

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

1241

CA 14-00083

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

JOHN BISSELL, EDNA BISSELL AND KELLY BISSELL,
CLAIMANTS-APPELLANTS,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
DEFENDANT-RESPONDENT.
(CLAIM NO. 116958.)

LIPPES & LIPPES, BUFFALO (RICHARD LIPPES OF COUNSEL), FOR
CLAIMANTS-APPELLANTS.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (GARY J. O'DONNELL OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensì Minarik, J.), entered October 17, 2013. The order granted the motion of defendant for summary judgment and dismissed the claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the claim is reinstated.

Memorandum: Claimants commenced this action alleging that they sustained damage to their real and personal property as the result of defendant's reconstruction of the road adjacent to their property. The Court of Claims erred in entertaining defendant's untimely motion for summary judgment dismissing the claim and in granting the motion. Defendant made its motion more than 10 months after the expiration of the statutory deadline of 120 days and failed to show good cause for its delay in its moving papers (see CPLR 3212 [a]; *McNeill v Menter*, 19 AD3d 1161, 1161). The court improperly considered the "good cause" proffered by defendant for the first time in its reply papers (see *Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579) and, in any event, defendant's explanation for its untimeliness did not constitute good cause (see *Brill v City of New York*, 2 NY3d 648, 652; *McNeill*, 19 AD3d at 1162).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court