



Moroz v City of New York

Supreme Court of New York, Appellate Division, Second Department

October 10, 2018, Decided

2017-05228

Reporter

83 N.Y.S.3d 300 *; 2018 N.Y. App. Div. LEXIS 6725 **; 2018 NY Slip Op 06731 ***

[***1] Witold Moroz, respondent, v City of New York, et al., appellants. (Index No. 500168/17)

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Prior History: [Matter of Moroz v. City of New York, 2018 N.Y. App. Div. LEXIS 6688 \(N.Y. App. Div. 2d Dep't, Oct. 10, 2018\)](#)

Counsel: [**1] Lewis Brisbois Bisgaard & Smith, LLP, New York, NY (Nicholas P. Hurzeler and Meghan Cavalieri of counsel), for appellants.

The Perecman Firm, PLLC, New York, NY (Peter D. Rigelhaupt of counsel), for respondent.

Judges: ALAN D. SCHEINKMAN, P.J., REINALDO E. RIVERA, CHERYL E. CHAMBERS, HECTOR D. LASALLE, JJ. SCHEINKMAN, P.J., RIVERA, CHAMBERS and LASALLE, JJ., concur.

Opinion

[*300] DECISION & ORDER

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Johnny L. Baynes, J.), dated April 20, 2017. The order denied the defendants' motion pursuant to [CPLR 3211\(a\)\(7\)](#) [*301] to dismiss the complaint for failure to timely serve a notice of claim

and granted the plaintiff's oral application for leave to serve an amended complaint within 90 days.

ORDERED that on the Court's own motion, the appeal from so much of the order as granted the plaintiff's oral application for leave to serve an amended complaint within 90 days is deemed a motion for leave to appeal from that portion of the order, and leave to appeal is granted (*see* [CPLR 5701\(c\)](#)); and it is further,

ORDERED that the order is reversed, on the law, with costs, the defendants' motion pursuant to [CPLR 3211\(a\)\(7\)](#) to dismiss the complaint is granted, [**2] and the plaintiff's oral application for leave to serve an amended complaint within 90 days is denied as academic.

The plaintiff commenced this action while a proceeding he commenced pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim was still pending. The defendants moved pursuant to [CPLR 3211\(a\)\(7\)](#) to dismiss the action for failure to serve a timely notice of claim. Upon granting the plaintiff's petition in the separate proceeding and deeming the notice of claim timely served nunc pro tunc, the Supreme Court denied the defendants' motion to dismiss this action and instead granted an oral application by the plaintiff for leave to serve an amended complaint within 90 days. The defendants appeal.

In light of our determination on the companion appeal from the order granting the petition in the separate proceeding (*see* [Matter of Moroz v City of New York, AD3d](#) , 2018 N.Y. App. Div. LEXIS 6688 [decided herewith]), the order appealed from must be reversed, the defendants' motion pursuant to [CPLR 3211\(a\)\(7\)](#) to dismiss the complaint granted, and the plaintiff's oral application for leave to serve an amended complaint within 90 days denied as academic.

SCHEINKMAN, P.J., RIVERA, CHAMBERS and
LASALLE, JJ., concur.

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