

**Guzman v Nuevo Mexico Lindo Su Abarrotera Cent.
Corp.**

2015 NY Slip Op 30832(U)

May 18, 2015

Supreme Court, Queens County

Docket Number: 2893/2013

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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NANCY GUZMAN, JOSE TAVAREZ, IRENE FERNANDEZ, JOSE TAVAREZ, JR., a minor over the age of 14 years old, by his parents and natural guardians, JOSE TAVAREZ and IRENE FERNANDEZ, ELVIS TAVAREZ, a minor over the age of 14 years old by his parents and natural guardians, JOSE TAVAREZ and IRENE FERNANDEZ, ELBA TAVAREZ, JUAN A. VIZCAINO, OSCAR FLORES, SR., GRECIA FLORES, DERRICK JOLLIFE, OSCAR FLORES, FELIX JOSE FRANCO, LAURA FRANCO, JOAN FRANCO, a minor over the age of 14 years old, by his parents and natural guardians, FELIX JOSE FRANCO and LAURA FRANCO, THAMILA FRANCO, an infant under the age of 14 years old by her parents and natural guardians, FELIX JOSE FRANCO and LAURA FRANCO, JOSHUA FRANCO, and infant under the age of 14 years old, by his parents and natural guardians, FELIX JOSE FRANCO and LAURA FRANCO, JULISA FLORES, JUAN CARPTO, GLADIS, SIGUENCIA, CARLOS HUERTA, MARIA FAJARDO, MELBA QUINTEROS, and JOSE QUIANJOTA,

Index No.: 2893/2013
Motion Date: 02/24/15
Motion No.: 105
Motion Seq.: 5

Plaintiffs,

- against -

NUEVO MEXICO LINDO SU ABARROTERA CENTRAL CORPORATION d/b/a MORENO PRODUCE, FELIPE MORENO, NEURI MORENO, THE CIY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,

Defendants.

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The following papers numbered 1 to 14 were read on this motion by defendants, CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT, for an order pursuant to CPLR 3212 extending the time to file a motion for summary judgment and for an order pursuant to CPLR 3212 and/or 3211(a) (7) dismissing plaintiff's complaint and all cross-claims against the City for failure to file a Notice of Claim and for failure to state a cause of action:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition.....	7 - 11
Reply Affirmation.....	12 - 14

This is an action for a permanent injunction restraining the defendants Moreno Produce and its owners Felipe Moreno and Neuri Moreno and the company's employees from disrupting and disturbing the plaintiffs' rights to quietly and peacefully enjoy their residential homes and apartments and the immediate common areas of their residential neighborhood. In their complaint, filed with this court on February 13, 2013, plaintiffs, who reside within a one or two block vicinity of the business premises of the defendants, allege that for the past several years the defendants park their tractor-trailer trucks all over the plaintiffs' residential neighborhood, block traffic, force school buses and emergency vehicles to change their routes, block the plaintiffs' vehicles for hours at a time, occasionally damage the plaintiffs' vehicles, conduct business between the hours of 9:00 p.m. and 5:00 a.m. seven days a week and during the daytime on Saturdays and Sundays, including loading and unloading tractor-trailer trucks using forklifts, allowing refrigerator motors to run constantly, allowing trucks to idle on the street for hours at a time sending toxic pollutants into neighboring residential homes. In addition, the plaintiffs claim that despite numerous complaints to the defendants Felipe Moreno and Neuri Moreno as well as to the 110th Precinct, the Moreno defendants, the City of New York and the New York City Police Department have all failed to discontinue the offensive actions and to protect the plaintiffs' rights to quietly and peacefully enjoy their residential homes.

The business in question is located at 97-34 43rd Avenue Corona, New York. Plaintiffs claim that the conduct specified above has been ongoing for the last several years. In addition, to a permanent injunction, the plaintiffs also seek monetary damages in the amount of 10 million dollars against the City of New York, The New York City Police Department and the Moreno defendants.

Issue was joined by service of a copy of the City of New York's answer with cross-claims on May 30, 2014. The plaintiffs filed a Note of Issue on February 19, 2014. A temporary restraining order was issued by Justice Hart on February 14, 2013. The plaintiffs subsequently moved to hold the defendants in contempt for violating the temporary restraining order. By decision and order dated October 21, 2013, Justice Lebowitz found that the plaintiff did not establish by clear and convincing evidence that the defendants violated the temporary restraining order.

The defendant, City of New York, now moves for an order dismissing the action against the City of New York and the New York City Police Department (collectively, "the City"), on the ground that a Notice of Claim was never filed by the plaintiffs and the plaintiffs never appeared for a hearing pursuant to General Municipal Law § 50-h. The City also alleges that no depositions have been held by or with any of the City witnesses and the City, who has recently filed an answer, has not participated in any discovery. In addition, the City asserts that it was never served with a copy of the Note of Issue. Further, the City alleges that the addendum to the Note of Issue signed by plaintiff's counsel asserts that "due to various issues, the parties have not been able to complete any of the discovery called for in the preliminary conference and compliance conference orders." Counsel goes on to state that "the attorneys for the parties are working out the details of a discovery schedule that will be binding upon the parties yet not interfere with the scheduling of a trial."

The City now moves to extend the time to file a motion for summary judgment because discovery has not been completed as conceded by the plaintiff's counsel and because the City was never served with a Note of Issue.

Secondly, the City moves to dismiss the action against it pursuant to GML § 50-e because the plaintiff failed to file a notice of claim. The City asserts that the plaintiff cannot file a late notice of claim at this time because the one year and 90 day Statute of Limitations has elapsed.

Thirdly, the City alleges that the complaint must be dismissed for failure to state a cause of action because no special duty existed between the plaintiffs and the City. The City asserts that a municipality is immune from tort suits arising out of its performance of a governmental function absent the existence of a special relationship between it and the injured person (citing De Long v County of Erie, 60 N.Y.2d 296 [1983]).

The City also alleges that plaintiffs' complaint must be dismissed for failure to plead the elements required for a private right of action. Here, it is alleged that the plaintiffs failed to plead the existence of a violation of a statute on the part of the City or a statute that provides for a private right of action.

In the alternative, it is alleged that the City is entitled to summary judgment on the defense of governmental function immunity because the complaint implicates discretionary governmental functions and discretion was exercised. Counsel asserts that a municipality may not be sued for allegedly failing to protect members of the general public from criminal acts or other public hazards addressed by the police or other security personnel (see Kircher v. Jamestown, 74 N.Y.2d 25 [1989]). The defendant asserts that the decision of unnamed police officers not to make any arrests or issue summons in this matter were decisions that were inherently discretionary and as such the City defendants are entitled to immunity.

In opposition, plaintiffs' counsel, Peter Zirbes, Esq., states that when the action was commenced by order to show cause Justice Hart directed that the City of New York be served by serving a copy of the order to show cause as well as the summons and complaint on the City by service upon the 110th Precinct by February 14, 2013. The affidavit of service annexed to the answering papers indicates that a police officer at the desk was served at the precinct on February 14, 2013. The City did not file a timely answer. However, the plaintiff withdrew its motion for a default judgment and consented to permit the City to serve a late answer by May 2014.

With respect to the failure to file a Notice of Claim, the plaintiff does not dispute that a notice of claim was never served. However, plaintiff asserts that timely service of a summons and complaint should be accepted as proper notice in lieu of a notice of claim because the complaint provided the defendant with actual knowledge of the essential facts of the claim. (citing Grieco v Fugaro, 61 AD2d 903 ([1st Dept. 1978])). Here, the plaintiff asserts that the order to show cause served on the City with the summons and complaint contains sworn affidavits from four of the twenty plaintiffs each recounting in detail their experiences that make up all of the various claims against the City found in the complaint.

Plaintiff also asserts that without discovery it is premature to grant dismissal of the complaint against the City for failure to state a cause of action. Plaintiff asserts that

the complaint against the City is related to its proprietary function and that a special duty does exist and as such the defendants can be held liable for their failure to perform their governmental functions.

With respect to the defendants' application for an extension of time to file a summary judgment motion, the plaintiff's counsel states that there is no objection to allowing an extension while the case remains on the trial calendar.

Counsel for the Moreno defendants has not opposed the City's motion to dismiss.

Upon review and consideration of the defendants' motion, plaintiffs' affirmation in opposition and defendants' reply thereto, this court finds that the motion by the City of New York to dismiss the complaint against it is granted based upon the plaintiffs' failure to file a notice of claim pursuant to GML § 50-e (see Zarate v Nassau County Med. Ctr., 9 AD3d 427 [2d Dept. 2004]). Pursuant to GML § 50-e, a plaintiff commencing a tort action against the City must serve a Notice of Claim upon the city. The service of a Notice of Claim within 90 days after the accrual of a cause of action is a condition precedent to the commencement of a tort action against City (General Municipal Law [GML] 50-e[1][a]; GML 50-i[1][a]; Shahid v City of New York, 50 AD3d 770 [2d Dept 2008]). The failure to file a timely notice of claim requires dismissal of the cause of action (see Tannenbaum v City of New York, 30 AD3d 357 [1st Dept 2006]). Here, it is undisputed that the plaintiffs failed to serve a Notice of Claim regarding their allegations against the New York City Police Department. In fact, the plaintiffs acknowledged in their motion papers that they had not served a notice of claim.

However, courts have broad discretion to grant leave to serve a late notice of claim pursuant to GML § 50-e(5). However, the plaintiffs failed to offer any excuse for the failure to timely file a notice of claim and failed to file an application for leave to serve a late notice of claim. Although the plaintiff claims that the defendant had notice of the factual allegations being alleged by the plaintiffs by virtue of the four individual affidavits served with the summons and complaint, the plaintiff is still obligated to make application for leave to serve a late notice of claim so that the court may consider all of the factors enumerated in the statute so as to properly exercise its discretion. For example, in determining whether to grant leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts

constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant made an excusable error concerning the identity of the public corporation, (3) the delay would substantially prejudice the public corporation in its defense, and (4) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim (see General Municipal Law § 50-e[5]; Matter of Valila v Town of Hempstead, 107 AD3d 813 [2d Dept. 2013]) and whether the application to file a late notice was made within the time period of the statute of limitations.

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the motion by the City of New York and the New York City Police Department for an order dismissing the plaintiff's complaint against it is granted, and it is further,

ORDERED, that as the complaint has been dismissed against the City for failure to file a Notice of Claim, the remaining branches of the defendants' motion to dismiss the complaint are denied as academic, and it is further,

ORDERED that the case remains on the trial calendar with respect to the remaining defendants.

Dated: May 18, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.