

**Wadler v City of New York**

2010 NY Slip Op 31809(U)

July 13, 2010

Sup Ct, NY County

Docket Number: 116207/06

Judge: Barbara Jaffe

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

BARBARA JAFFE

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_

PART 5

Index Number : 116207/2006

WADLER, DAVID

vs

CITY OF NEW YORK

Sequence Number : 003

AMEND

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 7/13/10

37  
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

-----X  
DAVID WADLER,

Plaintiff,

-against-

Index No. 116207/06  
Motion Date: 05/25/10  
Motion Seq. No.: 003  
Calendar No.: 124

**DECISION & ORDER**

THE CITY OF NEW YORK and  
THE NEW YORK CITY POLICE DEPARTMENT  
Defendants.

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**  
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**For defendant:**  
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By notice of motion dated February 23, 2010, plaintiff moves pursuant to CPLR 3025 for an order granting him leave to file and serve an amended complaint, restoring the matter, and scheduling a compliance conference. Defendants oppose. For the reasons that follow, plaintiff's motion is denied.

I. UNDISPUTED FACTUAL BACKGROUND

On October 31, 2005, plaintiff, a police officer employed by defendant The New York City Police Department (NYPD), arrived at a police checkpoint outside One Police Plaza in a motor vehicle. (Affirmation of Brad Kauffman, Esq., dated Feb. 23, 2010 [Kauffman Aff.]). The checkpoint consisted of a moving vertical barricade used for screening cars entering the premises and designed to lay flush with the ground to allow for passage of vehicles once cleared. (Affirmation of Jessica Wisniewski, Esq., dated Mar. 23, 2010 [Wisniewski Aff.]). As plaintiff

crossed the barrier, the police officer assigned to operate the barrier raised it, thereby lifting plaintiff and his vehicle off the ground and injuring him. (Kauffman Aff., Exh. A).

## II. PERTINENT PROCEDURAL BACKGROUND

On October 26, 2006, plaintiff served defendants with a summons and complaint advancing a single cause of action for negligence. (Kauffman Aff., Exh. C). By decision and order dated February 28, 2008, another justice of this court summarily dismissed plaintiff's claim, holding that it was barred by the "firefighter's rule." (*Id.*, Exh. D). By decision and order dated December 18, 2008, the Appellate Division affirmed (*id.*, Exh. M), and by decision and order dated February 18, 2010, the Court of Appeals affirmed (*id.*, Exh. O).

Plaintiff now seeks to amend his complaint to include a violation of General Municipal Law (GML) § 205-e, alleging that defendants failed to comply with Labor Law § 27-a-3, which requires that employers supply a work environment free of hazards that are likely to cause death or serious injury.

## III. ANALYSIS

### A. Contentions

Plaintiff explains that he did not include with his original complaint a cause of action based on GML § 205-e because defendants failed to furnish him with certain documents supporting the claim, and contends that defendants will suffer no prejudice if leave is granted. (Kaufman Aff.).

Defendant asserts that plaintiff is barred by CPLR 205(a) from amending his complaint, that the Court of Appeals' decision constitutes "a final judgment on the merits," that the proposed amended complaint is barred by *res judicata* and lacks merit, and that it will be prejudiced if leave is granted. (Wisniewski Aff.).

In reply, plaintiff maintains that absent entry of the Court of Appeals' decision, the judgment is neither final nor barred by CPLR 205(a), is not *res judicata*, and the proposed claim is meritorious. (Reply Affirmation of Brad A. Kaufman, Esq., dated Apr. 22, 2010).

#### B. Analysis

CPLR 3025(b) permits a party to amend his pleadings "at any time by leave of court," and requires that "[l]eave shall be freely given upon such terms as may be just." Here, however, the award of summary judgment constitutes a final judgment on the merits (*Collins v Betram Yacht Corp.*, 42 NY2d 1033 [1977]), and its entry is merely ministerial (73 NY Jur 2d, Judgments § 10 [2010]). Therefore, notwithstanding that the judgment has not yet been submitted for entry, it is final, the complaint has been dismissed, and there is no complaint capable of amendment.

Pursuant to CPLR 205(a), a plaintiff "may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination" of the action so long as it is timely commenced and not terminated by, *inter alia*, "a final judgment upon the merits." Here, however, plaintiff does not seek to bring a new action. Consequently, CPLR 205(a) is inapplicable.

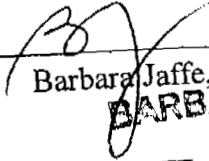
As plaintiff is barred from amending his complaint for the reasons discussed above, the remaining issues need not be addressed.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting leave to file and serve an amended complaint, and for an order restoring this matter and scheduling a conference, is denied.

This constitutes the decision and judgment of the court.

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: July 13, 2010  
New York, New York

**UNFILED JUDGMENT**

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