

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 22**

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

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

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

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

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**JUAN A. CASTANEDA,  
Plaintiff,**

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

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

**Motion Sequence #003, #004  
Submitted January 9, 2006**

**The following papers were read on these motions:**

<b>CHEMICK Notice of Motion to Reargue (#003).....</b>	<b>1</b>
<b>WOODMERE and SACKETT Affirmation in Opposition.....</b>	<b>2</b>
<b>CASTANEDA Cross-Motion to Reargue (#004) .....</b>	<b>3</b>
<b>WOODMERE and SACKETT Affirmation in Opposition to Cross-Motion....</b>	<b>4</b>
<b>CHEMICK Affirmation in Reply.....</b>	<b>5</b>

The Court has been advised that the above captioned action #1 has been settled.

In the above captioned Action # 2, defendants, DIANE CHEMICK and LOWELL CHEMICK (hereinafter referred to as "CHEMICK"), seek to reargue that portion of the decision and order of the Court, dated September 27, 2005, that dismissed their cross-claim against defendant, WOODMERE FIRE DISTRICT (hereinafter referred to as

“WOODMERE”), based upon plaintiff, JUAN A. CASTANEDA ‘s failure to file a timely Notice of Claim against WOODMERE. In a companion motion, JUAN A. CASTANEDA (hereinafter referred to as “CASTANEDA”), cross-moves for the same relief and/or to modify the order of the Court to permit CHEMICK to interpose an impleader naming WOODMERE as a third party defendant. WOODMERE and GOLDA SACKETT and SETH GILBERT SACKETT (hereinafter referred to as “SACKETT”) oppose the motions, which are determined as follows:

In these actions, 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.

The order of the Court, dated September 27, 2005, found that WOODMERE was entitled to have the complaint and all-cross-claims dismissed against it on the ground that plaintiff had failed to timely serve a Notice of Claim. The movants herein argue that the Court misapprehended the law as it is well settled that General Municipal Law §50(e) does

not impose a duty to serve a Notice of Claim as a condition precedent upon a defendant asserting a claim for contribution and indemnity in a cross-claim or a third-party action, citing *Valstry v Board of Election*, 2 NY2d 413, 161 NYS2d 52 (1957) and *Zillman v Meadowbrook Hospital*, 45 AD2d 267, 358 NYS2d 466 (2<sup>nd</sup> Dept. 1974). Movants state that the rationale for such law is that the claims for contribution and indemnity sounding in tort do not accrue until a judgment has been rendered against defendant and it is their position that the claims for contribution and indemnity survive dismissal of the main action against WOODMERE for failure to file a timely Notice of Claim.

In opposition to the motion, counsel for WOODMERE and SACKETT point out that the CHEMICK motion is procedurally defective in that it does not attach as exhibits, or even reference, the Court's decision, the original motion or any of the Affirmations in support or in opposition to the motion. Moreover, it observes that, while the prior affidavits made reference to the cross-claims surviving dismissal of the main action, neither CHEMICK nor CASTANEDA properly filed the appropriate Notice of Cross-Motion in the prior motions. However, the Court notes that the cases cited by the movants are neither challenged nor distinguished in any way. WOODMERE and SACKETT urge that the motions be denied and assert that the Court has correctly ruled on the applications presented.

After a careful reading of the submissions herein, it is the judgment of the Court that modification of the prior order is warranted. It is well established that a Court rendering a judgment/order may vacate that judgment/order where it appears that an error has been made and substantial justice will be served and an injustice prevented. See, *F&C General Contract Corp. v Atlantic Mutual Mortgage Corporation*, 202 AD2d 629, 612 NYS2d 871

(2<sup>nd</sup> Dept. 1994). While the Court does not condone the procedural defects in the moving papers, CPLR §2001 provides that “[a]t any stage of an action, the Court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded”. Based on the foregoing, and the Court finding no prejudice to a substantial right of a party, it is hereby

**ORDERED**, that the CHEMICK and CASTANEDA motions for reargument are granted to the extent that the prior order of the Court, dated September 27, 2005, is modified to reflect that the motion for an order dismissing the complaint against WOODMERE FIRE DISTRICT is granted and that all cross-claims seeking contribution and indemnity against WOODMERE FIRE DISTRICT are severed and continued; and it is further

**ORDERED**, that the caption is once again amended to include the WOODMERE FIRE DISTRICT as a party defendant with respect to the Cross-claims in action #2, the caption in Action #1 is deleted as settled, and the caption shall henceforth read as follows:

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

**INDEX NO: 004731/04**

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**JUAN A. CASTANEDA,**

**Plaintiff,**

**-against-**

**GOLDA T. SACKETT, SETH GILBERT SACKETT,  
DIANE CHEMICK, LOWELL CHEMICK and  
WOODMERE FIRE DISTRICT,**

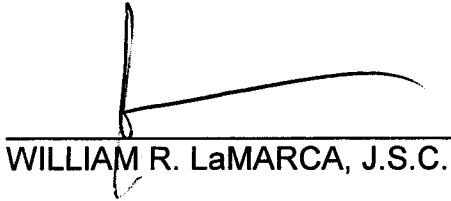
**Defendants.**

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All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 3, 2006

  
WILLIAM R. LaMARCA, J.S.C.

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ENTERED

APR 11 2006

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