

Lara v City of New York
2011 NY Slip Op 30730(U)
March 25, 2011
Supreme Court, New York County
Docket Number: 103608/2010
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.

PART 5

Index Number : 103608/2010

LARA, JOSE

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

EXTEND TIME

CAL # 64

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1

2

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

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

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/25/11

MAR 25 2011

[Signature]
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
JOSE LARA,

Plaintiff,

-against-

Index No. 103608/10

Argued: 2/15/11
Mot. Seq. No.: 001
Cal. No.: 64

DECISION AND ORDER

THE CITY OF NEW YORK, *et al.*,

Defendants.

-----X
BARBARA JAFFE, J.:

FILED

MAR 30 2011

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NEW YORK
COUNTY CLERK'S OFFICE
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By notice of motion dated October 25, 2010, plaintiff moves pursuant to CPLR 306-b for an order extending his time to serve, *nunc pro tunc*, the summons and complaint upon defendant police officers. Defendant City of New York opposes the motion.

I. BACKGROUND

On April 19, 2009, plaintiff was allegedly assaulted by the officers, arrested, charged with resisting arrest and disorderly conduct, and eventually released on his own recognizance.

(Affirmation of Jeffrey L. Emdin, Esq., dated Oct. 21, 2010 [Emdin Aff.]).

On May 12, 2009, plaintiff served on City a notice of claim, naming only City as a defendant and alleging that he had been falsely arrested, falsely imprisoned, assaulted and battered, humiliated and abused, subjected to excessive use of force, intentionally subjected to emotional distress, and had his federal and state civil constitutional rights violated by members

of the New York City Police Department and City while unnamed officers were acting within the scope of their employment. (Affirmation of Colin Marville, ACC, dated Nov. 16, 2010 [Marville Aff.], Exh. A).

On January 22, 2010, all criminal charges against plaintiff were dismissed. (Ermdin Aff.). On or about March 19, 2010, plaintiff filed his summons and complaint, naming City and the officers as defendants, and alleging false imprisonment, false arrest, assault and battery, negligence, malicious prosecution, violations of his federal constitutional rights under 42 USC 1983, and intentional infliction of emotional distress as his causes of action, and on or about March 25, 2010, served it on City. (*Id.*, Exh. A). On April 23, 2010, City served its answer. (*Id.*, Exh. C).

II. CONTENTIONS

According to plaintiff's counsel, plaintiff's summons and complaint was served on the officers by counsel's former employee, who left his employment without signing the affidavits of service. Plaintiff thus requests an extension of time in the interest of justice to re-serve the officers, observing that the statute of limitations has not yet run on his claims and no discovery has taken place. Moreover, he alleges that his claims are meritorious, submitting an affidavit detailing the incident and the officers' alleged actions, and denies that the officers have been prejudiced by his three-month delay as they received notice of the alleged incident by the filing of his notice of claim, as City possesses the applicable criminal records, and as City was served timely with the summons and complaint naming them. (*Id.*, Affidavit of Jose Lara, dated Oct. 25, 2010).

City opposes on the ground that plaintiff did not assert any claims against the officers or

name them in his notice of claim and did not move for leave to serve a late notice of claim, and thus his proposed state law claims against them are time-barred. City also asserts that plaintiff's civil rights claims must be dismissed as they were not pleaded with specificity. (Marville Aff.).

III. ANALYSIS

Pursuant to CPLR 306-b, if service of a summons and complaint is not made within 120 days after its filing, the court may extend the time for service upon good cause shown or in the interest of justice. In determining whether the interest of justice warrants granting an extension, the court may consider "the plaintiff's diligence, or lack thereof [in attempting to serve] along with any other relevant factor . . . including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]). However, the court may not extend the time to serve a defendant against which an action was never validly commenced. (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C306-b:3 [2010 main vol]; *Henriquez v Inserra Supermarkets, Inc.*, 68 AD3d 927 [2d Dept 2009] [as action against defendant was untimely commenced, court lacked authority to extend plaintiffs' time to serve defendant]).

The service of a notice of claim within 90 days after the accrual of a cause of action is a condition precedent to the commencement of a tort action against City. (General Municipal Law [GML] 50-a[1][a]; GML 50-i[1][a]; *Shahid v City of New York*, 50 AD3d 770 [2d Dept 2008]). The notice of claim must identify any City employee against which a plaintiff intends to bring a cause of action, and the failure to do so requires dismissal of the cause of action. (*Tannenbaum v City of New York*, 30 AD3d 357 [1st Dept 2006]). Moreover, a personal injury claim against City

must be commenced within one year and 90 days of the accrual of the claim. (GML 50-i[1]).

Absent any dispute that plaintiff did not identify the officers in his notice of claim and that he failed to move for leave to amend or serve a late notice of claim before the statute of limitations expired on his state law claims, these claims were time-barred by the time that plaintiff filed his summons and complaint. Thus, there is no ground upon which to grant plaintiff an extension of time to serve the officers with a summons and complaint containing these claims. (*See Gonzalez v New York City Health and Hosps. Corp.*, 29 AD3d 369 [1st Dept 2006] [as action was commenced more than one year and 90 days after claim arose, it was time-barred when summons and complaint was filed and thus no service period to extend]).

However, as plaintiff was not required to plead his federal civil rights claims in his notice of claim (*Tannenbaum*, 30 AD3d at 358), and as these claims are not time-barred, plaintiff has established his entitlement to an order extending his time to serve a summons and complaint containing his federal claims by showing that he attempted to serve the officers within the 120-day period, that his claims are meritorious, that he delayed only three months in moving for an extension of time, and that defendants have not been prejudiced.

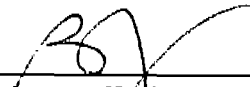
City's application for dismissal of plaintiff's federal civil rights claims is improperly interposed absent a notice of cross-motion seeking such relief. (CPLR 2215; Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2215:1D [2010 main vol]; Siegel, NY Prac § 249 [3d ed]; *see Rinaldi v Rochford*, 77 AD3d 720 [2d Dept 2010] [to extent plaintiff requested relief in opposition to defendant's motion, relief should have been sought in notice of cross-motion]; *Chun v North Am. Mtge. Co.*, 285 AD2d 42 [1st Dept 2001] [court had no jurisdiction to grant relief to defendants absent notice of cross motion]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to extend the time to serve his complaint upon the four officers named therein is granted to the extent that plaintiff may serve an amended complaint, removing any reference to his state law claims against the officers, upon all defendants within 120 days of the date of this order with notice of entry.

ENTER:



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

DATED: March 25, 2011
New York, New York

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE