

Ward v City of New York

2007 NY Slip Op 32318(U)

July 19, 2007

Supreme Court, New York County

Docket Number: 0118396/2006

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

WARD, LINTON

INDEX NO. 118396/06

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

*THE CITY OF NEW YORK, METROPOLITAN
TRANSPORTATION AUTHORITY, THE NEW YORK
CITY TRANSIT AUTHORITY, and NEW YORK CITY
POLICE DEPARTMENT*

MOTION CAL No. _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion to dismiss.

PAPERS NUMBERED

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

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

FILED
2
3 17 2007

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 7-19-07

Donna M. Mills
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
LINTON WARD,

Plaintiff,

-against-

Index No. 118396/06

THE CITY OF NEW YORK, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK CITY
TRANSIT AUTHORITY and NEW YORK CITY
POLICE DEPARTMENT,

Defendants.

-----X

DONNA M. MILLS, J.:

The defendants Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA) (collectively, the movants), move for an order: pursuant to CPLR 3211, dismissing the complaint and cross claims on the grounds that plaintiff and codefendants have failed to state a cause of action and fail to meet the requirements of General Municipal Law § 50 (e) and Public Authorities Law § 1212; pursuant to CPLR 3211 (a) (5) and Public Authorities Law § 1276, dismissing this action on the ground of statute of limitations; and pursuant to CPLR 3212, granting summary judgment.

This is an action to recover damages for personal injuries suffered by the plaintiff Linton Ward (Ward), as the innocent victim of a gang assault on a subway platform.

In support of their motion, the movants allege that although the NYCTA was properly served, the MTA was never served with either a notice of claim, or a summons and complaint.

Additionally, it is argued that the action was untimely commenced beyond the applicable statute of limitations.

In opposition to the motion, the plaintiff Ward alleges that the notice of claim was served upon the defendants MTA and NYCTA, at 4:26 PM on May 13, 2005. It is argued that the MTA must have been served with a summons and complaint because it both served an answer, and conducted a General Municipal Law § 50-H hearing. Finally, it is argued that the plaintiff Ward's cause of action is timely because it is "grounded in contract."

The defendant bears the initial burden of establishing prima facie that the time in which to sue has expired. Once such prima facie showing is made, the burden shifts to the plaintiff to aver evidentiary facts establishing either that it was timely commenced, or that the case falls within an exception to the statute of limitations (Savarese v Shatz, 273 AD2d 219 [2d Dept 2000]).

In the case relied upon by the plaintiff Ward, Crosland v New York City Transit Authority (68 NY2d 165 [1986]), the complaint alleged, as here, that a NYCTA employee seeing the injury being inflicted, unreasonably failed to summon aid, although he could have done so without risk to himself. The Court held that such failure to act, watching someone being beaten from a vantage point offering both safety and the means to summon help without danger, was within the narrow range of circumstances which could be found to be actionable. However, contrary to the plaintiff Ward's assertion, the NYCTA employee's failure to act was actionable as a tort, not as a breach of contract.

Here, the underlying dispute can be resolved through a form of action for which a specific limitation period is statutorily provided, and that limitation period governs. Since the argument

raised in opposition to the motion, alleging breach of contract, is merely incidental to the personal injury claim, the only purpose it serves is to circumvent the three-year statute of limitations (Gold Sun Shipping Ltd. v Ionian Transp., 245 AD2d 420 [2d Dept 1997]). The plaintiff's claims rely on allegations of a duty, breach of that duty, resulting personal injury, and do not even allege the existence of a contract.

At bar, the facts set forth in the complaint allege no more than causes of action to recover damages for personal injury, which are barred by the applicable one-year and 90-day statute of limitations. The movants establish, prima facie, that Ward's cause of action to recover damages for tort, accrued, and the relevant statute of limitations began to run, upon the date of the assault, on February 18, 2005. This action was untimely commenced with the filing of the summons and complaint on December 12, 2006, more than one year and 90 days after the cause of action accrued on February 18, 2005 (General Municipal Law § 50-i [1] [c]; Public Authorities Law § 1212). In the instant case, the applicable statute of limitations is one year and 90 days (Public Authorities Law § 1212 (2); Pilgrim v New York City Transit Authority, 235 AD2d 527 [2d Dept 1997]). Public Authorities Law § 1212 (2) requires that an action "founded on tort" shall not be commenced against defendant authorities more than one year and 90 days "after the happening of the event upon which the claim is based." General Municipal Law § 50-i, like Public Authorities Law § 1212, requires that any action for personal injury sustained by reason of the negligence or wrongful act of a municipality has to be commenced within one year and 90 days after the happening of the event (Collins v City of New York, 55 NY2d 646 [1981]; Melendez v Manhattan and Bronx Surface Transit Operating Authority, 137 AD2d 390 [1st Dept 1988]).

Finally, it is undisputed that the notice of claim and the summons and complaint were

never properly served on the MTA at 347 Madison Avenue, New York, New York.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against the defendants Metropolitan Transportation Authority, and New York City Transit Authority, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue in a City part.

Dated: 7-19-07

ENTER:



J.S.C.

FILED
JUL 27 2007
CLERK OF COURT
COUNTY CLERK'S OFFICE