

<b>Mulvaney v County of Westchester</b>
2019 NY Slip Op 34769(U)
April 23, 2019
Supreme Court, Westchester County
Docket Number: Index No. 67063/2016
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
DEVAN MULVANEY, as Executor of the Estate of  
DONALD MULVANEY, deceased, as Executor of  
the Estate of LEDELL MULVANEY, deceased,  
and as Administrator of the Estate of  
KATHERINE MULVANEY, deceased,  
Plaintiff,

DECISION AND ORDER  
Index No: 67063/2016  
(Prior Index No.  
62649/2018)  
Seq# 1

-against-

COUNTY OF WESTCHESTER, TOWN OF YORKTOWN,  
YORKTOWN HEIGHTS ENGINE COMPANY #1, THE  
MILLWOOD FIRE COMPANY NUMBER ONE, INC.,  
MOHEGAN VOLUNTEER FIRE ASSOCIATION, INC.,  
EMPRESS AMBULANCE SERVICE, INC., MOUNT  
KISCO VOLUNTEER AMBULANCE CORPS, INC.  
OSSINING VOLUNTEER AMBULANCE CORPS,  
INCORPORATED, PEEDSKILL COMMUNITY  
VOLUNTEER AMBULANCE CORP., and SOMERS  
VOLUNTEER FIRE DEPARTMENT, INC.,

Defendants,

-----X  
Town of Yorktown,

Third-Party Plaintiff,

-against-

Empress Ambulance Service, Inc.,

Third-Party Defendant  
-----X

The following papers were reviewed on the motion seeking an order dismissing the action as against the defendant, Yorktown Heights Engine Company#1:

Notice of Motion/Affirmation/Affidavit/Exhibit A-D  
Memorandum of Law in Support

1-7  
8

Affirmation in Opposition/Exhibits A-B  
Reply Affirmation/Exhibits A-E

9-11  
12-17

Based on the foregoing papers the motion is granted.

Factual and Procedural Background

The plaintiff commenced an action on November 14, 2016 against the County of Westchester and the Town of Yorktown, stemming from a vehicular accident that occurred on August 15, 2015, when a vehicle that was driving northbound on the Taconic State Parkway crossed the center embankment and collided with the Mulvaney's vehicle traveling southbound, resulting in personal injuries and the deaths of the plaintiff's father, mother and sister, Donald, Ledell and Katherine Mulvaney.

On November 17, 2017, the Town of Yorktown (the "Town") filed a third-party summons and complaint, against Empress Ambulance Service, Inc., and on August 15, 2018, the plaintiff commenced this action against the defendant, Yorktown Heights Engine Company #1 ("YHEC") and other named defendants.

YHEC now files the instant motion seeking dismissal of the action against it. YHEC argues that the parts of the complaint that allege wrongful death must be dismissed as untimely pursuant to CPLR 3211(a)(5) because the plaintiff failed to file suit within two years of the decedents' deaths. YHEC further argues that the claims against it must be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7) because YHEC cannot be liable for the actions of the firefighters who responded to the accident since, as a matter of law, they are employees of the Yorktown Heights Fire District (the "Fire District"), a political subdivision that provides

fire and rescue service to the location where the accident occurred. Further, as a political subdivision, the Fire District must be served with a notice of claim within ninety days of the incident giving rise to the claim pursuant to General Municipal Law § 50-e and the Fire District must sue within one year and ninety days of the incident in cases of claimed negligence or within two years of the date of death, pursuant to General Municipal Law § 50-i.

The plaintiff's attorney filed an affirmation in opposition, arguing that YHEC failed to meet its burden and the requirement of demonstrating that it is entitled to judgment as a matter of law. The attorney also argues that the motion is premature, since YHEC is in exclusive control of material information necessary for the plaintiff to raise a genuine issue of material fact and contends that the Yorktown fire chief testified that Yorktown personnel extracted the decedents from their vehicles. The plaintiff's attorney argues that YHEC does not provide proof of assertions made in the affidavit submitted and the plaintiff has not had an opportunity to verify the information contained therein. The attorney also argues that the affidavit is silent with regard to Yorktown personnel's involvement with the extraction of the plaintiff's decedents from their vehicle.

In reply, YHEC's attorney argues that the plaintiff's attorney does not address the key points of its motion, in that, a fire company cannot be sued and the attorney attaches a print out from the NYS Department of States website indicating that YHEC is an active not for profit corporation. The attorney further asserts that the fire chief's testimony was consistent with the affidavit submitted on the motion and the plaintiff's

exhibits confirm this point. YHEC's attorney also argues that the plaintiff's attorney failed to address the issue of the plaintiff's failure to file a timely notice of claim.

### DISCUSSION

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that, "[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

(7) the pleading fails to state a cause of action..."

(N.Y. Civ. Prac. L. & R. 3211 [a][5] & [a] [7]).

In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5), a defendant must demonstrate that the time within which to commence the action has expired." *Plain v. Vassar Bros. Hosp.*, 115 A.D.3d 922, 923, 982 N.Y.S.2d 558, 559 (2d Dep't 2014). YHEC asserts that the applicable statute of limitations for the wrongful death claim expired on August 15, 2017 for Katherine and Ledell Mulvaney and September 15, 2017 for Donald Mulvaney. The plaintiff did not file the action until August 15, 2018, therefore, that part of the action for wrongful death is dismissed.

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). A motion to dismiss pursuant to CPLR 3211(a)(7) will be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no

significant dispute exists regarding it. (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2d Dept 2012]).

In this case, Arthur R. Orneck ("Orneck"), the chairman of the Yorktown Heights Board of Fire Commissioners, states in his affidavit that all fire and rescue service within the Yorktown Heights Fire District (the "Fire District") is provided by the Yorktown Heights Fire District, which is a separate and distinct political subdivision and YHEC is a 501(c)(3) organization that provides a pool of prospective employees to the Yorktown Heights Fire District. Orneck also states that, when members of the engine company respond to emergency calls, pursuant to Town Law, they are acting as employees of the Fire District. Orneck states that YHEC was not responsible for any of the actions taken at the scene of the accident and all members of the company who were present at the scene, were there in their capacity as employees of the Fire District.

Here, YHEC does not exercise any degree of control that would subject it to liability for the negligent acts alleged in the complaint, since it is the Fire District and not YHEC that employs, supervises and controls the individual firefighters (*Knapp v Union Vale Fire Co.*, 141 AD2d 509 [2d Dept 1988]) and the plaintiff did not submit any evidence or documentation to rebut Orneck's affidavit. Further, the plaintiff's attorney's contention that the fire chief, Jason Swart testified that it was Yorktown personnel who extracted the decedents from their vehicle, does not, in fact, contradict YHEC's claim that it is not responsible for, nor does it supervise the firefighter and that it is the Fire District's responsibility. Therefore, a material fact as claimed by the pleader to be one is not a fact at all and the action must be dismissed as against YHEC.

Additionally, General Municipal Law §50-e provides that in order to commence an action against a municipality/public corporation the claimant must serve a notice of claim upon the entity within 90 days from the date the claim arises. General Municipal Law § 50-e tolls the service of a notice of claim in wrongful death actions to 90 days after the appointment of a representative of the decedent's estate (see General Municipal Law § 50-e[1][a]).

Further General Municipal Law § 50-i states, in pertinent part, that “[n]o action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property of such city, county, town, village, fire district or school district...unless 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” (see General Municipal Law § 50-i[1])

The Fire District, which is the entity responsible for the firefighters, is a municipal entity and therefore, is required to be served with a notice of claim pursuant to General Municipal Law § 50-e and 50-i. Katherine and Ledell Mulvaney died on August 15, 2015 and Donald Mulvaney died on September 15, 2015. The Letters of Testamentary were issued on April 5, 2016. Orneck avers that to date the plaintiff has not filed a notice of claim with the fire district and the time to do so has expired. The plaintiff has not rebutted this assertion, nor has he filed for permission to file a late notice of claim.

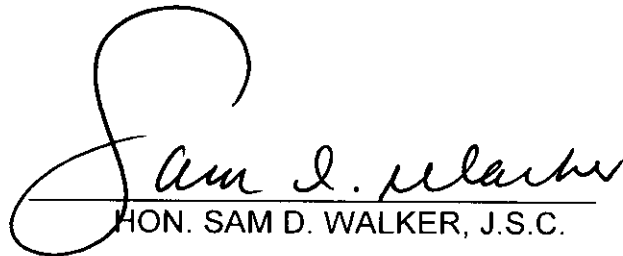
Accordingly, based on the foregoing, it is

ORDERED that the motion to dismiss granted and it is further

ORDERED that the action against Yorktown Heights Engine Company #1, is dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York  
April 23, 2019

  
HON. SAM D. WALKER, J.S.C.