

<b>Jones v Trinity Church Corp.</b>
2007 NY Slip Op 30187(U)
March 7, 2007
Supreme Court, New York County
Docket Number: 0100829
Judge: Marylin G. Diamond
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: HON. MARYLIN G. DIAMOND PART 48**

*Justice*

LAVERNE STAMP JONES,

Plaintiff,

- v -

TRINITY CHURCH CORP et al.,

Defendants.

INDEX NO. 100829/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

**FILED**  
MAR 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** In this personal injury action, the plaintiff alleges that on March 10, 2003, she tripped and fell while on property owned and maintained by the defendants Trinity Church Corp., Trinity Cemetery and Mausoleums and Parish of Trinity Church. The defendants previously moved to dismiss the complaint on the grounds that (1) service of process was ineffective, (2) the plaintiff's claims are barred by the applicable statute of limitations, (3) they did not own, manage or occupy the property where plaintiff fell and (4) they are improper defendants because they are not entities which exist under the laws of the State of New York. By decision and order dated October 23, 2006, the court (Roselyn Richter, J.) denied the motion. In its decision, the court noted that the defendants had failed (1) to support their service of process claim with an affidavit from anyone stating that the individuals who were allegedly served were not authorized to accept service, (2) to identify when the statute of limitations ran, (3) to support their claim that the entities listed in the caption do not exist in New York through an affidavit of a knowledgeable person or through documentation. The court found that the affidavit of Stephan Duggan contending that the property is owned by the Rector, Churchwardens and Vestrymen of the Parish of Trinity Church, and not by the defendants, was inadequate. The court directed the defendants to answer the complaint within twenty days of service on them of a copy of the decision with notice of entry and stated that its denial of their motion was without prejudice to raise these claims in their answer and to have them resolved upon proper papers supported by someone with personal knowledge.

Rather than serve and file an answer, as the court had directed, defendants chose to bring this motion to dismiss in which the only new evidence offered is a copy of a conveyance dated May 23, 1900 which establishes that the Rector, Churchwardens and Vestrymen of the Parish of Trinity Church is, indeed, the owner of the property where the plaintiff fell. The motion does not support the defendants' ineffective service of process claim, does not establish that they are not legal entities amenable to lawsuit and does not preclude their liability to the plaintiff for negligently operating and maintaining the premises. The motion must therefore be denied. This denial is with prejudice to the defendants' ineffective service of process claim.

The plaintiff has cross-moved for a default judgment, pursuant to CPLR 3215, on the ground that the defendants failed to serve an answer as directed by the court in its October 23, 2006 decision and order. The motion is denied. Although the defendants ill-advisedly chose to make another motion to dismiss rather than serve an answer, they nevertheless should be given a final opportunity to do so given the public policy of this state in favor of resolving cases on the merits. *See Trimble v. SAS Taxi Co., Inc.*, 8 AD3d 557 (2<sup>nd</sup> Dept 2004); *Van Man Adhesives Corp. v City of New York*, 236 AD2d 465 (2<sup>nd</sup> Dept. 1997).

Alternatively, the plaintiff seeks leave to serve and file a supplemental summons and amended complaint adding the Rector, Churchwardens and Vestrymen of the Parish of Trinity Church as a party defendant. The plaintiff, however, does not need leave of court and may, under CPLR 3025(a), amend her complaint as of right within twenty days of service of the defendants' answer. *See STA Management Development, Inc. v. New York State Dept. of Taxation and Finance*, 254 AD2d 409, 410 (2<sup>nd</sup> Dept 1998). The defendants' argument that the plaintiff's claim against the Rector, Churchwardens and Vestrymen of the Parish of Trinity Church is barred by the statute of limitations, *see* CPLR 203(b)(1), is premature and may be raised on a motion to dismiss the amended complaint.

Accordingly, the defendants' motion and the plaintiff's cross-motion are hereby denied. The defendants shall serve an answer within the time limit fixed under CPLR 3211(f).

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on April 24, 2006 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 3/7/07

Check one:  FINAL DISPOSITION

*MGD*  
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MARYLIN G. DIAMOND, J.S.  
 NON-FINAL DISPOSITION

**FILED**  
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COUNTY CLERK'S OFFICE  
NEW YORK