SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1638

CA 09-00974

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ.

SCOTT M. HARVEY AND JOHANNA HARVEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NICOLE M. GAULIN, DEFENDANT.

COUNTY OF ORLEANS AND KENDALL CENTRAL
SCHOOL DISTRICT, APPELLANTS.
(APPEAL NO. 2.)

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR APPELLANT COUNTY OF ORLEANS.

HURWITZ & FINE, P.C., BUFFALO (SHAWN P. MARTIN OF COUNSEL), FOR APPELLANT KENDALL CENTRAL SCHOOL DISTRICT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Orleans County (James H. Dillon, J.), entered December 8, 2008 in a personal injury action. The order, among other things, granted plaintiffs' application for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained on March 27, 2007 by Scott M. Harvey (plaintiff) when a vehicle driven by defendant Nicole M. Gaulin made a left turn in front of the motorcycle driven by plaintiff. Plaintiffs first learned by way of an affidavit executed by Gaulin on January 14, 2008 that Gaulin was employed by the County of Orleans (County) and was assigned to the Kendall Central School District (KCSD) and, approximately six months later, made an application for leave to serve a late notice of claim. Supreme Court issued a "Memorandum and Decision" in September 2008 in which it stated that it would allow the late "filings" but the order granting the application was not entered until December 8, 2008. We note at the outset that in appeal No. 1 the County purports to appeal from the "order" granted in September. That appeal must be dismissed, however, because "[t]hat document [i.e. the "Memorandum and Decision"] did not actually order anything and

'[n]o appeal lies from a mere decision' " (*Pecora v Lawrence*, 28 AD3d 1136, 1137).

With respect to appeal No. 2, we conclude that Supreme Court did not abuse its discretion in granting plaintiffs' application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). "The court is vested with broad discretion to grant or deny [such an] application . . . and, although [plaintiffs] failed to offer a reasonable excuse for [their] failure to serve the notice of claim within the statutory 90-day period . . ., that failure is not fatal [because] actual notice was had and there is no compelling showing of prejudice to [the County or KCSD]" (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [internal quotation marks omitted]; *see* § 50-e [1] [a]; [5]). We further conclude, however, that the court erred in directing in the second ordering paragraph that the County and KCSD "are made defendants in the within action" without first affording them the opportunity to conduct a hearing pursuant to General Municipal Law § 50-h (*see Southern Tier Plastics, Inc. v County of Broome*, 53 AD3d 980), and before plaintiffs had served a notice of claim (*see* §§ 50-e, 50-i) and an amended complaint (*see* CPLR 304 [former (a)]). We therefore modify the order accordingly.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court