

Bradley v City of New York

2007 NY Slip Op 30095(U)

February 27, 2007

Supreme Court, Queens County

Docket Number: 0014671

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

NATEQUAN BRADLEY, Index
Plaintiff(s),

Number: 14671/06

- against -

Motion
Date: 02/13/07

THE CITY OF NEW YORK and NEW YORK CITY,
POLICE DEPARTMENT,

Motion
Cal. Number: 2

Defendant(s).

Motion Seq. No. 1

-----X

The following papers numbered 1 to 9 read on this motion by defendants dismiss the complaint or, in the alternative, for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition- Exhibits.....	5-7
Reply-Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Defendants move to dismiss the complaint, pursuant to CPLR 3211(a)(5), or, in the alternative, for summary judgment, pursuant to CPLR 3212, on the ground that plaintiff failed to commence the instant action within the statutory time period required pursuant to General Municipal Law §50-I.

A motion to dismiss pursuant to CPLR 3211(5) may only be made prior to the date the responsive pleading is interposed (see CPLR 3211[e]). Since defendants interposed an answer, a motion to dismiss pursuant to CPLR 3211 is not appropriate.

Motion by defendants for summary judgment, pursuant to CPLR 3212, however, is granted.

Plaintiff alleges that he sustained injuries when the motorcycle he was believes was owned by the City and operated by a police officer on March 30, 2005 at the intersection of 107th Avenue and 164th Place in Queens County. The vehicle that allegedly struck plaintiff's motorcycle left the scene of the incident. A notice of claim was served on June 16, 2005 and the summons and complaint was filed on June 29, 2006. An answer was interposed by defendants on September 6, 2006, pleading statute of limitation as an affirmative defense.

Pursuant to General Municipal Law §50-i, an action against the City must be commenced within one year and 90 days after the happening of the event upon which the claim is based. Plaintiff does not dispute that the instant action was commenced one day beyond the statute of limitations period. However, plaintiff contends that defendant misrepresented to plaintiff that the New York City Police Department was not involved in the accident and concealed from him the identity of the police officer who was the operator of the vehicle at the time of the accident and, therefore, plaintiff should be equitably estopped from raising the affirmative defense of statute of limitations.

The doctrine of equitable estoppel is an extraordinary remedy that may be invoked to bar the affirmative defense of statute of limitations only where plaintiff demonstrates that defendant's affirmative wrongdoing contributed to the delay in timely commencing the action, that plaintiff reasonably relied upon defendant's misrepresentations and that plaintiff exercised due diligence in ascertaining the facts and commencing the action (see AD 3d, 2007 NY Slip Op 00395 [1st Dept, January 23, 2007]). Plaintiff "must set forth evidence showing that he was induced by fraud, misrepresentation or deception to refrain from commencing a timely action" (Kiernan v. Long Island Railroad, 209 AD 2d 588 [2nd Dept 1994]).

Plaintiff alleges that he tried unsuccessfully to obtain the identity of the vehicle and operator thereof that struck him. He alleges that several letters were sent to the Police Department but were never answered and that he filed a complaint with the Department of Internal Affairs, but upon telephone inquiry was told that the Police Department was not involved in the accident and that no further information would be provided.

Such allegations do not constitute proof that defendants engaged in misrepresentation or concealment designed to thwart plaintiff's ability to commence a timely action. The misrepresentation perpetrated by defendants must be of a material existing fact (see Dowdell v. Greene County, 14 AD 3d 750 [3rd Dept 2005]). Plaintiff fails to establish that the vehicle that

struck him was, in fact, an unmarked police car operated by a police officer. Obviously, this Court may not find that defendants misrepresented or concealed facts which have not been established to exist.

Moreover, plaintiff failed to establish that defendants willfully intended to mislead and delay the commencement of the instant action (id;).

Even had plaintiff set forth evidence that defendants had engaged in acts of misrepresentation, he has failed to show any detrimental reliance (see, Kiernan v. Long Island Railroad, supra).

Plaintiff alleges in his notice of claim, which was dated May 26, 2005 and filed on June 16, 2005, that he was struck by a vehicle owned by the New York City Police Department and operated by its employee. At plaintiff's 50-H hearing on August 23, 2005, plaintiff testified that he was struck by a police car. Therefore, plaintiff could not have been lulled "into a false sense of security" that a police car was not involved, since plaintiff knew, or believed, since at least May 2005 that the vehicle with which he was involved in the accident was a police vehicle driven by an employee of the New York City Police Department. The fact that the police department did not respond to plaintiff's letters and that plaintiff, in a call made to its department of internal affairs on June 27, 2006, one day before the expiration of the statute of limitations, allegedly was told that the police were not involved in the accident, does not establish detrimental reliance. Plaintiff does not show that any facts were discovered subsequent to June 27, 2006 that defendants prevented him from finding out before the statute of limitations had expired. Plaintiff fails to articulate any justifiable reason for not commencing the instant action within the period of limitation.

Plaintiff's contention that he is entitled to a trial on the issue of equitable estoppel, pursuant to CPLR 2218, is without merit. Plaintiff's request for a "declaratory judgment" to determine whether a legal claim exists against defendants is likewise denied as being without merit. In the first instance, plaintiff has not cross-moved for declaratory relief, nor could said relief be granted in any event. Moreover, since plaintiff has failed to establish that defendants are equitably estopped from raising the affirmative defense of statute of limitations, General Municipal Law §50-i serves as a complete bar to plaintiff's action and, therefore, no legal claim exists against defendants, as a matter of law.

Accordingly, defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: February 27, 2007

KEVIN J. KERRIGAN, J.S.C.