

Campos v New York City Tr. Auth.

2007 NY Slip Op 33728(U)

October 31, 2007

Supreme Court, New York County

Docket Number: 0104736/2005

Judge: Donna Marie Mills

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT : DONNA M. MILLS
Justice

PART 21

CAMPOS, ANDERSON et al.,
Plaintiffs,
-v-
NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX NO. 104736/05
MOTION DATE _____
MOTION SEQ. No. 002
MOTION CAL NO. _____

The following papers, numbered 1 to 5 were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1+2</u>
Answering Affidavits- Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4+5</u>

CROSS-MOTION: YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
NOV 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-31-07

D 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
ANDERSON CAMPOS, an infant over the age of 14 years
old, by his mother and natural guardian, MARILUZ CAMPOS
and MARILUZ CAMPOS, individually,

Plaintiffs,

-against-

Index No. 104736/05

NEW YORK CITY TRANSIT AUTHORITY,
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY and "JOHN DOE",

Defendants.

-----X
DONNA MILLS, J.:

The plaintiffs Anderson Campos and Mariluz Campos (plaintiffs) move for an order granting a default judgment against the defendant Kenneth O'Neal a/k/a "John Doe." The defendants New York City Transit Authority (NYCTA) and Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) (collectively, defendants) cross-move, pursuant to CPLR 3211 (a) to dismiss the complaint as against the defendant Kenneth O'Neal (O'Neal), on the ground that the plaintiff has failed to timely and properly serve said defendant.

Preliminarily, the court notes that the cross-movants' failure to give any notice to O'Neal ordinarily would mandate denial of the cross motion. Unlike the plaintiffs who did serve O'Neal with the main motion, the defendants NYCTA and MABSTOA have not seen fit to provide O'Neal with notice of the cross motion.

This is an action to recover damages for personal injuries suffered by the infant plaintiff

Anderson Campos (Campos) on October 26, 2004, when a NYCTA bus driver, O'Neal, allegedly attempted to take away Campos's bus pass by twisting Campos's arm.

In support of their motion, the plaintiffs argue that an amended complaint naming O'Neal was filed with the County Clerk on January 5, 2006, and pursuant to court orders dated February 23, 2006 and January 25, 2007, process was served pursuant to CPLR 308 (2), on the defendant O'Neal on February 2, 2007, over one year after filing the amended complaint on January 5, 2006.

In support of their cross motion, the defendants argue that the plaintiffs failed to timely and properly serve O'Neal with the amended summons and complaint within the required 120-day period after filing (CPLR 306-b). In reply, the plaintiffs argue that the cross motion was untimely made, and that the NYCTA and MABSTOA do not have standing to make the cross motion.

Preliminarily, the defendants' untimely service of the cross motion is waived by the plaintiffs' arguing the merits of the cross motion. The court will first dispose of the cross motion, before turning to the motion.

Contrary to the defendants' assertion, they do not have the standing merely to move to dismiss the complaint against O'Neal. Counsel do not assert that they represent O'Neal, or that they consulted with O'Neal before making the cross motion. On the contrary, counsel assert that they represent NYCTA and MABSTOA. Counsel did not even serve O'Neal with the cross motion. It is very cynical for counsel to cross-move to dismiss, without also seeking leave for O'Neal's to serve a late answer. Apparently, counsel represents O'Neal sufficiently to seek a type of relief which benefits O'Neal, NYCTA and MABSTOA, but not sufficiently to seek a type

of relief (leave to serve an answer) which benefits merely O'Neal. In fact, by cross-moving to dismiss on a jurisdictional ground, without also seeking to vacate O'Neal's default, the lawyers for NYCTA and MABSTOA have placed O'Neal in an untenable position.

Each defendant is entitled to one day in court on a jurisdictional question. If the defendant asserts the objection by motion, as here, he had best stay on and defend on the merits if the motion is denied. If the defendant leaves the action after the denial, a default judgment will result and it will be binding in personam (Siegel, NY Prac § 111, at 202 [4th ed]). Any unexplored jurisdictional defense will be gone.

Turning to the main motion, CPLR 306-b requires that service of process be made on the defendant within 120 days after filing of the summons and complaint. "If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

The plaintiffs argue that their request for a CPLR 306-b interest-of-justice extension of time to serve the summons and complaint on the defendant O'Neal should be granted in view of the diligence shown by plaintiffs. Although there was a lengthy delay (over one year after filing) before defendant O'Neal received notice of the action, and although the service on O'Neal on February 2, 2007, was beyond the one-year statute of limitations applicable to the plaintiffs' second cause of action for intentional tort (CPLR 215), the court will exercise its discretion in granting the plaintiffs an extension to serve defendant "in the interest of justice," pursuant to CPLR 306-b (Slate v Schiavone Construction Co., 4 NY3d 816 [2005]; Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106 [2001]). The plaintiffs never abandoned their claim

against O'Neal. The service of process on O'Neal was within the statute of limitations for the plaintiffs' first cause of action for negligence (CPLR 214), and the plaintiffs on two prior occasions sought court orders seeking to add O'Neal as a party.

Accordingly, it is

ORDERED that the plaintiffs' motion for a default judgment against Kenneth O'Neal is denied with leave to renew if the defendant O'Neal fails within 30 days, to serve an answer in response to service of a copy of this order with notice of entry, and it is further

ORDERED that the plaintiffs, within 30 days of the date of this order, serve on the defendant O'Neal, a copy of this order with notice of entry; and it is further

ORDERED that the cross motion to dismiss is denied.

Dated: 10-31-07

ENTER:

J. Miller

J.S.C.

DONNIA M. MILLER

FILED

NOV 20 2007

**CLERK'S OFFICE
NEW YORK**