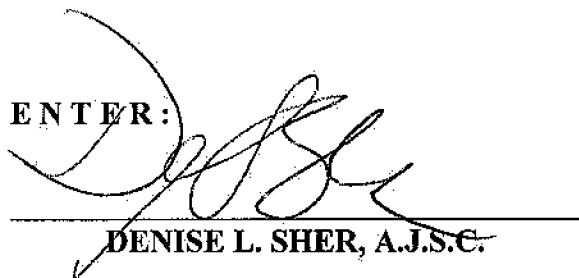
This constitutes the Decision and Order of this Court.

**ENTERED**

**Nov 02 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
October 28, 2020