

**Santana v Long Is. R.R.**

2010 NY Slip Op 33144(U)

November 1, 2010

Supreme Court, Nassau County

Docket Number: 2074/2010

Judge: Joel K. Asarch

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU: I.A. PART 19**

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**CAROLINE SANTANA,**

Plaintiff,

-against-

**LONG ISLAND RAILROAD, TISHMAN  
CONSTRUCTION CORPORATION and BECHTEL,**

Defendants.

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**DECISION AND ORDER**

Index No.: 2074/2010

Initial Return Date: 04/09/10  
Motion Sequence No.: 001

**P R E S E N T :**

**HON. JOEL K. ASARCH,  
Justice of the Supreme Court.**

The following named papers numbered 1 to 5 were submitted to this Court on this Notice of Motion on June 4, 2010:

*Papers numbered:*

Notice of Motion and Affirmation annexed	1-2
Affirmation in Opposition	3
Reply Affirmation and Affidavit	4-5

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The motion by the Defendant LONG ISLAND RAILROAD COMPANY for an Order pursuant to C.P.L.R. 3211(a)(5) dismissing the Summons with Notice is decided as follows:

The Plaintiff commenced an action seeking damages for personal injuries allegedly sustained as a result of a railroad train collision at or near the train station terminal located in Jamaica, New York. The Defendant LONG ISLAND RAILROAD COMPANY (sued herein as "LONG ISLAND RAILROAD") moves for dismissal of the action pursuant to C.P.L.R. 3211(a)(5) and Public Authorities Law Section 1276(2), based upon the purported untimely commencement of the action due to the expiration of the applicable statute of limitations. The Plaintiff opposes the motion.

The within action was commenced by the filing of a Summons with Notice with the Clerk of the County of Nassau on January 29, 2010. While no copy of the Summons with Notice is

attached to the moving papers (notwithstanding a reference to same being annexed as Exhibit "A"), the Plaintiff has subsequently served and attached to her opposition a copy of her Verified Complaint. Neither party disputes the filing date of the Summons with Notice [the interposition date pursuant to C.P.L.R. 203(a) and 304(a)].

According to the Complaint and Affirmation of counsel for the Plaintiff, it appears that on November 19, 2008 and while a passenger on a LONG ISLAND RAILROAD COMPANY (hereinafter "L.I.R.R.") westbound Babylon-line railroad train stopped at or near the Jamaica station terminal, a westbound Port Jefferson-line railroad train entering the same station collided with the train on which the Plaintiff was a passenger. As a result of the impact, the Plaintiff alleges that she sustained serious personal injuries.

"The effective statute of limitations for actions in tort against the Long Island Railroad has repeatedly been held to be one year and thirty days after the occurrence of the alleged accident. (Public Authorities Law 1276[1], [2], and [6]; Andersen v. Long Island Railroad, 59 N.Y.2d 657, 463 N.Y.S.2d 407, 450 N.E.2d 213, rearg. den., 60 N.Y.2d 586, 467 N.Y.S.2d 1031, 454 N.E.2d 127)." Burgess v. Long Island R.R. Authority, 172 A.D.2d 302, 568 N.Y.S.2d 385 (1st Dept.), *aff'd* 79 N.Y.2d 777 (1991). In the instant matter, the cause of action accrued on November 19, 2008 (the date of the collision) and the subsequent claim was interposed on January 29, 2010 (the date the within action was commenced by Summons with Notice). Thus, the tort action was commenced against the Defendant L.I.R.R. one year and 71 days after the cause of action actually accrued – some forty-one days beyond applicable statutory time period allotted. Unless the statute of limitations is tolled or may be extended for permissible cause, the instant tort action appears on its face to be untimely. *See* Public Authorities Law Section 1276; Sudakin v. Long Island Rail Road Company, 32 A.D.2d 560, 300 N.Y.S.2d 371 (2nd Dept. 1969).

It appears that the initial filing of the requisite notice of the claim on or about December 18, 2008 was timely pursuant to Public Authorities Law Section 1276(1). Thereafter, counsel for the Plaintiff negotiated with railroad personnel assigned to investigate the matter and in an attempt to settle such claim. Counsel for the Plaintiff contends that he submitted proof requested by the Defendant L.I.R.R. and, in fact, an offer of settlement was made by the Defendant L.I.R.R. which was ultimately rejected by the Plaintiff. Thereafter, on November 9, 2009 (and still within the applicable limitations period), the Defendant L.I.R.R. served a notice to examine for testimony to be taken on January 22, 2010 (following the expiration of the limitations period) in furtherance of such investigation. Notwithstanding the request by counsel for the Plaintiff to advance the date of the hearing, such hearing was conducted on January 22, 2010 as noticed, following which the Defendant L.I.R.R. requested additional documentation. The Plaintiff commenced her action five (5) business days later.

The Plaintiff argues that at the very least, a hearing should be held to determine if the L.I.R.R. “knowingly engaged in an orchestrated practice to deceive the plaintiff[]” to “misrepresent their intention to settle this claim beyond the statutory period and induce further delay in filing of the action”, and whether such the Defendant should be equitably estopped from raising the defense of statute of limitations based upon such purported conduct. The Court disagrees.

As the Appellate Division, Second Department noted in Impastato v. Metropolitan Transp. Authority, 226 A.D.2d 587, 641 N.Y.S.2d 362 (2nd Dept. 1996), “[s]ince the plaintiffs commenced this action after the expiration of the applicable limitations period (see, Public Authorities Law 1276[2]), the Supreme Court properly granted the defendants’ motion to dismiss the complaint [citation omitted]. Contrary to the plaintiffs’ contention, the defendants’ service of a notice for an oral examination of the plaintiffs did not toll the limitations period (citations omitted)”.

Once the initial thirty day period expired following service of the notice by counsel for the Plaintiff (*see* Public Authorities Law Section 1276(1)), there was no absolutely no bar to the Plaintiff commencing the action and preserving her rights, no matter the administrative remedies available. “Regardless of when the oral examination took place, plaintiff could have commenced the action any time ... after [January 17, 2009], 30 days after the notice of claim was served. He did not file the [Summons with Notice] until [January 29, 2010], which was beyond the one-year-and-30-day limit (citation omitted),” Stillman v. New Jersey Transit, 224 A.D.2d 348, 638 N.Y.S.2d 65 (1st Dept. 1996). The record before this Court is devoid of any evidence that the Plaintiff was instructed or enticed not to pursue its legal remedies during negotiations nor that the Defendant L.I.R.R. intentionally mislead the Plaintiff to refrain from commencing such action during the applicable statute of limitations period. According to the Affidavit of JAMES F. RICE, the investigator assigned by the Defendant L.I.R.R., sworn to on May 6, 2010, the attorney for the Plaintiff actually indicated that this matter would have to be placed into suit following the rejection by the Plaintiff of the offer of settlement.

Equitable estoppel is applied by the courts in only the most egregious of situations. *See e.g.* Simcuski v. Saeli, 44 N.Y.2d 442 (1978) [medical malpractice]; Murphy v. Wegman’s Food Market, Inc., 140 A.D.2d 973, 529 N.Y.S.2d 648 (4th Dept.), *appeal denied* 72 N.Y.2d 808 (1988) [slip and fall]. In Terry v. Long Island R.R., 207 A.D.2d 881, 616 N.Y.S.2d 910 (2nd Dept. 1994), the Court stated that:

[A] defendant may be estopped from pleading the Statute of Limitations only where the plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action (citations omitted). The instant record establishes that defendants’ claims adjuster maintained conventional communication with the plaintiff’s counsel, and requested proof of liability and damages. In addition, he indicated that he would be willing to discuss settlement after the plaintiff’s surgery ... by which time the Statute of Limitations would have run. Such inquiries and allusions to possible future settlement negotiations do not give rise

to an estoppel, where, as here, there is no evidence that the defendants intended thereby to lull the plaintiff into inactivity until after the expiration of the Statute of Limitations (citations omitted).”

Accordingly, there is no sound basis for the Court to apply the doctrine of equitable estoppel against the Defendant L.I.R.R. under the facts and circumstances of this case.

Finally, the argument proffered by the Plaintiff that the other Defendants may seek contribution and/or indemnification from the Defendant L.I.R.R. is irrelevant to the pending motion. The sole issue before the Court is whether the Defendant L.I.R.R. can be compelled to defend a direct cause of action brought by the Plaintiff in an untimely fashion – not whether it has a duty to contribute or indemnify a Defendant who has paid in excess of his or her apportioned share.

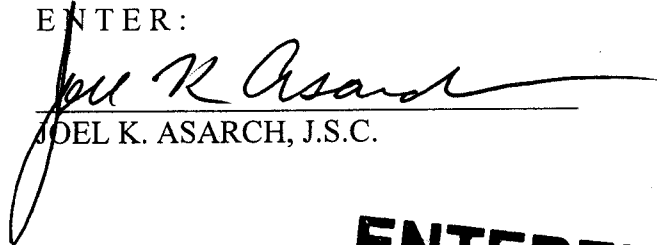
Accordingly, after due deliberation, it is

ORDERED, that the motion of the Defendant LONG ISLAND RAILROAD COMPANY is **granted** and the Summons with Notice and Complaint are hereby dismissed as against the Defendant LONG ISLAND RAILROAD COMPANY, together with any cross-claims asserted by the Co-Defendants against the Defendant LONG ISLAND RAILROAD COMPANY.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
November 1, 2010

ENTER:

  
JOEL K. ASARCH, J.S.C.

Copies mailed to:

- Paul M. Murphy, Esq.  
Attorney for Plaintiff
- J. Dennis McGrath, Esq.  
Attorney for Defendant L.I.R.R.
- Burns, Russo, Tamigi & Reardon, LLP  
Attorneys for Defendant Tishman
- Landman Corsi Ballaine & Ford, P.C.  
Attorneys for Defendant Bechtel

**ENTERED**  
NOV 04 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE