

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 25**

**Present: HON. WILLIAM R. LaMARCA
Justice**

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

**DIANE CHEMICK and LOWELL CHEMICK,
Plaintiff,
-against-
GOLDA T. SACKETT, SETH GILBERT SACKETT,
and WOODMERE FIRE DISTRICT,
Defendants.**

**INDEX NO: 3862/04
Action #1**

**JUAN A. CASTANEDA,
Plaintiff,
-against-
DIANE CHEMICK, GOLDA T. SACKET, WOODMERE
FIRE DISTRICT, LOWELL CHEMICK and SETH
GILBERT SACKET,
Defendants.**

**INDEX NO: 004731/04
Action #2
Motion Sequence #001, #002
Submitted June 27, 2005**

The following papers were read on these motions:

**SACKETT and WOODMERE Notice of Motion.....1
CASTANEDA Notice of Cross-Motion.....2
CHEMICK Affirmation in Opposition and in Support of Cross-Motion.....3
SACKETT and WOODMERE Reply Affirmation.....4
CASTANEDA Reply Affirmation.....5**

Defendants in Action # 2, GOLDA SACKETT (hereinafter referred to as "SACKETT")
and WOODMERE FIRE DISTRICT (hereinafter referred to as "WOODMERE"), move for
an order, pursuant to CPLR §3211(a)(7), dismissing the complaint and all cross-claims

against moving defendants for failure to timely file the required Notice of Claim. Plaintiff in Action #2, JUAN A. CASTANEDA (hereinafter referred to as "CASTANEDA"), opposes the motion to the extent that it seeks to dismiss the cross-claims asserted by defendants, DIANE and LOWELL CHEMICK, for contribution and indemnity and, by affirmation, requests, in the alternative, that said cross-claim be converted to a third-party action against WOODMERE. Further, CASTANEDA cross-moves for an order, pursuant to CPLR §3025, granting leave to amend the complaint to assert a claim against defendants, GOLDA SACKETT and SETH GILBERT SACKETT, alleging that their wilful negligence and malfeasance contributed to the subject accident. DIANE and LOWELL CHEMICK (hereinafter referred to as "CHEMICK"), defendants in Action #2 and plaintiffs in Action #1, oppose the motion in chief and support the "cross-motion" to permit the cross-claim against co-defendants SACKETT and WOODMERE, to be converted into a third-party action or, in the alternative, to permit the filing and service of a third-party action against co-defendants to assert a claim for willful negligence and malfeasance pursuant to Municipal Law §205-b. The motion and cross-motion are determined as follows:

Action #1 and #2 were consolidated for trial pursuant to Short Form Order of the Court, dated July 30, 2004, as both actions arise from the same automobile accident and share common questions of law and fact. Plaintiffs seek to recover for personal injuries that resulted from a three (3) car accident that occurred on November 4, 2003 at the "T" intersection of Woodmere Boulevard and Knota Road in Woodmere, New York. CASTANEDA claims that he was parked in the parking lane running along the top of the "T" and observed heavy, stopped traffic in the oncoming lanes of the roadway. He claims that the vehicle owned by SETH SACKETT and operated by his daughter, GOLDA

SACKETT, a volunteer fire fighter for WOODMERE, came out from behind the stopped line of traffic, crossed over to the left of the yellow lines, proceeded on the wrong side of the road at an excessive rate of speed, without emergency blue lights engaged, and entered the intersection without slowing or stopping, where it collided with the vehicle operated by DIANE CHEMICK, and owned by LOWELL CHEMICK. CASTANEDA states that the impact between those vehicles propelled the CHEMICK vehicle into his parked car causing him serious injuries.

SACKETT and WOODMERE move to dismiss the Supplemental Summons and Verified Amended Complaint in Action #2, entitled JUAN A. CASTANEDA v. GOLDA SACKETT, SETH GILBERT SACKETT, WOODMERE FIRE DISTRICT, DIANE CHEMICK AND LOWELL CHEMICK, as well as the cross-claim of CHEMICK. The Verified Amended Complaint is dated November 29, 2004, verified by CASTANEDA on December 17, 2004 and served on WOODMERE on or about January 6, 2005,. It appears that all of the parties to the original action stipulated to the addition of WOODMERE as a party defendant in Action #2. The Amended Complaint alleges that, at the time of the accident, GOLDA SACKETT was responding to an alarm as part of her duties as a volunteer fire fighter for WOODMERE. It also alleges that, within the time prescribed by law, a sworn Notice of Claim was duly served on WOODMERE. Movants point out that this is incorrect as the Notice of Claim was dated and verified on June 21, 2004, some 230 days after the events giving rise to the claim and is, thus, not in compliance with General Municipal Law §50-e. Said statute requires that a Notice of Claim be filed within 90 days after the claim arises as a condition precedent to the commencement of an action against a public corporation. Movants assert that when a plaintiff fails to timely file a Notice of Claim and fails to move

the Court for leave to serve a late Notice of Claim within the one year ninety day Statute of Limitations, the Court lacks the power to extend claimant's time. It is movants position that the statutory period elapsed on February 2, 2005 and, therefore, the Court must dismiss the instant complaint against WOODMERE for failure to comply with a condition precedent to the maintenance of the action against the Fire District and cannot entertain a cross-motion for leave to file a late Notice of Claim as the Statute of Limitations has elapsed.

As to GOLDA SACKETT, movant claims that the Amended Complaint must be dismissed against her as well because General Municipal Law §205-b provides, in pertinent part, that "[m]embers of duly organized volunteer fire companies in this state shall not be liable civilly for any acts or acts done by them in the performance of their duty as a volunteer firefighter, except for wilful negligence or malfeasance". Movants state that the Amended Complaint alleges that SACKETT was responding to an emergency on behalf WOODMERE at the time of the accident and was operating the vehicle within the scope of her duties for WOODMERE. and cannot be civilly liable. Furthermore, the Amended Complaint alleges that defendants were "negligent, careless and reckless" and movants contend that the complaint fails to allege that SACKETT acted with "wilful negligence and malfeasance" and, thus, fails to state a cause of action upon which relief can be granted. Additionally, movants claim that since SACKETT was acting within the scope of her employment for WOODMERE, and the Fire District has a duty under General Municipal Law §205-b to indemnify the acts of its volunteers, a timely Notice of Claim would be required even if the Fire District had not been named in the Complaint.

On the cross-motion, CASTANEDA asserts that the law does not require that he serve a Notice Of Claim on the SACKETTS as a condition precedent to commencing the action which is based upon her wilful negligence and malfeasance. Furthermore, while acknowledging that a Notice of Claim is required as a condition precedent as to WOODMERE, he contends that it is not required as a condition precedent to the filing of the CHEMICK cross-claim for contribution and indemnity. He requests, by affirmation, that should his direct action be dismissed against WOODMERE, that CHEMICK's cross-claim be converted to a third-party action. As the Notice of Cross-Motion does not request said relief, neither CASTANEDA nor CHEMICK are entitled to an award on that request.

CASTANEDA argues that a Notice of Claim is not required as a condition precedent to the commencement of an action against a person who is an employee of a public corporation unless the corporation has a statutory obligation to indemnify such person, citing GML §50-e(1). He quotes GML §205-b which provides:

Members of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighter, except for wilful negligence or malfeasance . . . fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district.

CASTANEDA urges that no statute requires WOODMERE to indemnify the SACKETTS due to the wilful negligence and malfeasance of GOLDA SACKETT and thus, no Notice of Claim upon GOLDA SACKETT was required. CASTANEDA bases this argument upon his claim that, despite not using the words "wilful negligence and malfeasance", the Amended Complaint and the amplification of that pleading in the Bill of Particulars set forth a cause of action for SACKETT's wilful negligence. He states that Paragraph 43 of the Amended

Complaint alleges the SACKETTS were negligent, careless, and reckless in the ownership, operation, management, maintenance, supervision, use and control of the vehicle. It is CASTANEDA's position that those allegations, viewed in connection with the Bill of Particulars, that sets forth that he observed GOLDA SACKETT pull out from behind a long row of cars stopped in traffic, drive at excessive speed on the wrong side of the road and enter the intersection without any warning and without slowing, do in fact state a cause of action based upon wilful negligence and malfeasance, citing *Cox v Du Chaine*, 29 AD2d 814, 287 NYS2d 106 (3rd Dept. 1968). He urges that the Court liberally construe the pleadings and find that CASTANEDA has properly pleaded a cause of action based upon wilful negligence and malfeasance against the SACKETTS or, in the alternative, permit him to amend the pleading to specifically assert such a claim. It is his position that defendants have not demonstrated any prejudice or surprise and the Court should grant the motion for leave to amend the complaint citing *Lotito v Lund*, 129 AD2d 776, 514 NYS2d 770 (2nd Dept. 1987).

The Law

General Municipal Law (GML) § 50-e requires that before a plaintiff may sue a municipality, a Notice of Claim must be filed within ninety (90) days after the claim arises. Service of the Notice of Claim is a condition precedent to the commencement of an action or special proceeding. GML § 50-e. The statutory pre-condition serves "to enable municipalities to pass upon the merits of a claim before the initiation of a law suit and thereby forestall unnecessary law suits". *Alford v City of New York*, 115 AD2d 420, 496 NYS2d 224 (1st Dept. 1985) *affd.* 67NY2d 1019, 503 NYS2d 324, 494 NE2d 455 (C.A.

1986). Plaintiff's failure to file a Notice of Claim within 90 days of accrual of the cause of action, and the failure to seek leave to file a late Notice of Claim prior to the expiration of the Statute of Limitations period to commence an action against the municipality requires that the Complaint be dismissed. See, *Hardie v New York City Health and Hospital Corp.*, 278 AD2d 453, 719 NYS2d 256 (2nd Dept. 2000); *Hall v City of New York*, AD3d 254, 768 NYS2d 2 (1st Dept. 2003); *Hall v Niagra Frontier Transportation Authority*, 206 AD2d 853, 615 NYS2d 205 (4th Dept. 1994). The Court has no discretion to extend the time once the Statute of Limitations has expired. See, *Hall v City of New York*, *supra*.

Furthermore, it is well settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a)(7), the Court must accept the plaintiffs factual allegations as true and liberally construe the complaint in favor of the plaintiff. *EECP of AM, Inc. v Vasomedical, Inc.*, 265 AD2d 372, 696 NYS2d 837 (2nd Dept. 1999); *Smuker v 12 Lofts Realty Inc.*, 156 AD2d 161, 548 NYS2d 437 (1st Dept. 1989); *Foley v D'Agostino*, 21 AD2d 60, 248 NYS2d 121 (1st Dept. 1964). On said motions, the Court looks to the substance of the motion rather than to the form. Such a motion is solely directed to the inquiry of whether or not the pleading considered as a whole fails to state a cause of action or whether any cause of action can be spelled out from the four corners of the pleadings. *Foley v D'Agostino*, *supra*.

Discussion

After a careful reading of the submissions herein, the Court concludes that movant, WOODMERE FIRE DISTRICT, is entitled to the requested relief to the extent that CASTANEDA's complaint and all cross-claims against WOODMERE must be dismissed based upon plaintiff's failure to timely file a Notice of Claim. However, with respect to

SACKETT, its is the judgment of the Court that the complaint, though inartfully drawn, does state a cause of action based upon wilful negligence and malfeasance. Accordingly, a dismissal of the complaint against GOLDA SACKETT for failure to timely serve a Notice of Claim upon her is unwarranted as the action is based upon wilful negligence and malfeasance and there is no statutory obligation to indemnify her for said action. GML §50-e(l). The Court has considered the other arguments of the parties and finds them to be without merit.

Conclusion

Based upon the foregoing, it is hereby

ORDERED, that WOODMERE FIRE DISTRICT's motion for an order dismissing the complaint and all cross-claims against it is granted; and it is further

ORDERED, that GOLDA SACKETT's motion for an order dismissing the complaint and all cross-claims against her is denied; and it is further

ORDERED, that JUAN A. CASTANEDA's motion for leave to assert a cause of action against the SACKETTS for wilful negligence and malfeasance is granted to the extent that the pleadings, when liberally construed, are found to assert such a cause of action. and if is further

ORDERED, that the caption shall hence forth read as follows:

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

**DIANE CHEMICK and LOWELL CHEMICK,
Plaintiff,**

**-against-
GOLDA T. SACKETT, SETH GILBERT SACKETT,
and WOODMERE FIRE DISTRICT,
Defendants.**

**INDEX NO: 3862/04
Action #1**

JUAN A. CASTANEDA,

Plaintiff,

**INDEX NO: 004731/04
Action #2**

**-against-
DIANE CHEMICK, GOLDA T. SACKETT,
LOWELL CHEMICK and SETH GILBERT SACKETT,
Defendants.**

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 27, 2005



WILLIAM R. LaMARCA, J.S.C.

ENTERED

SEP 30 2005

**NASSAU COUNTY
COUNTY CLERK'S OFFICE
JE**

TO: Robert S. Fader, PC
Attorney for Plaintiffs Diane Chemick and Lowell Chemic, Action #1
3000 Marcus Avenue, Suite 1W8
Lake Success, NY 11042

Luffy & Luffy, PC
Attorneys for Plaintiff in Juan Castaneda, Action #2
595 Stewart Avenue, Suite 520
Garden City, NY 11530

James P. Nunemaker & Assoc
Attorney for Defendant Seth Gilbert Sackett, Action #1 and #2
333 Earle Ovington Boulevard, Suite 401
Uniondale, NY 11553

Kenney & Goidel, LLP
Attorneys for Defendant Golda Sackett, Action # 1 and Action #2 and Defendant Woodmere
Fire District, Action #1
50 Route 111
Smithtown, NY 11787

Russo & Apnozanski, Esqs.
Attorneys for Defendants Diane Chemick and Lowell Chemick, Action #2
875 Merrick Avenue
Westbury, NY 11590

castaneda-chemick&sackett,#01,#02/genmunicipal