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STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

JENNIFER BIRCKMAYER,

Plaintiff,

-against-

THE VILLAGE OF KINDERHOOK,

Defendant.

Index No. 9217-15
RJI No. 10-15-0391

DECISION AND ORDER

This is a Motion by the Defendant to Dismiss the Plaintiff's Amended Complaint pursuant to CPLR 3211 (a) 7, for failure to state a cause of action. The Plaintiff has cross moved to amend her Complaint again to reduce the ad damnum clause for some of the twelve causes of action and to omit the eighth and twelfth causes of action. She also seeks to add a cause of action for unlawful taking of property without compensation, in violation of the Fifth Amendment to the United States Constitution. This new cause of action also seeks attorneys fees pursuant to 42 U.S.C. 1988. (Fourth cause of action). The Defendant opposes Plaintiff's Cross-Motion.

HISTORY

This action was commenced by the filing and service of the Summons and Complaint on August 12, 2015. The Complaint was answered on or about September 18,

2015. Plaintiff served an Amended Complaint on or about August 26, 2015, to which the Defendant served an Answer on October 8, 2015.

In the interim, Plaintiff moved to serve a late Notice of Claim, by Notice of Motion dated August 11, 2015. The Motion was opposed. The Court denied Plaintiff's Motion to serve a late Notice of Claim by Decision and Order dated April 6, 2016. No Notice of Appeal was taken from that Decision and Order. A certain amount of paper discovery took place thereafter and this Motion to Dismiss Plaintiff's Amended Complaint followed.

Plaintiff's Amended Complaint contains twelve causes of action. The first cause of action is to quiet title to a portion of Plaintiff's real property alleged to been taken by the Defendant. The second cause of action is in the nature of a declaratory judgment asking the Court to declare that the Defendant has no right or title or interest in the lands beyond the state highway right-of-way on U.S. Route 9 or in the land underlying state highway right-of-way U.S. Route 9, further that the Village has constructed its project, in part, on Plaintiff's property and finally that the Plaintiff is entitled to either just compensation for the taking of her property or the removal of encroaching structures.

The third cause of action is for inverse condemnation and seeks to compel the

Village to purchase the property or remove the project and restore the property to its prior condition. The fourth cause of action seeks removal of the Defendant's underground structures and is injunctive in nature. However, it seeks damages in an amount no less than $50,000. The fifth cause of action is for trespass and seeks permanent removal of the offending structures, compensatory damages in the amount of $25,000 and punitive damages in the amount of $50,000. The sixth cause of action sounds in nuisance and seeks a permanent injunction, requiring the Defendant to remove the project as well as damages in an amount of no less than $50,000. The seventh cause of action alleges surface water diversion as a form of continuing trespass and again seeks a permanent injunction.

The eighth cause of action sounds in negligence and seeks monetary damages in the amount no less than $164,000. The ninth cause of action invokes Section 861 of the Real Property Actions and Proceedings Law and seeks treble damages for each tree damaged, as well as a direction that the Plaintiff's property be restored to its previous condition, or by the assessment of monetary payment in the amount not less than $164,000. The tenth cause of action seeks an injunction to remove the offending structures on Plaintiff's property as well as monetary damages in an amount no less than $50,000. The eleventh cause of action seeks a restoration of her property to its condition preconstruction. Finally, the twelfth cause of action alleges conversion by the Defendant

of Plaintiff's topsoil and earth and seeks compensatory damages in an amount not less than $25,000 plus interest, as well as punitive damages.

ARGUMENT

It is the Defendant's contention that by virtue of the failure of the Plaintiff to file a Notice of Claim against the Village prior to the commencement of this proceeding, in compliance with CPLR §§9801 and 9802, all causes of action, including those of an equitable nature, must be dismissed. It alleges the Plaintiff failed to serve a timely notice of claim and failed to plead compliance with this requirement, rendering all of the causes of action defective under CPLR §3211 (a) (7). It contends that the Complaint as a whole, primarily seeks monetary relief, not damages incidental to equitable relief. Moreover, it contends that any claim for punitive damages is barred as a matter of law, since punitive damages cannot be awarded against a municipality, citing LaBelle v. County of St. Lawrence, 85 A.D.2d 759 (3d Dept. 1981) and Sharapata v. Islip, 82 A.D.2d 350 (2d Dept. 1981).

Additionally, Plaintiff's third cause of action alleges a taking of property without due process and just compensation in violation of the United States Constitution, which could be viewed as an action under 42 U.S.C. §1983 for the deprivation of

constitutionally protected rights. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978); Town of Orangetown v. Magee, 88 N.Y.2d 41, 48 (1996). It asserts that for municipal liability to exist under §1983, the complaint must allege more than the theory of respondeat superior. It contends that the plaintiff must establish that the municipality:

> 1. Created a formal policy, officially promulgated or adopted by the municipal defendant; or
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> 2. A specific action or decision by an official responsible for establishing final policy with respect to the subject matter and that such action or decision caused a violation of plaintiff's constitutional rights; or
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> 3. Established an unlawful practice by subordinate officials so permanent and well settled as to constitute a "custom or usage", Plaintiff must prove that this practice was so manifest or widespread as to imply the constructive acquiescence of the policymaking officials; or
>
> 4. Failed to train or supervise its employees in a fashion designed to prevent the violation of plaintiff's rights, if such failure amounted to "deliberate indifference" to the rights of those with whom the municipal employees will come into contact.

Each of those four possibilities of municipal liability are supported by various cases cited by the Defendant. It then goes on to argue that the Plaintiff has failed to meet its burden to demonstrate any facts that would support one or more of those four possible scenarios to qualify for a valid "Monell" claim. Any theory of liability under 42 U.S.C.

§1983 amounts to nothing more than a claim of respondeat superior or vicarious liability, it contends, barred as a matter of law. DeRatafia v. Columbia County, 2013 U.S. Dist.Ct. WL5423871 (N.D.N.Y. 2013).

In response, Plaintiff cross moves to amend her Complaint a second time. She consents to the removal of two of the causes of action, eighth and twelfth, that seek monetary damages, and further concedes that Plaintiff's claims for punitive damages against the Village cannot stand. They have been removed, wherever they existed, from the second proposed Amended Complaint. Finally, Plaintiff seeks to add a cause of action under 42 U.S.C. §1983 (Fourth) which seeks damages for the violation of her constitutional rights and attorneys fees.

Plaintiff contends her request to amend the Complaint again comes as no surprise, since the Motion is intended to address the defects complained about by the Defendant. She contends further that discovery is in its inception, no depositions have been conducted, there is no discovery schedule in place and, therefore, Defendant will not be hindered in the preparation of this case. Finally, she contends that her Amended Complaint has merit.

With regard to Defendant's arguments that CPLR §§9801 and 9802 require the

filing of a Notice of Claim for all causes of action, whether brought at law or in equity, she asserts there is conflicting case law on the subject. She appears to concede that there are some Appellate cases in the Second and Fourth Departments that support that position,[1] but argues that Appellate cases in the Second Department are split on the subject, citing several, and that at least two miscellaneous cases in the Third Department, SAB Enterprises Inc., v. Stewart's Ice Cream Co., 113 Misc2d 492 (Sup. Ct. Greene County 1982) and Bloss v. Village of Canastota, 35 Misc2d 829 (Sup. Ct. Madison County), have suggested that the filing of a Notice of Claim is not necessary, where the primary relief sought is equitable in nature.

Plaintiff also argues, under the authority of Salesian Society v. Ellenville, 41 N.Y.2d 521 (1997), that where a municipality has raised the absence of a Notice of Claim for the first time after long and vigorous litigation, it created a strong presumption that they were waiving such a defense. She then argues that there has been substantial discovery engaged in and that somehow, the Plaintiff had been led to believe that the Defendant was going to proceed on the merits of the action. Alternatively, she contends that continuous trespass and nuisance theories give rise to successive causes of action, limited only by the expiration of such time as to acquire a prescriptive easement. Since, as

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[1]Town of Macedon v. Village of Macedon, 129 A.D.3d 1639 (4th Dept. 2015); Greco v. Inc. Village of Freeport, 223 A.D.2d 674 (2d Dept. 1996); Solow v. Liebman, 175 A.D.2d 867 (2d Dept. 1991); Medik v. Inc. Village of Lanningtown, 76 A.D.3d 616 (2d Dept. 2010)

she asserts, she has filed and served three Notices of Claim against the Village since the commencement of this action for, inter alia, continuous trespass and nuisance, a new action could be brought against the Village within a matter of days, should the present Complaint be dismissed and, therefore, in the interests of judicial economy, the current Complaint should not be dismissed.

She contends that the third cause of action in the current Complaint, which remains the same in the second proposed Amended Complaint, is for inverse condemnation, or de facto appropriation, which can legally stand on its own, under state law, and need not be subject to the strictures associated with a civil rights claim under 42 U.S.C. §1983.

Finally, she argues that leave to amend the Complaint should be created freely granted pursuant to CPLR §3025 (b). Here, she contends, no prejudice will be suffered to the opposing party. The Defendant in this case was on notice of the proposed amendment and seeking a diminution in the various prayers for relief as it relates to money damages simply bolsters her contention that the relief sought in this action is primarily equitable. Furthermore, the new cause of action (for violation of Federal Constitutional rights under 42 U.S.C. §1983), is valid and one for which the Village has been on notice for almost one year.

In reply, Defendant reasserts that case law previously cited requires the dismissal of all state law claims due to the absence of a timely Notice of Claim. This includes Plaintiff's third cause of action alleging de facto appropriation and inverse condemnation, citing Phelps Steel Inc. v. Glens Falls, 89 A.D.2d 652 (3d Dept. 1982). Defendant then proceeds to distinguish cases cited by Plaintiff, contending that many of Plaintiff's cases such as Watts v. Gardner, 90 A.D.2d 615 (3d Dept. 1982); Clempner v. Southhold,154 A.D.2d 421 (2d Dept. 1989); Petty v. Town of Lexington, 92 A.D. 1111 (3d Dept. 2012); and Greaney v. Springer, 266 A.D.2d 707 (3d Dept. 1999) address a question involving a late Notice of Claim against a Town, not a Village. It also criticizes Plaintiff's reliance upon SAB Enterprises Inc., v. Stewart's Ice Cream Co., supra because the case was decided in 1982 and more recent case law from the Fourth and Second Departments, as it asserts, is more compelling. It seeks to distinguish Bass Bldg. Corporation v. Pomona, 142 A.D.2d 657 (2d Dept. 1980), asserting that it is no longer good law in the Second Department because of subsequent Second Department decisions.

Additionally, Defendant opposes the new fourth cause of action attached to Plaintiff's proposed second Amended Complaint. It contends that a landowner must first seek compensation from the state, using remedies provided under State law, before resorting to a claim under 42 U.S.C. §1983 citing Blanchette v. Connecticut Gen. Ins. Corporations, 419 U.S. 102 (1974) and Williamson County Regular Planning

Commission v. Hamilton Bank, 473 U.S.172 (1985). It contends Plaintiff must proceed with her state law remedies first before she can bring a claim under Section 1983. Canzoneri v. Inc. Village of Rockefeller Center, 980 F Supp2d 194 (E.D.N.Y. 2013).

Alternatively, even if the Court were to consider this cause of action on its merits, the Amended Complaint does not cure the defect relating to her failure to set forth a specific allegation that identifies a specific individual with final decision-making authority making a decision that resulted in the alleged violation of Plaintiff's rights. Plaintiff's theory of liability is still based upon respondeat superior, which is insufficient to sustain a Section 1983 claim. DeRatafia v. County of Columbia, 2013 U.S. Dist. Ct. WL5423871 (N.D.N.Y. 2013)

The fact that Plaintiff has filed three additional Notices of Claim in April, June and September 2016, is of no moment, it contends, since New York law requires the filing of a Notice of Claim as a condition precedent to the commencement of any tort or equitable action against the Village, citing Berry v. Village of Millbrook, 815 F Supp2d 711 (S.D.N.Y. 2011) and Hardy v. New York City Health and Hospitals Corporation, 160 F3d 789 (2d Cir. 1999).

Finally, Defendant contends Plaintiff alleges that Plaintiff has not pled a

continuous trespass and nuisance claim because it has alleged that the Village has placed permanent highway structures on her property constituting a de facto taking. Citing Smith v. Town of Long Lake, 40 A.D.3d 1381 (3d Dept. 2007), it contends that if interference with the owner's use of the land is complete, it can only be a de facto taking, not a trespass. Nor has any waiver by the Defendant taken place since the case is, by the Plaintiff's own admission, in its infancy, and, therefore, her reliance upon Salesian Society v. Ellenville, 41 N.Y.2d 521 is misplaced.

DISCUSSION

CPLR 9802 provides:

> Except as provided otherwise in this chapter no action shall be maintained against the village upon or arising out of a contract of the village unless the same shall be commenced within eighteen months after the cause of action therefor shall have accrued, nor unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued, and no other action shall be maintained against the village unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law. The omission to present a claim or to commence an action thereon within the respective periods of time above stated applicable to such claim, shall be a bar to any claim or action therefor against said village; but no action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the village clerk.

County Law 52 (1) provides:

> 1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought.
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> 2. This section shall not apply to claims for compensation for property taken for a public purpose, nor to claims under the workmen's compensation law.

Section 50-e of the General Municipal Law provides, in relevant part:

> 1. When service required; time for service; upon whom service required.
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> 1. (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after

> the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.
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> (b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

In a pre-answer Motion to Dismiss pursuant to CPLR 3211 (a) (7) "we accept as true each and every allegation made by the plaintiff" (Davis v. Boeheim 24 N.Y.3d 262, 268 [2014]. We must give Plaintiffs the benefit of every possible inference (EBC I, Inc. V. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 [2005]; Torok v. Moore's Flatwork & Founds., LLC, 1068 A.D.3d 1421 (2013]).

There is no allegation by the Plaintiff, in either version of its Complaint, that it has complied with CPLR §9802. Neither is there an allegation that she is excused from compliance with this Section. The current Amended Complaint can be construed to contain causes of action both at law and in equity. Since the service of the Second Amended Complaint, it is undisputed that the Plaintiff has filed three Notices of Claim, dated April 19, June 27 and September 22, 2016. Each of them purports to assert claims for interference with real property rights of the claimant including continuing trespass,

nuisance, encroachment, inverse condemnation and a violation of claimant's civil rights and constitutional guarantees. All are alleged to have arisen on or about April 21, 2014, and have been continuous in nature thereafter.

Defendant argues that case law and the statute require a dismissal of all causes of action, whether they be at law or equitable in nature. They have cited a number of cases that do, in fact, hold for that very proposition. Thus for example, in the case of Incorporated Village of Muttontown v. Rybak, 121 A.D.3d 757, 758 (2d Dept. 2014), the Plaintiff had commenced an action for, among other things, an accounting, without filing a Notice of Claim. Six Defendants moved for Summary Judgment, arguing, among other grounds, that the Plaintiff's failed to file a Notice of Claim in accordance with CPLR 9802. The trial court determined that a Notice of Claim for an equitable accounting obligation was not required but granted Plaintiff's request to file a late Notice of Claim. On appeal, the Appellate Division expressly held

> the "notice of claim requirements in CPLR 9802 encompass causes of action for equitable relief" (Mendik v. Incorporated Vil. of Lattingtown, 76 A.D.3d 616, 618 (citations omitted); see Greco v. Incorporated Vil. of Freeport, 223 A.D.2d 674, 637 (citations omitted); Solow v. Liebman, 175 A.D.2d 867 (citations omitted). The "public interest" exception does not relieve Muttontown from the notice of claim requirement (citations omitted).

Similarly, the fact that a landowner's proposed Supplemental Summons and Amended Complaint sought only equitable relief against the Village in the form of an injunction prohibiting it from issuing a certificate of occupancy until the adjoining property owner's house was constructed in accordance with applicable zoning laws, did not obviate the need to comply with the requirements of CPLR 9802 that, in an action against the Village, a Notice of Claim must be served in accordance with Gen. Municipal Law §50-e. CPLR 9802, in addition to providing for maintenance of contract actions against villages, provides that "no other action" may be maintained in the absence of such Notice of Claim and the quoted language permits no exception. Solow v. Liebman, 175 A.D.2d 867 (2nd Dept. 1991).

In the case of Town of Macedon v. Village of Macedon, 129 A.D.3d 1839 (4th Dept. 2015), the Town sought a permanent injunction based upon the contentions that the Village improperly threatened to discontinue sewer treatment service without reasonable notice. The Town sought a preliminary injunction and the Village cross moved to dismiss the Complaint, contending that the action was barred by CPLR 9802 because the Complaint was filed after the expiration of the statute of limitations and, further, because the Town failed to file a Notice of Claim related to the action. The trial court deemed the cross-motion to apply to the Amended Complaint that was thereafter served by the Plaintiff and the trial court further granted the preliminary injunction and denied the

cross-motion. The Fourth Department agreed with the Village that the Notice of Claim requirements of CPLR 9802 apply to all actions, including actions in equity, citing Genesee Brewing Co. v. Village Lattingtown, 126 Misc.2d 827, 831-833; Mendes v. Inc. Village of Lattingtown, supra and Greco v. Inc. Village of Freeport, 223 A.D.2d 674. However, they also found that an exception to the Notice of Claim requirement exists where compliance would prevent obtaining the relief required because of the immediacy of the relief warranted. Id. at 1642.

In opposition, the Plaintiff contends that an exception to the Notice of Claim obligation exists if the Plaintiff is suing for equitable relief. It is important to note, first of all, that she concedes that the two causes of action at law should be dismissed because no Notice of Claim was filed. She further concedes that she is not entitled to make a claim for punitive damages (Fourth and Twelfth causes of action). She cites a series of cases that discuss Notice of Claim, but every one concerns an obligation under the General Municipal Law, not CPLR 9802.

Thus, for example, in the case of Carbonaro v. Town of North Hempstead, 107 A.D.3d 839 (2d Dept. 2013), in dicta, the Second Department recognized that even if the limitation period set forth in GML §50-i does not apply to a cause of action in equity to restrain a continuing wrong and to recover incidental damages, citing a string of cases,

the limitations period set forth in that statute is clearly applicable to a Complaint that primarily seeks damages for alleged negligence. The Supreme Court, in that case, properly dismissed the Complaint as time-barred.

The Third Department recognized an exception to the obligation to file a Notice of Claim against a Town imposed by GML 50-e in Petti v. Town of Lexington, 99 A.D.3d 1111, 114 (3rd Dept. 2012) where the first of two complaints sought to quiet title and the second sought a permanent injunction and monetary damages incidental to that form of relief. This proposition was also recognized, in dicta, in Stefanis v. Town of Middletown, 56 A.D.3d 980 (3d Dept. 2008).

More recently, the Third Department affirmed a trial court's dismissal of a Complaint based upon Plaintiff's noncompliance with the Notice of Claim precedent of GML §50-e, as applicable to counties, pursuant to County Law §52. Sager v. County of Sullivan, 145 A.D.3d 1175 (3d Dept. 2016). In that case, involving a claimed Civil Service Law §75-B, public sector whistle blower violation, the Court held:

> Here, plaintiff's complaint sought damages for wrongful termination and, thus, pursuant to County Law §52 (1), General Municipal Law §50 – e (1) (a) required service of the notice of claim within 90 days after the claim for retaliatory termination arose. It is undisputed that

> plaintiff failed to serve a notice of claim, entitling defendant to dismissal of the complaint… (Citations omitted).

Significantly, it had occasion to refute the argument by the Plaintiff that appellate decisions involving complaints asserting a Civil Service Law or similar claim against cities, in which the courts have ruled that the filing of a Notice of Claim is not required, should also apply to Counties, finding the same to be misplaced. Id. at 1176. It held:

> The cases cited by plaintiff involved claims against cities to which the more narrow notice of claim provisions of General Municipal Law §§50-e and 50-i apply, limiting the requirement for notices of claim to "tort" claims (General Municipal Law §50-E [1] [a]) or claims for "personal injury, wrongful death or damage to real or personal property" (General Municipal Law §50-i [1]). By comparison, County Law §52 applies to the claim against defendant, the County of Sullivan and mandates notices of claim in a much broader scope of matters then the General Municipal Law (see Castro v. City of New York, 141 A.D.3d at 457-458…), Requiring that a notice of claim be filed for "*[a]ny claim*…against a county for damage" or "any other claim for damages arising at law or in equity."(emphasis added)" Id. at 1176-1177.

The distinction made there would appear to have equal applicability to the present case. Because of the restrictive language contained in CPLR 9802 (...a bar to any claim or action...) and the appellate cases that have interpreted this statute, the cases cited by Plaintiff supporting an exception from the requirement to file a Notice of Claim against Towns, are not found to be applicable against Villages. The two miscellaneous cases from

the Third Department, SAB Enterprises, Inc. v. Stewart's Ice Cream Co., 113 Misc.2d 492 and Bloss v. Village of Canastota, 35 Misc.2d 829, cited by the Plaintiff, lack precedential value and have been discredited. See Genesee Brewing Company, Inc. v. Village of Sodus Point, 126 Misc.2d 827, (1984), aff'd 115 A.D.2d 313 (3d Dept. 1985).

The failure to file a Notice of Claim renders all of the causes of action invalid, whether they be claims at law or equitable in nature.

The argument that Defendant waived this defense by engaging in certain preliminary discovery proceedings is not persuasive. The case cited by Plaintiff, Salesian Society v. Ellenville, 41 N.Y.2d 521 (1977) is easily distinguished. In that case, a boundary line Complaint was commenced on October 26, 1967. The Complaint contained no allegation of the service of the Notice of Claim. On June 9, 1969, all the parties entered into a written Stipulation which stated the contentions of the parties. It did not in any way suggest any issue concerning compliance with Notice of Claim requirements. After a trial without a jury in September and October 1973, Plaintiff was granted possession of the disputed land, its boundaries fixed and the Plaintiff declared its owner. The issue of the determination of damages was reserved for trial at a later date.

On initial appeal, neither party raised any question concerning the fact that

Plaintiff had not pleaded nor proved that it had served and filed a Notice of Claim. The Appellate Division, on its own initiative, nevertheless reversed the judgment and dismissed the Complaint on that ground alone. It did not address or rule on any of the other issues in the case involving the substantive one of adverse possession raised by the Village or the contention asserted by the Plaintiff that the defense had been waived. In that case, the Village never availed itself of the statutory practice devices by which we now interpose the equivalents of the ancient common law pleas in bar or in abatement or enter a general demurrer (CPLR 3211). More than that, in the entire six years between the start of the suit and the opening of trial, it in no way ever raised the matter of the Notice of Claim, not at trial or on appeal. And it continued to fail to do so, in its briefing and on its oral argument, even when having been unsuccessful at trial, it sought appellate reversal of the judgment against it. Id. at 524.

By contrast, Defendant raised the question of failure to file the Notice of Claim in its first Answer to the original Complaint, as well as in its second Answer to the Amended Complaint. As the Plaintiff concedes, "discovery is only at the beginning, no depositions have been conducted and only the Plaintiff has engaged in document disclosure."[2] The factual distinction is dramatic and that case is found not to be persuasive here, based upon its facts.

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[2]Affirmation of Laura E. Ayers, dated November 9, 2016

MOTION TO AMEND COMPLAINT

Plaintiff seeks to amend its Complaint by reducing or eliminating the ad damnum clause in many of its causes of action and eliminating any claim for punitive damages. She also seeks to add several paragraphs to the third cause of action for inverse condemnation, arguing that it may stand on its own as a violation of Plaintiff's rights pursuant to the takings clause of the United States Constitution's Fifth Amendment as well as a violation of Art. One Section 7A of the New York State Constitution. She makes no attempt, however, to assert that such a cause of action is exempt from the obligation to comply with the CPLR 9801 or 9802.

Similarly, she seeks to add a separate cause of action (Fourth) a violation of 42 U.S.C. 1983. Once again, she cites no case or statute that exempts her from the Notice of Claim requirement. In the alternative, she is obligated to proceed with her state law remedies first before she can bring a claim under federal law. Canzoneri v. Incorporated Village of Rockville Center, 986 F.Supp2d 194, 201 (E.D.N.Y. 2013).

Any other arguments not specifically addressed in this Decision and Order are considered denied.

For all of the foregoing reasons, Plaintiff's Cross-Motion to amend its Complaint is denied. Defendant's Motion to dismiss the Complaint in its entirety, is granted.

The original Decision and Order is being mailed to Jonathan M. Bernstein, Esq. The original Motion papers are being sent to the Columbia County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: March 31, 2017
Hudson, New York

RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Notice of Motion; Affirmation of Jonathan M. Bernstein, Esq., dated October 14, 2016; together with Exhibits "A" through "F"

2. Memorandum of Law of Jonathan M. Bernstein, Esq., dated October 14, 2016

3. Notice of Cross-Motion; Affirmation of Laura E. Ayers, Esq., dated November 9, 2016; together with Exhibits "1" through "8"; Memorandum of Law in Opposition of Laura E. Ayers, Esq., dated November 8, 2016

4. Reply Affirmation of Jonathan M. Bernstein, Esq., dated November 21, 2016; Reply in Opposition Memorandum of Law Jonathan M. Bernstein, Esq., dated November 21, 2016

5. Reply Affirmation of Laura E. Ayers, Esq., dated November 28, 2016; Reply Memorandum of Law of Laura E. Ayers, Esq., dated November 28, 2016