Carrington v New York City Tr. Auth.

2007 NY Slip Op 31447(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0101305/2006

Judge: Donna Marie Mills

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SCANNED ON 6/5/2007
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART 21**
Justice

CARRINGTON, KATHERINE

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, ET AL.
Defendants.

INDEX NO. 101305/06

MOTION DATE ____

MOTION SEQ. NO. 002

MOTION CAL NO. ____

The following papers, numbered 1 to 2 were read on this motion for Summary Judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-22-07

[signature]
J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

--X

KATHERINE CARRINGTON,

Plaintiff,

-against-

Index No. 101305/06

NEW YORK CITY TRANSIT AUTHORITY,
d/b/a MTA NEW YORK CITY TRANSIT, and
THE CITY OF NEW YORK,

Defendants.

--X

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

DONNA MILLS, J.:

The plaintiff Katherine Carrington (Carrington) moves, pursuant to CPLR 2221, for leave to reargue the granting of the defendant New York City Transit Authority's (Transit Authority) prior motion to dismiss for failure to serve a notice of claim.

In an order dated December 8, 2006, Justice Robert D. Lippmann, now retired from this court, dismissed the complaint for the plaintiff Carrington's failure to serve the Transit Authority with a notice of claim.

This is an action to recover damages for personal injuries suffered by Carrington on January 24, 2005, in a slip and fall accident, on a ramp leading to the subway station at 34th Street and Sixth Avenue in Manhattan. Pursuant to a lease dated 1953, between the City of New York (City) and the Transit Authority, the Transit Authority has the duty to maintain the ramp. On March 9, 2005, the defendant City, through its Corporation Counsel, was properly and timely served with a notice of claim naming as defendants both the City and the Transit Authority.

However, the notice of claim was not served on the Transit Authority. On August 11, 2005, more that 90 days after the accident, the plaintiff Carrington sent to the Transit Authority, a letter requesting a General Municipal Law § 50-h hearing, and attaching a copy of the notice of claim previously served on the City. According to the time stamp, the Transit Authority received the letter on August 15, 2005.

In support of her motion to reargue, Carrington asserts that her failure to serve the notice of claim on the Transit Authority is saved by General Municipal Law § 50-e (3) (c).

In opposition to the motion, the defendant Transit Authority makes the following arguments. The court, in its previous decision, did not misapply the facts or the law. The service of a notice of claim on the City, and the subsequent mailing of a copy of the notice of claim to the Transit Authority, is not service of a notice of claim on the Transit Authority. Carrington's mailing to the Transit Authority on August 11, 2005, was untimely done more than 90 days after the accident. The Transit Authority did not waive the notice of claim requirement by holding a General Municipal 50-h hearing. Carrington never timely sought leave to serve a late notice of claim.

The movant Carrington has failed to demonstrate that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (Carillo v PM Realty Group, 16 AD3d 611 [2d Dept 2005]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]).

In support of her position, the plaintiff Carrington relies on Mercado v New York City Health and Hospitals Corporation (247 AD2d 55 [1st Dept 1998]), wherein the plaintiff incorrectly served the City, rather than the New York City Health and Hospitals Corporation

(HHC), with a notice of claim properly naming HHC as defendant. The City's Corporation Counsel conducted an examination pursuant to General Municipal Law § 50-h. The court validated the plaintiff's service of the notice of claim on the City, applying the saving provision of General Municipal Law § 50-e (3) (c) which provides:

> (c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

However, Mercado (supra) has been abrogated by Scantlebury v New York City Health and Hospitals Corporation (4 NY3d 606 [2005]). The saving provision, General Municipal Law § 50-e (3) (c), does not apply to service on the wrong entity, but rather only to the manner of service.

It is well settled that the City and the Transit Authority are separate entities (Nowinski v City of New York, 189 AD2d 674 [1st Dept 1993]). In the instant case, the plaintiff Carrington served only the City with the notice of claim, and never served the defendant Transit Authority in accordance with General Municipal Law § 50-e. Carrington's attempt to serve the Transit Authority by letter dated August 11, 2005, outside the 90-day period, without leave of court, was a nullity (Wollins v New York City Bd. of Educ., 8 AD3d 30 [1st Dept 2004]).

Furthermore, it is well settled that the court may not grant leave to serve a late notice of claim after the expiration of the one year and 90-day statute of limitations (General Municipal Law §§ 50-e [5], Public Authorities Law § 1212 [2]; Hochberg v City of New York, 63 NY2d 665 [1984]). Here, Carrington never sought leave within the one year and 90-day limiting period

to serve a late notice.

Finally, contrary to Carrington's assertion, the saving provision, General Municipal Law § 50-e (3) (c), does not apply to service on the wrong entity (Scantlebury v New York City Health and Hosp. Corp. [supra]).

Accordingly, it is

ORDERED that the motion is denied.

Dated: 05/22/07

ENTER:

J.S.C.

FILED
JUN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE