

**Jones v Pronto Car Serv.**

2010 NY Slip Op 32934(U)

September 29, 2010

Sup Ct, NY County

Docket Number: 400310/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Jones, Patricia

INDEX NO. 400310/10

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

Pronto

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for dismiss/cross to amend

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 4  
2, 3, 5  
6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
OCT 04 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 9/29/10  
SEP 29 2010

BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

PATRICIA JONES,

Plaintiff,

-against-

PRONTO CAR SERVICE, "JOHN DOE,"  
AMERICAN TRANSIT INSURANCE CO.,  
MOHAMMAD BUTT and MICHAEL  
COUSIN-HAYES,

Defendants.

-----X

BARBARA JAFFE, JSC:

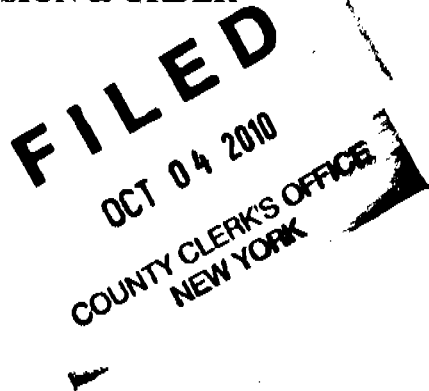
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516-873-1902

**For defendants Cousin-Hayes:**  
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Michael A. Cardozo  
Corporation Counsel  
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New York, NY 10007  
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Index No. 400310/10  
Motion Date: 8/17/10  
Motion Seq. No.: 001  
Calendar No.: 52

**DECISION & ORDER**



By notice of motion dated March 3, 2010, defendant Michael Cousin-Hayes (Cousin-Hayes) moves pursuant to CPLR 3211(a) for an order dismissing plaintiff's claims against him, or, in the alternative, for an order pursuant to CPLR 3212 summarily dismissing plaintiff's claims against him. Plaintiff and co-defendant Mohammed Butt (Butt) oppose.

By notice of cross-motion dated May 19, 2010, plaintiff moves pursuant to CPLR 3025(b) for an order granting leave to amend her complaint to add City as a defendant, and pursuant to GML § 50-e(5) for an order granting her leave to file a late notice of claim against City. For the reasons that follow, Cousin-Hayes's motion is denied, and plaintiff's cross-motion is denied.

## I. UNDISPUTED FACTS

On March 25, 2007, plaintiff was a passenger in an automobile driven by Butt and allegedly owned by defendant Pronto Car Service (Pronto), and was injured in a collision with a vehicle driven by Cousin-Hayes, a police officer, at the intersection of St. Nicholas Avenue and West 115<sup>th</sup> Street in Manhattan. (Affirmation of Bradley Braut, ACC, dated March 3, 2010 [Braut Aff.], Exh. B).

A police report completed that day names Cousin-Hayes and Butt as the drivers of the two vehicles. (*Id.*, Exh. 4). On the second page of the report, Cousin-Hayes's vehicle is described as an NYPD vehicle; it includes Cousin-Hayes's shield number and command. A box at the bottom of the second page, next to the words "routine patrol," is checked. (*Id.*).

## II. PERTINENT PROCEDURAL BACKGROUND

On July 23, 2007, Butt served a signed and sworn claim against City for property damage arising from the accident, alleging that Cousin-Hayes's car had run a red light. (Reply in Opposition to Cross-Motion of Bradley Braut, ACC, dated June 11, 2010 [Braut Reply Aff.], Exh. 1). Attached to the claim are both pages of the police report. (*Id.*).

On February 19, 2009, plaintiff commenced this action by filing a summons and complaint in Kings County. (Braut Aff., Exh. 3). On September 4, 2009, the Corporation Counsel of the City of New York (Corporation Counsel) submitted an answer on behalf of Cousin-Hayes, wherein he denied owning the vehicle and stated that City owned it and that he had operated it within the scope of his employment. (*Id.*, Exh. B). By order dated January 8, 2010, the action was transferred to New York County. (*Id.*, Exh. C).

### III. CONTENTIONS

Cousin-Hayes argues that the claim against him must be dismissed because plaintiff did not serve a notice of claim on City as required by GML § 50-e and § 50-k(6), that the action was untimely filed pursuant to GML § 50-i, and that the court has no discretion to grant leave to amend. (Braut Aff.).

In opposition, plaintiff argues that if Cousin-Hayes was not acting within the scope of his employment, she need not serve City with a notice of claim, and in any event ought not be deprived of a reasonable opportunity for discovery as to whether he was acting within the scope of his employment. (Affirmation in Opposition of John P. Anderson, Esq., dated May 19, 2010). Moreover, she maintains that City is responsible for her failure to serve the notice of claim timely, as the police report does not reflect the identity of the owner of the vehicle driven by Cousin-Hayes or a legitimate address for him. (*Id.*).

Butt asserts that there exists an issue of fact as to whether Cousin-Hayes was acting within the scope of his employment, and that the police report does not identify Cousin-Hayes as a police officer. (Affirmation in Support of Cross-Motion of Janice M. Hansen, Esq., dated June 11, 2010).

In support of her cross-motion, plaintiff argues that the claim against City arises out of the same conduct and occurrence as the originally filed causes of action, that City has actual knowledge of the claims against it, that plaintiff made an excusable error given the absence of any indication in the police report as to the vehicle's owner or Cousin-Hayes's correct address, and that City will not suffer prejudice as a result of the late notice of claim. (Affirmation in Support of Cross-Motion of John P. Anderson, Esq., dated May 19, 2010).

In reply, Cousin-Hayes alleges that the police report contains the information necessary for plaintiff to know that he was a police officer acting within the scope of his employment, that the Corporation Counsel has decided that he was acting within the scope of his employment, and that the court has no discretion to either add the City as a party or grant the late notice of claim because leave is sought beyond the expiration of the statute of limitations. (Braut Reply Aff.).

#### IV. DISCUSSION

GML § 50-i requires that, prior to the commencement of an action against City for personal injury or damage to property, a notice of claim must be served on City, and that the action must be commenced within one year and 90 days of the incident. Pursuant to GML § 50-e(1)(a), where the action sounds in tort, the notice of claim must be served within 90 days of the claim, and pursuant to section 50-e(5), a court may grant a plaintiff leave to serve a late notice of claim if the 90 days has expired. However, permission to file a late notice of claim does not extend the one-year and 90-day period. (GML § 50-e[5]; 50-i[3]). Thus, if more than one year and 90 days has elapsed, a court may not grant leave to serve notice beyond it. (*Pierson v City of New York*, 56 NY2d 950, 955 [1982]; accord *Mullins v East Haven Nursing and Rehabilitation Ctr., LLC*, 66 AD3d 578, 579 [1<sup>st</sup> Dept 2009]).

Here, the limitations period applies only if Cousin-Hayes was acting within the scope of his employment (GML § 50-k[1], [2]) and in that case, City must indemnify him (GML § 50-k[1][e], [2]), and a notice of claim must be timely served on it. On the other hand, if plaintiff proves that Cousin-Hayes was acting beyond the scope of his employment, City cannot be held liable for his conduct. (See *Pinkney v City of New York*, 52 AD3d 242 [City not liable for police officer's actions beyond scope of employment]; *Campos v City of New York*, 32 AD2d 3d 287

[1<sup>st</sup> Dept 2006] [same]). Consequently, it must initially be determined whether or not Cousin-Hayes was acting within the scope of his employment.

A determination as to whether or not an employee was acting within the scope of his or her employment depends on the specific facts and circumstances of the case. (*Piquette v City of New York*, 4 AD3d 402, 403 [2d Dept 2004], *lv denied* 3 NY3d 605). Here, the sole evidence that Cousin-Hayes was acting within the scope of his employment is the box that was checked off on the police report indicating that he was on routine patrol at the time of the accident; no specific facts and circumstances are furnished therein and counsel's affirmation as to the scope of his employment has no probative value (*see Kelly v Rubin*, 224 AD2d 262 [1<sup>st</sup> Dept 1996] [facts alleged only in counsel's affirmation are without evidentiary value]). There is thus an insufficient factual basis for finding that Cousin-Hayes was acting within the scope of his duties, notwithstanding Corporation Counsel's undertaking to represent him pursuant to GML § 50-k(2). (*Cf Vasquez v City of New York*, 217 AD2d 614, 615 [2d Dept 1995] [Corporation Counsel's determination that officer was not working within scope of employment not binding on plaintiff]). As further discovery may illuminate the issue, a summary disposition is inappropriate (CPLR 3212[f]).

However, as the statute of limitations had already elapsed by the time plaintiff filed her original complaint, plaintiff may not proceed against City even if the proposed amendment were to relate back to the commencement of the action. (*See Williams v City of New York*, 97 AD2d 372 [1<sup>st</sup> Dept 1983] [limitations period expired prior to commencement]).

#### V. CONCLUSION

For all of the foregoing reasons, it is hereby

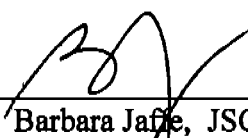
ORDERED, that the motion by defendant Michael Cousin-Hayes for an order summarily dismissing the complaint against him is denied; it is further

ORDERED, that plaintiff's cross-motion is denied in its entirety; it is further

ORDERED, that plaintiff may proceed with discovery from Michael Cousin-Hayes on the issue of whether he was acting within the scope of his employment; and it is further

ORDERED, that all parties shall appear at a preliminary conference on October 19, 2010, at 2 p.m., in room 103, at 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
**J.S.C.**

DATED: September 29, 2010  
New York, New York

**FILED**  
**OCT 04 2010**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**