

Mfum v Metropolitan Transp. Auth.

2009 NY Slip Op 31094(U)

April 21, 2009

Supreme Court, New York County

Docket Number: 400035/09

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 400035/2009

MFUM, ALEXANDER

vs

METROPOLITAN TRANSPORTATION

Sequence Number : 001

DISMISS ACTION

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

It is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad for an order dismissing the Complaint of plaintiffs Alexander Mfum, as Administrator of the Goods and Chattels of Alex Boakye Yiadom, and Alexander Mfum, Individually, pursuant to CPLR §3211(a)(5) and (8), is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

FILED
APR 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/21/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 35

-----X
ALEXANDER MFUM, As Administrator of the
Goods and Chattels of ALEX BOAKYE YIADOM and
ALEXANDER MFUM, Individually

Index No. 400035/09

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and
METRO-NORTH COMMUTER RAILROAD,

Defendants.

HON. CAROL ROBINSON EDMEAD, J.S.C.

DECISION/ORDER

FILED

APR 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiffs Alexander Mfum, as Administrator of the Goods and Chattels of Alex Boakye Yiadom (“decedent”) and Alexander Mfum, Individually, (“Mr. Mfum”) (collectively “plaintiffs”) seek to recover damages from defendants Metropolitan Transportation Authority (“MTA”) and Metro-North Commuter Railroad (“Metro-North”) (collectively “defendants”) for wrongful death and negligence.

Defendants now move for an order dismissing plaintiffs’ Verified Complaint, pursuant to CPLR §3211(a)(5), as time-barred by the applicable statute of limitations, and/or pursuant to CPLR §3211(a)(8), for lack of personal jurisdiction.

*Factual Background*¹

On July 22, 2005, decedent was at the tracks near platforms 1 and 3 and 40 yards north of the end of the platform of the Metro North train station at 125th Street, New York, New York

¹Information is taken from defendants’ motion (“motion”) and plaintiffs’ opposition (“opp.”).

(“the train station”) when he “sustained personal injuries and subsequent death due to the negligence of [defendants] in failing in [their] special duty of care . . . to protect [decedent] from trains equipment, rails and power” (Notice of Claim, ¶ 3).

On or about October 21, 2005, plaintiffs served a Notice of Claim upon defendants.

On April 26, 2006, plaintiffs filed a Summons and Complaint against defendants containing two causes of action (“April 26, 2006 Complaint”). In the April 26, 2006 Complaint, Mr. Mfum alleges that “as the Proposed Administrator of the Goods and Chattels” of decedent, he is entitled to recover for non-economic and economic losses.

On August 21, 2007, this Court issued an Order discontinuing plaintiffs April 26, 2006 Complaint “without prejudice,” on the ground that plaintiffs’ action was commenced by a “proposed administrator,” an improper party (“Order”).

On July 21, 2008, plaintiffs filed a new Summons and Verified Complaint against defendants. The July 21, 2008 Complaint contains the same allegations and causes of action as the April 26, 2006 Complaint. However, Mr. Mfum now bears the proper title of “Administrator of the Goods and Chattels” of decedent.

Defendants’ Motion

Citing Public Authorities Law §2981, defendants argue that because plaintiffs allege a wrongful death cause of action, the applicable statute of limitations is two years. According to plaintiffs’ Notice of Claim and Complaint, the alleged incident occurred on July 22, 2005.

Plaintiffs’ Complaint was filed on July 21, 2008, three years after the alleged incident. Therefore, plaintiffs’ Complaint must be dismissed as untimely (motion, ¶ 8).

Defendants further argue that by failing to file their Complaint before the expiration of

the applicable Statute of Limitations, plaintiffs failed to comply with CPLR §304, which requires that a Summons and Complaint be timely filed (motion, ¶ 9). Compliance with CPLR §304 is mandatory, and the failure to comply is fatally defective, defendants contend. In essence, plaintiffs' cause of action was never commenced, and the Court lacks personal jurisdiction over defendants, defendants argue.

Plaintiffs' Opposition

Plaintiffs argue that defendants misrepresent the facts. According to plaintiffs, their action was commenced on April 26, 2006, not July 21, 2008, as defendants maintain (opp., ¶ 4, *citing* the April 26, 2006 Complaint and a copy of defendants' Answer dated May 1, 2006 ("May 1, 2006 Answer"). Defendants made no affirmative defense of statute of limitations in their May 1, 2006 Answer, plaintiffs contend².

Citing the Order, plaintiffs point out that the April 26, 2006 Complaint was ordered discontinued without prejudice, because of a "procedural defect." However, plaintiffs never received the Order with notice of entry, plaintiffs argue (opp., ¶ 5). Thus, if defendants are claiming that their action is barred under CPLR §205, they must show that they served the order of notice of entry to start the time running (opp., ¶ 5).

Plaintiffs contend that the cure of the procedural defect required "the appointment of an administrator, guardian for the minor children, etc." (opp., ¶ 6). The family of the decedent resided in Ghana, which presented significant logistical difficulties to having the appointment made. Citing CPLR §203 and caselaw, plaintiffs argue that claims become viable upon the

²Upon a review of defendants' May 1, 2006 Answer, the Court finds that plaintiffs are incorrect: MTA did plead that plaintiffs' cause of action was barred by the applicable statute of limitations (May 1, 2006 Answer, ¶ 8). The Court notes that plaintiffs' opposition papers do not include an Answer to the April 26, 2006 Complaint from defendant Metro-North.

appointment of the administrator, and the limitations period begins to run from then (opp., ¶ 8).

Plaintiffs further contend that defendants' argument that the Court lacks personal jurisdiction over defendants is specious. The appointment of the administrators and guardians was accomplished in a reasonable time, and the action was timely recommenced, plaintiffs argue (opp., ¶ 10-11). Further, there is no prejudice to defendants based upon plaintiffs' following the Order in recommencing the action, plaintiffs argue (opp., ¶ 12).

Defendants' Reply

Defendants argue that plaintiffs' contention that this action was commenced on April 26, 2006 is inaccurate. The April 26, 2006 Complaint is captioned "Proposed Administrator." The term "Proposed Administrator" is a fiction with no legal meaning, defendants argue. A "Proposed Administrator" does not have standing to commence a cause of action.

Defendants also contest plaintiffs' contention that defendants failed to assert a statute of limitations defense in response to the April 26, 2006 Complaint. The affirmative defenses contained in defendants' May 1, 2006 Answer clearly raise a defense based on the statute of limitations (May 1, 2006 Answer, ¶¶ 8-10)³ (reply, ¶ 4).

Defendants further contend that the April 26, 2006 Complaint was discontinued at the Preliminary Conference on August 21, 2007, when it was discovered that the "Proposed Administrator" had no standing to proceed or enter into a binding order on behalf of decedent's estate (reply, ¶ 5). Defendants further argue that the Order is misphrased. Citing Black's Law Dictionary, 7th Edition, defendants argue that a discontinuance is a "voluntary act." Thus,

³Defendants contend that Metro-North also raised the statute of limitations as an affirmative defense in its Answer (reply, ¶ 4). However, upon a review of the documents, the Court finds that Metro-North raised this defense in its August 5, 2008 Answer to the July 21, 2008 Complaint. The Court notes that defendants' moving papers do not include an answer to the July 21, 2008 Complaint from MTA.

plaintiffs “did not have to be served with a copy of its voluntary act” defendants argue (reply, ¶ 7). Defendants further argue that the caselaw plaintiffs cite is not on point (reply, ¶ 8). The statute of limitations was not tolled by the Order and should be dismissed as time barred, defendants argue (reply, ¶ 9).

Analysis

Dismissal Pursuant to CPLR §3211(a)(5)

CPLR § 3211(a)(5) provides for the dismissal of a cause of action that is time-barred by the applicable statute of limitations. According to Public Authorities Law §2981, a “wrongful death action against a public authority or public benefit corporation shall be commenced within two years of the happening of the death” (*see also Roque v Metropolitan Hosp.*, 292 AD2d 175, 2002 N.Y. Slip Op. 01651 [1st Dept 2002] [“Since plaintiff’s decedent died in September 1996 and the action was not filed until March 1999, the motion court correctly dismissed the action as barred by the two-year Statute of Limitations applicable to wrongful death actions against defendant”]). A wrongful death action can only be maintained by a personal representative of the decedent who is duly appointed to administer the decedent’s estate (McKinney’s Estates, Powers and Trusts Law §5-4.1; *see also Chong v New York City Transit Auth.*, 83 AD2d 546, 547 [2d Dept 1981] [“The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent’s death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent and (4) the appointment of a personal representative of the decedent” (*id.*, citing 21 Carmody-Wait 2d, § 130:21)]).

A “proposed administrator” lacks the capacity to bring a wrongful death action (*see*

Carrick v Central General Hosp., 51 NY2d 242, 246 [1980]). In rejecting a Complaint naming a “proposed administratrix” as the plaintiff in the caption, the Court in *Carrick* held that “since the appointment of a qualified administrator is an essential element of the right to bring suit for wrongful death, plaintiff’s first action, which was commenced prior to the issuance of letters of administration, was ‘tantamount to no suit whatsoever’” (*Carrick v Central General Hosp.* at 247, citing *Carrick v Central General Hosp.*, 71 AD2d 226, 229 [2d Dept 1979]). However, such a defect does not “lie in the means of commencing the action, but rather in the identity of the named plaintiff. While that defect was fatal in the sense that the action was subject to dismissal, it was not the type of defect which precludes application of CPLR 205 (subd. (a))” (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 178 [1979]) (*emphasis added*). In fact, the New York Court of Appeals, citing *George v Mt. Sinai Hosp.*, reversed the Second Department’s decision in *Carrick* dismissing the plaintiff’s wrongful death cause of action for untimeliness “on the basis of its erroneous assumption that the extension of the limitations period provided in CPLR 205 (subd. (a)) was unavailable to plaintiff as a method for reviving that previously dismissed claim” (*Carrick v Central General Hospital*, 51 NY2d 242, 253 [1980]).

CPLR §205(a) provides in pertinent part:

If an action is timely commenced and is terminated *in any other manner than by a voluntary discontinuance*, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.
(*emphasis added*)

The Court in *George v Mt. Sinai Hospital* explains the purpose of CPLR §205(a):

The very function of that subdivision is to provide a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim. The statute by its very nature is applicable in those instances in which the prior action was properly dismissed because of some fatal flaw; thus, to suggest that it should not be applied simply because there was a deadly defect in the prior action seems nonsensical. Indeed, the statute will normally "involve situations in which a suit has been started but, due to an excusable mistake or a procedural defect or ineptitude of counsel or inability to obtain needed evidence, or some other cause that should not be fatal to the claim, the start has been a false one" (1 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 205.03, at p. 2-134).
(*George v Mt. Sinai Hospital* at 178.)

The Appeals Court in *Carrick* went on to hold: "Inasmuch as we conclude that [CPLR §205(a)] may be applied when a prior wrongful death action has been dismissed due to the lack of an appointed administrator, we can see no reason not to permit plaintiff to prosecute her action on behalf of the decedent's distributees" (*Carrick v Central General Hospital*, 51 NY2d 242, 253 [1980]).

In the instant case, decedent died on July 22, 2005. Plaintiffs filed a Complaint against defendants on April 26, 2006. As defendants are public entities, PAL §2981 applies. The April 26, 2006 Complaint was well within the statute of limitations, as the statute was not set to expire until two years after decedent's date of death, or July 22, 2007. However, the April 26, 2006 Complaint was procedurally defective, because it was brought by Mr. Mfum "as the *Proposed Administrator* of the Goods and Chattels" of decedent (April 26, Complaint (*emphasis added*); *Carrick v Central General Hosp.*, 51 NY2d 242, 247 [1980]). The procedural defect was brought to this Court's attention during a Preliminary Conference involving the parties on August 21, 2007. Consequently, on that same day, Judge Edmead issued an Order "discontinuing *without prejudice*" plaintiffs' April 26, 2006 Complaint (*see Order*).

Contrary to defendants' argument, the effect of the Order was to grant plaintiffs a six

month toll of the statute of limitations, pursuant to CPLR §205. See *Censor v Mead Reinsurance Corp.*, 176 AD2d 600 [1st Dept 1991] [applying a CPLR 205(a) toll to a court-ordered discontinuance without prejudice]. Accordingly, plaintiffs had until February 2008 to file a new complaint, curing the defect in the caption. However, plaintiffs did not file a new complaint containing a proper party until July 21, 2008, five months after the toll deadline expired.

Therefore, plaintiffs' July 21, 2008 Complaint is time-barred by the statute of limitations, pursuant to CPLR §3211(a)(5).

In their opposition, plaintiffs point out that they had difficulty securing the appointment of Mr. Mfum as the estate administrator, because decedent's family resided in Ghana (opp., ¶ 6). They argue that the Court should toll the statute of limitations for that reason. Plaintiffs cite CPLR §203 and the case of *Matter of Estate of Richman* (168 Misc 834, 835 [NY Sur 1938]) for the proposition that claims become viable upon the appointment of an administrator (opp., ¶ 8). CPLR §203 addresses methods of computing statutes of limitation *generally*; it does not deal specifically with PAL §2981 or the statutes of limitation in wrongful death actions. *Matter of Estate of Richman* also is not on point; it deals with the issue of whether an action to compel an accounting of an estate was time-barred. Plaintiff also cites *Schultz v Motor Vehicle Acc. Indemnification Corp.* (84 Misc 2d 640 [NY Sup 1976]) for the proposition that "where leave of court was necessary to maintain an action – analogous in our case to the appointment of an administrator – then the limitations period should be tolled until such time as the court permits the action to proceed" (reply, ¶ 9). However, the court in *Schultz* denied plaintiff's application for leave to amend a Complaint five years after the date of death and more than two years after the appointment of an administrator (*Schultz* at 642). And, plaintiffs here never requested leave from

the Court to amend their Complaint.

Even if plaintiffs had requested to leave to amend its Complaint, it is not the practice in New York courts to toll a wrongful death action until a plaintiff has appointed an administrator (*see, e.g., Hammie v City of New York*, 143 AD2d 805, 806 [2 Dept 1988] [holding that a family dispute delaying the appointment of an administrator did not toll the two-year statute of limitations]; *Ortiz v Hertz Corp.*, 212 AD2d 374, 375 [1st Dept 1995] [holding that the plaintiff administrator “was duty bound to seek Letters of Administration on behalf of the decedent’s distributees prior to the running of the two year statute of limitations, particularly where, as here, correspondence establishes that the Estate, by the plaintiff, had retained competent legal counsel” (*id.*)]). Accordingly, plaintiffs’ arguments lack merit.

Plaintiff further argues that it never was served the Order with a notice of entry. “Thus, if movant is claiming the limitation under CPLR 205, it must show that it served the order of notice of entry to start the time running,” plaintiff contends (*opp.*, ¶ 5). It is well settled that the running of the six-month period starts at the date of the termination of an action, and not at the date of service (*McKinney’s CPLR § 205; Pi Ju Tang v St. Francis Hospital*, 2007, 37 AD3d 690 [2d Dept 2007]).

The only disputed issue on this appeal is when the six-month period began to run. CPLR 205(a) clearly provides that the six-month period runs from the date of termination of the earlier action (*see Burns v. Pace Univ.*, 25 A.D.3d 334, 335, 809 N.Y.S.2d 3; *Yates v. Genesee County Hospice Found., Inc.*, 299 A.D.2d 900, 750 N.Y.S.2d 727; *Gesegnet v. Hyman*, 285 A.D.2d 719, 720-721, 726 N.Y.S.2d 812; *Extebank v. Finkelstein*, 188 A.D.2d 513, 591 N.Y.S.2d 434; *Dinerman v. Sutton*, 45 Misc.2d 791, 258 N.Y.S.2d 13). Thus, the six-month period began to run when the District Court dismissed the earlier action and we reject the plaintiff’s contention that the six-month period should be calculated from the date of service of the judgment in the earlier action with notice of entry. (*Pi Ju Tang v St. Francis Hosp.* at 691)

Therefore, plaintiffs’ argument lacks merit.

Dismissal Pursuant to CPLR §3211(a)(8)

CPLR §3211(a)(8) allows for the dismissal of an action where the Court lacks personal jurisdiction over the defendant. CPLR §304 requires that an action be “commenced by filing a summons and complaint or summons with notice.” The filing of the summons and complaint must be timely, within statute of limitations (*Tucker v Leak*, 268 AD2d 320, 320 [1st Dept 2000]). The failure to comply with CPLR §304 is a jurisdictional defect requiring the dismissal of the action, pursuant to CPLR §3211(a)(8) (*Cuccia v H.M. Weiner and Associates*, 234 AD2d 26 [1 Dept 1996]; McKinney’s CPLR § 304). Here, as discussed above, despite being given a six-month toll, pursuant to CPLR §205, plaintiffs failed to file a timely Complaint against defendants. Accordingly, they failed to timely comply with CPLR §304, and dismissal of their Complaint is warranted, pursuant to CPLR §3211(a)(8).

Conclusion

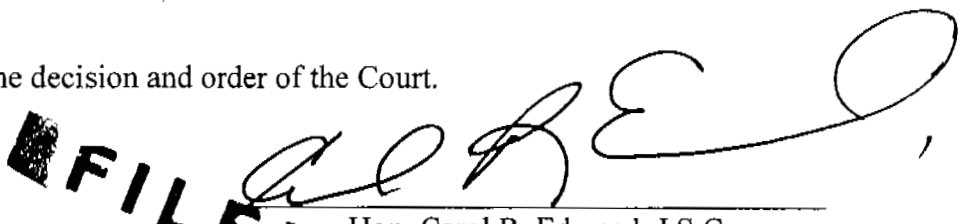
Based on the foregoing, it is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad for an order dismissing the Complaint of plaintiffs Alexander Mfum, as Administrator of the Goods and Chattels of Alex Boakye Yiadom, and Alexander Mfum, Individually, pursuant to CPLR §3211(a)(5) and (8), is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: April 21, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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