

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

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**CA 18-01511**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND TROUTMAN, JJ.

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JOSEPH BITTINGER, JR. AND LINDA BITTINGER,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY, DEFENDANT-APPELLANT.

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RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JAMES GRABER OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

THE WESTMAN LAW FIRM, JAMESTOWN (JAMES E. WESTMAN OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Chautauqua County  
(James H. Dillon, J.), entered May 16, 2018. The order denied  
defendant's motion to dismiss the action.

It is hereby ORDERED that the order so appealed from is  
unanimously reversed on the law without costs, the motion is granted  
and the action is dismissed.

Memorandum: Defendant appeals from an order denying its motion,  
inter alia, to dismiss the action based on plaintiffs' failure to  
timely comply with defendant's demand for service of a complaint  
pursuant to CPLR 3012 (b). We agree with defendant that Supreme Court  
erred in denying the motion. It is well settled that, "[t]o avoid  
dismissal for failure to timely serve a complaint after a demand for  
the complaint has been made pursuant to CPLR 3012 (b), a plaintiff  
must demonstrate both a reasonable excuse for the delay in serving the  
complaint and a meritorious cause of action" (*Berges v Pfizer, Inc.*,  
108 AD3d 1118, 1119 [4th Dept 2013] [internal quotation marks  
omitted]; see *McIntosh v Genesee Val. Laser Ctr.*, 121 AD3d 1560, 1560  
[4th Dept 2014], *lv denied* 25 NY3d 911 [2015]; *Dunlop v Saint Leo the  
Great R.C. Church*, 109 AD3d 1120, 1120-1121 [4th Dept 2013], *lv denied*  
22 NY3d 858 [2013]). Here, even assuming, arguendo, that plaintiffs  
showed a meritorious cause of action, we conclude that they failed to  
provide any excuse for the delay in serving their complaint, and thus  
dismissal of the action is required (see *JL Collier Corp. v Wells  
Fargo Bank, N.A.*, 127 AD3d 1026, 1027 [2d Dept 2015]; *Dunlop*, 109 AD3d  
at 1121; *Fasano v J.C. Penney Corp.*, 59 AD3d 1102, 1102 [4th Dept  
2009]). Plaintiffs' contention that defendant has not been prejudiced  
or harmed by the delay is irrelevant. "The absence of any reasonable  
excuse for plaintiffs' delay is determinative; there is no requisite  
that prejudice be shown before a motion to dismiss is granted in a

case of this nature" (*Verre v Rosas*, 47 NY2d 795, 796 [1979]).

Entered: February 1, 2019

Mark W. Bennett  
Clerk of the Court