

Rivera v City of New York

2007 NY Slip Op 31794(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0101976/2004

Judge: Eileen A. Rakower

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

PRESENT: **EILEEN A. RAKOWER**
J.S.C.

PART **Part 5**

Index Number : 101976/2004

RIVERA, THOMAS

vs

CITY OF NEW YORK

Sequence Number : 001

AMEND SUPPLEMENT PLEADINGS

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 12 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 6, 2007



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
THOMAS RIVERA, an infant by his adoptive mother
CARMEN RIVERA and CARMEN RIVERA,
individually,

Plaintiffs,

- against -

THE CITY OF NEW YORK,

Defendants.

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE
-----X

Index No.
100928/05

Decision
And Order

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

Infant plaintiff, by his mother, brings this action for personal injuries allegedly sustained when he fell as a result of a wet and muddy condition in the outfield of "Diamond #8," located in Central Park, near the entrance on 102nd and 5th Avenues, New York. Plaintiff Carmen Rivera makes a derivative claim. Plaintiffs now move for an order pursuant to CPLR § 3025(b) granting leave to serve a summons and amended complaint adding Central Park Conservancy, Inc. (Conservancy) as a defendant in this action. City opposes the motion on behalf of Conservancy.

Plaintiffs argue that, at depositions, City produced three witnesses, all of whom are employees of Conservancy. Plaintiffs assert that it was only at the January 29, 2007 deposition that they learned that Conservancy was a separate entity from City and it is responsible for the maintenance of the area where the accident occurred.

City, in opposition, argues that pursuant to CPLR §§ 214(5) and 203, actions to recover damages for personal injuries, except under certain circumstances not present here, must be commenced within three years from the date when the cause of action accrues. City states that Plaintiffs' cause of action accrued on the date of the accident, July 18, 2003, and their time to commence an action against Conservancy expired on July 18, 2006. City argues that two depositions of Conservancy employees occurred prior to the expiration of the statute of limitations and the Court cannot extend the limitations period.

Plaintiffs reply that the statute of limitations is tolled by virtue of CPLR § 208 because Plaintiff was and still is an infant. Plaintiffs argue that the toll for infancy does not end when a guardian or attorney files an action to protect the infant's legal interests.

In fact, "the initial prosecution of [the infant's] claim by his legal representatives [does] not preclude him from invoking the CPLR 208 disability toll to prevent the running of the statutory period." (*Rosado v. Langsam Prop. Serv. Corp.*, 251 A.D.2d 258 [1st Dept. 1998]). The Court of Appeals has held that "it is the age and capacity of the infant rather than the conduct of its parents and guardians which controls." (*Russo v. City of New York*, 258 N.Y. 344 [1932]). Accordingly, the infant Plaintiff by his adoptive mother is not time barred from beginning an action against Conservancy. However, the derivative claim of the mother against Conservancy is time barred.

Further, CPLR § 3025 (b) states, in pertinent part:

A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just . . .

Accordingly, Plaintiffs' motion to amend the pleadings to add Conservancy as a defendant is granted only as to the infant Plaintiff's claim. Wherefore it is hereby

ORDERED that the motion on behalf of Carmen Rivera individually is denied; and it is further

ORDERED that the motion by Carmen Rivers on behalf of the infant Thomas Rivera for leave to amend the complaint herein to add Central Park Conservancy as a defendant is granted; and it is further

ORDERED that an amended complaint that is consistent with this decision shall be served, along with a copy of this order, on all parties within 20 days, with notice of entry thereof; and it is further

ORDERED that Plaintiff must serve a copy of this order on the County Clerk so that their records may be altered to reflect the changes; and it is further

ORDERED that the compliance conference scheduled for June 19, 2007, is adjourned until August 28, 2007, in room 103, 80 Centre Street, at 2:00 p.m.

All other relief requested is denied.

This constitutes the Decision and Order of the Court.

DATED: June 6, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE