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| Town of E. Hampton v Cyril's Fish House |
| 2015 NY Slip Op 31630(U) |
| August 24, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 12720/2013 |
| Judge: Joseph Farneti |
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SHORT FORM ORDER

INDEX NO. 12720/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

TOWN OF EAST HAMPTON,

Plaintiff,

-against-

CYRIL'S FISH HOUSE, CLAN-FITZ, INC.,
CLAN-FITZ, INC. DBA CYRIL'S FISH
HOUSE, MICHAEL DIOGUARDI,
KATHERINE DIOGUARDI, ROBERT
DIOGUARDI, DEBRA LAKIND and VICTOR
DIOGUARDI, JR.,

Defendants.

ORIG. RETURN DATE: APRIL 17, 2014
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: MAY 1, 2014
FINAL SUBMISSION DATE: MAY 29, 2014
MTN. SEQ. #: 004
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 11 read on this motion TO DISMISS
COUNTERCLAIMS AND CROSS-MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM.
Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Affirmation in Further Support of Motion to Dismiss and supporting papers 7, 8;
Memorandum of Law in Further Support of Motion to Dismiss 9; Reply Affirmation in Support
of Cross-motion and supporting papers 10, 11; it is,

ORDERED that this motion (seq. #002) by plaintiff TOWN OF EAST HAMPTON ("Town" or "plaintiff") for an Order, pursuant to CPLR 3211 (a) (2) and/or (7), dismissing defendants' counterclaims against plaintiff in their entirety, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #004) by defendants CLAN-FITZ, INC. and MICHAEL DIOGUARDI for an Order, pursuant to CPLR (sic) § 50-e, granting leave to file a late notice of claim and, pursuant to CPLR 3025 (b), granting leave to file an amended answer, is hereby **DENIED** for the reasons set forth hereinafter.

This declaratory judgment action was commenced by the Town on May 10, 2013. The Town's amended verified complaint was filed on October 9, 2013. Defendants ROBERT DIOGUARDI and DEBRA LAKIND served a verified answer with affirmative defenses dated November 11, 2013. Defendants MICHAEL DIOGUARDI and CLAN-FITZ, INC. ("defendants") served a verified answer, affirmative defenses and counterclaims dated November 8, 2013.

After a hearing held before this Court on April 10 and 11, 2014, the following temporary restraining Order was granted:

ORDERED THAT PENDING FURTHER ORDER OF THIS COURT; it is

1. **ORDERED** that the Defendants and their agents, assignees, employees, lessees or any other person or entity be and hereby are Temporarily Restrained from opening the Premises to the public the property or business located at 2167 Montauk Highway, Amagansett, New York 11930, known as Cyril's Fish House, or any other name, in any manner other than the legal preexisting nonconforming use of the Premises, as of the time of the zoning change in September, 1984, with the structures that were legally existing as of September, 1984; and

2. **ORDERED** that the Defendants and their agents, assignees, employees, lessees or any other person or entity be and hereby are Temporarily Restrained from opening the Premises to the public the property or business located at 2167 Montauk Highway,

Amagansett, New York 11930, known as Cyril's Fish House, or any other name, in any manner that is a greater level or intensity of use than that which legally existed as a preexisting nonconforming use of the Premises, as of the time of the zoning change in September, 1984; and

3. ORDERED that the Defendants and their agents, assignees, employees, lessees or any other person or entity be and hereby are Temporarily Restrained from opening the Premises to the public until there is an electrical inspection certificate; and

ORDERED that either party upon 24-hour notice may provide the Court with updated information concerning: (a) the electrical inspection of the premises; (b) any inspection report concerning excavation and fill of the fuel tanks location; and (c) structural inspection and report concerning the bar located on the south side of the property.

On May 15, 2014, the temporary restraining Order was modified by this Court solely to the extent that the date of "September, 1984" was replaced with the date of "December 18, 1984" in paragraphs 1 and 2 therein. On May 22, 2014, this Court vacated the temporary restraining Order in its entirety after finding that the immediate concerns regarding the health and safety of the public, employees, and any other individuals at the Premises no longer existed. However, the Court granted the Town's application for an expedited preliminary injunction hearing. The hearing was then conducted on June 9th, July 7th, 9th, 11th, 14th and 15th, 2014. Briefs were exchanged and the matter was submitted on September 2, 2014. By twenty-four page Order dated October 9, 2014, this Court recited the factual and procedural history of this matter in detail, and ultimately denied the Town's application for a preliminary injunction.

The parties have filed the instant applications for the relief described hereinabove.

Defendants assert counterclaims alleging abuse of process and malicious prosecution for allegedly issuing duplicative summonses for violations of the East Hampton Town Code. Plaintiff has now moved to dismiss the counterclaims on the ground that defendants never served the Town with a notice

of claim for either counterclaim asserted. Moreover, plaintiff indicates that defendants failed to allege in their answer that they served the Town with a notice of claim with respect to the counterclaims and that more than thirty days elapsed from the date of service without any resolution of the claims.

In response to this application, defendants have filed a cross-motion for leave to serve and file a late notice of claim, and to serve and file an amended answer alleging compliance with the General Municipal Law.

In determining whether to grant leave to serve a late notice of claim, a court should consider the following key factors: whether the petitioner has demonstrated a reasonable excuse for the failure to serve a timely notice of claim; whether the municipality acquired actual notice of the essential facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter; and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (General Municipal Law § 50-e [5]; *Matter of White v New York City Hous. Auth.*, 38 AD3d 675 [2007]; *Welch v N.Y. City Hous. Auth.*, 7 AD3d 805 [2004]; *Pruden v New York City Board of Education*, 235 AD2d 426 [1971]). In determining whether to permit the filing of the late notice of claim, the presence or absence of any one factor is not determinative (*Porcaro v City of New York*, 20 AD3d 357 [2005]; *Dubowy v City of New York*, 305 AD2d 320 [2003]; *Chatterqoon v New York City Housing Authority*, 197 AD2d 397 [1993]). The purpose of the notice of claim is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding an incident and explore the merits of the claim while the information is likely to be still available (see *DiMenna v Long Island Lighting Co.*, 209 AD2d 373 [1994]; *Dodd v Warren*, 132 Misc 2d 541 [Sup Ct, Nassau County 1986]).

In *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138 (2008), the Appellate Division emphasized that a municipality must have acquired actual knowledge of the essential facts constituting the claim, not merely knowledge of the incident. "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves" (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 148).

Accordingly, the Court must balance the aforementioned factors of General Municipal Law § 50-e (5). The Court finds that defendants have failed to demonstrate a reasonable excuse for the failure to timely and properly serve a

notice of claim upon the Town (*see Braverman v White Plains*, 115 AD2d 689 [1985]; *cf. Cox v City of Peekskill*, 297 AD2d 735 [2002]), and plaintiff has alleged prejudice as a result thereof. Under the circumstances of this matter, defendants' reliance on settlement negotiations is unavailing. The Court notes that defendants failed to elicit a stipulation from the Town extending the time to serve a notice of claim while the supposed settlement negotiations were ongoing. Even assuming, *arguendo*, that defendants were entitled to rely on the settlement negotiations, the negotiations concerned other issues, to wit: the alleged Town Code violations existing at defendants' premises and the attempts to rectify those violations, not the claims now asserted by defendants sounding in abuse of process and malicious prosecution.

Further, while the Town acknowledges that it had actual knowledge of the criminal and civil charges pursued against defendants, it alleges that it did not have actual knowledge of defendants' claims against the Town based upon its alleged wrongful conduct.

Therefore, after balancing the factors under General Municipal Law § 50-e (5), defendants' cross-motion for leave to serve a late notice of claim upon the Town and to amend their answer in compliance therewith is **DENIED**, and this motion by plaintiff to dismiss defendants' counterclaims in their entirety is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: August 24, 2015


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION