

Rosenblum v City of New York
2010 NY Slip Op 31203(U)
May 14, 2010
Supreme Court, New York County
Docket Number: 109743/05
Judge: Barbara Jaffe
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.

5-19-10

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

JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 109743/2005

ROSENBLUM, GLADYS

vs CITY OF NEW YORK

Sequence Number : 003

DISMISS

INDEX NO. 109743/05
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

CAL # 111

The following papers, numbered 1 to 2 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED
1
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAY 19 2010
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/14/10
MAY 14 2010

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

BARBARA JAFFE

-----x
 GLADYS ROSENBLUM,

J.S.C.

Index No. 109743/05

Plaintiff,

Motion Date: 3/8/10

Motion Seq. No.: 003

Argued: 4/20/10

-against-

DECISION AND ORDER

THE CITY OF NEW YORK and DOES 1-10
 INCLUSIVE,

Defendants.
 -----x

BARBARA JAFFE, JSC:

For plaintiff:

Jeffrey S. Schwartz, Esq.
 100 Jericho Quadrangle, Ste. 202
 Jericho, NY 11753
 516-938-3888

For defendant City of New York:

Jessica Wisniewski, ACC
 Michael A. Cardozo
 Corporation Counsel
 100 Church St.
 New York, NY 10007
 212-788-0609

FILED
 MAY 19 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

By notice of motion dated January 28, 2010, defendant City of New York moves pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's complaint against it. Plaintiff opposes the motion.

On July 8, 2004, plaintiff served City with a notice of claim, alleging that on April 14, 2004, she sustained personal injuries as a result of defendants' negligence. (Affirmation of Jessica Wisniewski, ACC, dated Jan. 28, 2010 [Wisniewski Aff.], Exh. A). On July 14, 2005, plaintiff's summons and complaint was marked filed by the New York County Clerk's office. (*Id.*, Exh. B).

City alleges that plaintiff filed her summons and complaint one day past the one-year and 90-day deadline set forth in General Municipal Law (GML) § 50-i, and observes that plaintiff

failed to allege in her complaint that the action was commenced at least 30 days after service of the notice of claim. (*Id.*). It thus contends that the complaint must be dismissed.

Plaintiff asserts that on July 8, 2005, she submitted her summons and complaint to the court clerk for filing, as evidenced by the letter she sent to the clerk with her pleadings, dated July 8, 2005, and the clerk's receipt stamp dated July 11, 2005 on the letter. (Affirmation of Jeffrey S. Schwartz, Esq., dated Feb. 25, 2010 [Schwartz Aff.], Exh. D). She contends that pursuant to CPLR 304, her summons and complaint were filed on July 11, 2005 when the clerk received the papers, and observes that as City failed to raise this issue in its answer, it has waived it. (Wisniewski Aff., Exh. C). Moreover, she maintains that her failure to include in her pleadings the allegation that 30 days had elapsed was inadvertent and submits an amended complaint containing the required language. (Schwartz Aff., Exh. E).

Section 50-i of the GML provides that:

No action or special proceeding shall be prosecuted or maintained against a city . . . for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city . . . unless . . . (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of [a notice of claim] and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based . . .

The one-year and 90-day deadline constitutes a statute of limitations rather than a condition precedent. (*Campbell v City of New York*, 4 NY3d 200 [2005]; *cf* GML 50-e[1][a] [notice of claim, which must be served within 90 days of accrual of claim, is condition precedent]).

Pursuant to CPLR 304(a), an action is commenced when a summons and complaint are

filed with the clerk of the court, which is defined as the delivery of the pleadings to clerk of the court who must then date-stamp them and return a date-stamped copy to the filing party. (CPLR 304[c]). The term “filing” references the clerk’s physical receipt of the papers. (*Grant v Senkowski*, 95 NY2d 605 [2001]). In *Enos v City of Rochester*, the plaintiff mailed the summons and complaint to the clerk on the last day of the one-year and 90-day deadline, and the action was held untimely commenced as the clerk physically received the pleadings after the statute of limitations had expired. (206 AD2d 159 [4th Dept 1994], *lv denied* 1995 WL 42487 [4th Dept 1995]).

Here, plaintiff’s summons and complaint were physically received by the clerk on July 11, 2005, and thus they were timely filed within a year and 90-days of plaintiff’s April 4, 2004 accident. In any event, as City did not raise this issue in its answer, it waived any objection to it. (*See Rubino v City of New York*, 145 AD2d 285 [1st Dept 1989] [City waived defense of statute limitations based on expiration of one-year and 90-day deadline by failing to raise defense either in answer or motion]).

Finally, plaintiff’s failure to include in her pleadings the allegation that the action was commenced at least 30 days after service of the notice of claim does not constitute a jurisdictional defect and may be cured by amending the complaint. (*Commrs. of State Ins. Fund v Bd. of Educ., Arlington Cent. School Dist. No. 1*, 301 AD2d 555 [2d Dept 2003] [discussing similar requirement in Education Law 3813(1)]; *Snyder v Bd. of Educ. of Ramapo School Dist. No. 2, et al.*, 42 AD2d 912 [2d Dept 1983] [deeming complaint amended to include 30-day allegation pursuant to GML 50-i]). Here, as City concedes that the notice of claim was filed on July 8, 2004, it is undisputed that the summons and complaint were filed more than 30 days

thereafter.

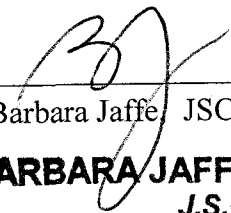
Accordingly, it is hereby

ORDERED, that defendant City's motion to dismiss is denied; it is further

ORDERED, that plaintiff's amended complaint in the proposed form annexed to plaintiff's papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED, that defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

This constitutes the decision and order of the court.



Barbara Jaffe JSC

BARBARA JAFFE
J.S.C.

DATED: May 14, 2010
New York, New York

MAY 14 2010

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE