

**Castillo v City of New York**

2010 NY Slip Op 33421(U)

December 10, 2010

Supreme Court, New York County

Docket Number: 104247/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C.  
Justice

PART 52

MARLBEL CASTILLO,  
- v -  
CITY OF N.Y.

INDEX NO. 104247/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

**FILED**

DEC 14 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/10/10 CSK  
CYNTHIA S. KERN 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 52

-----X  
MARIBEL CASTILLO,

Plaintiff,  
-against-

Index No. 104247/2010

DECISION/ORDER

CITY OF NEW YORK and NEW YORK CITY  
DEPARTMENT OF HOUSING AND PRESERVATION,

Defendants.  
-----X

**FILED**

DEC 14 2010

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the <sup>NEW YORK</sup> ~~reciprocity~~ <sup>COUNTY CLERK'S OFFICE</sup> motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action for injuries allegedly sustained when a ceiling collapsed in her apartment. Plaintiff seeks an order consolidating this action with an action bearing Index No. 105875/99 for identical claims. Defendants the City of New York and the New York City Department of Housing and Preservation (the "City") cross-move for an order denying plaintiff's request for consolidation and for summary judgment or dismissal of the complaint against the City. Plaintiff's request is denied and the City's cross-motion is granted for the reasons set forth below.

The relevant facts are as follows. On December 9, 1998, plaintiff allegedly sustained injuries when a ceiling collapsed in her apartment. Plaintiff initiated a special proceeding bearing Index No. 105875/99 seeking leave to serve a late Notice of Claim on the City of New York (the "City"). This request was granted by the court and that action was disposed of as the ultimate relief of leave to file a late notice of claim was granted. On February 25, 2000, plaintiff improperly attempted to commence a separate action for the underlying personal injury claims using the same index number from the special proceeding in which plaintiff sought leave to serve a late notice of claim. After improperly filing the summons and complaint, plaintiff did not take any action to litigate the underlying action until over ten years later when plaintiff purchased a new index number and served the City with a new summons and complaint for claims identical to those alleged in the improperly filed complaint bearing Index No. 105875/99. Plaintiff now seeks an order from this court consolidating those two actions.

Plaintiff's request to consolidate the instant action with the complaint improperly filed under Index No. 105875/99 is denied. First, the complaint filed under Index No. 105875/99 is a nullity because the plaintiff failed to pay the filing fee and obtain a new index number. In accordance with CPLR §§ 304 and 306-a, a plaintiff must pay a filing fee and obtain an index number to commence an action. Therefore, "service of process without first paying the filing fee and filing the initiatory papers is a nullity, the action or proceeding never having been properly commenced." *Gershel v. Porr*, 89 N.Y.2d 327, 330 (1996).

Moreover, plaintiff is now time-barred from asserting claims for alleged injuries sustained on December 9, 1998 as over ten years have passed since the statute of limitations for filing an action against the City expired. Pursuant to General Municipal Law § 50-i(1)(c), the

statute of limitations for bringing a personal injury action against the City is “one year and ninety days after the happening of the event upon which the claim is based.”

Finally, although CPLR 2001 provides the court with discretion to “permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected”, the court will not exercise its discretion provided under CPLR 2001 in the instant action to deem the commencement of this action as timely by virtue of plaintiff’s admittedly improper filing of the summons and complaint on February 25, 2000 as an over ten-year delay in litigating this action would substantially affect the ability of the City to defend against the claims. Accordingly, plaintiff’s request for consolidation is denied as there is no viable action with which to consolidate this action.

Plaintiff’s reliance on *MacLeod v. County of Nassau*, 75 A.D.3d 57 (2d Dept 2010) is unpersuasive. The court in *MacLeod* utilized CPLR 2001 to deem the date when plaintiffs filed their complaint under an index number assigned to a related proceeding to be the date of the actual commencement of the action where plaintiffs later paid an additional index number fee. In *MacLeod*, the parties were not prejudiced in any way because they had been actively litigating the case when they discovered that the summons and complaint bore the index number assigned to a related proceeding. In the instant action, as the plaintiff had not taken any action whatsoever for over ten years after improperly filing the summons and complaint, the City would be substantially prejudiced in being put in a position to defend an over ten-year old claim. Therefore, the analysis in *MacLeod* does not apply to the instant action.

Accordingly, plaintiff’s motion seeking an order consolidating the instant action with the

action bearing Index No. 105875/99 is denied. The City's cross-motion seeking dismissal of this action is granted. This constitutes the decision and order of the court.

Dated: 12/10/10

Enter:           egc          

J.S.C.

**CYNTHIA S. KERN**  
J.S.C.

**FILED**  
DEC 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE