

West v City of New York
2007 NY Slip Op 31439(U)
May 25, 2007
Supreme Court, New York County
Docket Number: 0400022/2007
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 400022/2007

PART S

WEST, HARRY

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2+3
3 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

FILED
DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/25/07



EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

HARRY WEST

Plaintiff,

Index No.
400022/07

- against -

Decision and
Order

CITY OF NEW YORK
DEPARTMENT OF CORRECTION,

Defendant.

FILED

-----X
HON. EILEEN A. RAKOWER

JUN 01 2007

NEW YORK COUNTY CLERK'S OFFICE

Plaintiff brings this action for personal injuries allegedly sustained while riding in an elevator at 125 White Street, New York, New York on October 3, 2005. Defendant the City of New York ("City") moves to dismiss for failure to state a cause of action pursuant to CPLR 3211 or, in the alternative, granting summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion, and also moves for summary judgment.

On the date of the accident, plaintiff was an inmate at the Bernard B. Kerik Complex located at 125 White Street. According to plaintiff, he was riding the elevator to get to the kitchen of the complex when the elevator allegedly malfunctioned and was caused to fall down four floors rapidly. Plaintiff claims that the elevator's maximum capacity was fifteen and that the accompanying officer allowed sixteen people on the elevator that day. Plaintiff alleges that he was then trapped in the elevator for Thirty-Five minutes and had to climb out through the roof. Since the accident plaintiff has complained of neck and back pain, anxiety, nightmares that he is falling and crashing, and other various health complaints.

City, in support of its motion, argues that plaintiff filed his summons and complaint after the one year and ninety day statute of limitations had run. Plaintiff's injury occurred on October 3, 2005 and complaint was stamped "filed" by the Clerk on January 4, 2007, two days after the statute expired.

Plaintiff, in opposition, argues that he originally mailed the summons and complaint to the County Clerk via the "inmate correspondence unit" on December 5, 2006. The documents were received by the clerk on or about December 11, 2006 as is evidenced by the U.S. Postal Service return receipt submitted by plaintiff. The Clerk sent plaintiff a check list of items which were needed in order to properly commence the action. This list included:

- 1) Completed application for index number directed to New York County Clerk;
- 2) Completed Index Purchase Cover Sheet; and
- 3) Completed Summons and *Verified Complaint* (emphasis added, verified complaint is highlighted on the paper).

Under the "other comments" section, there is a handwritten directive stating:

We need a completed verification for your complaint (see attached).
When completed return all papers for processing to this office.

CPLR §304, which governs the commencement of an action states, in relevant part:

An action is commenced by filing a summons and complaint or summons with notice...for purposes of this section...filing shall mean the delivery of the summons with notice, summons and complaint...to the clerk of the court in the county in which the action...is brought for that purpose together with any fee required as specified.

The court in *Soto v. Freda*, 766 N.Y.S.2d 299, dealt with the issue of whether an action is properly commenced when there is an attempt to file a summons and complaint but no index purchase cover sheet is completed. In that case an elderly employee was sent to the Clerk's office in order to file but due to poor vision, he could not properly fill out the cover sheet. Plaintiff's attorney sent someone else the next day to file but the statute of limitations had run. *Id.* at 300. The court held that

due to such extraordinary circumstances, the summons and complaint should be deemed filed *nunc pro tunc* as of the date of attempted filing. *Id.* at 304. There, the court reasoned that an effort was made to timely file, the index purchase cover sheet is not mandated by the CPLR or the Uniform Rules for Trial Courts and that cases should be decided on the merits and not whether someone has completed a nonjurisdictional form. *Id.* at 301.

Further, it was found in *City of New York v. Brown*, 465 N.Y.S.2d 388,390, that:

irregularities in a verification will rarely result in prejudice to a party or affect the substance of the litigation...omissions of this nature must be viewed as minor errors, inconsequential in nature, non-prejudicial in substance and correctable at any stage of the proceedings, even on the court's own initiative.

The court in *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, noted that the primary purpose of switching from the commencement-by-service to commencement-by-filing, was to generate revenue for the state. Thus, where the filing fee is paid and the defective filing only relates to the sufficiency of the filed papers, the court's principal interest in the filing system is satisfied. *Id.* at 719.

Here, the "application for index number" and the "index cover sheet" requested by the Clerk are not required by the CPLR in order to properly commence an action, nor is a verification form to accompany a signed pleading a jurisdictional prerequisite to the commencement of an action. The filing fee was paid as evidenced by the approved "Order Determining Application for Poor Person Status for an Inmate" found in plaintiff's file. The application was signed by plaintiff and notarized on the same date noted by plaintiff's signature on his original summons and complaint. Plaintiff promptly filed the requested form, and mailed it. The omission of the verification form does not constitute a jurisdictional defect.

The court is aware that under the facts presented here, plaintiff did not have the option of either personally filing the summons and complaint or even walking to a post office to mail the documents. Rather, he had to rely solely on the prison mailing system and may have faced lengthy postal delays inherent in the holiday season.

The fact that the complaint was not accompanied by a verification form when originally received does not prevent the court from deeming the summons and complaint filed on that date. For the aforementioned reasons, City's motion is denied.

Wherefore it is Hereby

ORDERED that defendant the City of New York's motion to dismiss is denied, and it is further

ORDERED that plaintiff's original complaint dated December 5, 2006 is deemed filed December 11, 2006; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied as premature; and it is further

ORDERED that all other relief requested is denied.

DATED: May 25, 2007


EILEEN A. RAKOWER, J.S.C.

FILED
JUN 01 2007
NEW YORK
COUNTY CLERK'S OFFICE