

Coleman v City of New York

2011 NY Slip Op 31954(U)

June 29, 2011

Sup Ct, NY County

Docket Number: 116188/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 5

COLEMAN, UNIQUE
- v -
CITY OF N.Y.

INDEX NO. 116188/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. 19

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

~~ACCOMPANYING DECISION / ORDER~~

Dated: 6-29-11
JUN 29 2011

BARBARA JAFFE
J.S.C. 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

UNIQUE COLEMAN,

Plaintiff,

-against-

Index No. 116188/10
Argued: 4/14/11
Mot. Seq. No.: 001
Cal. No.: 19

DECISION AND ORDER

THE CITY OF NEW YORK, P.O. LYNN RUGER,
SHIELD #26344, INDIVIDUALLY AND AS A
POLICE OFFICER, P.O. ANDREW BURRAFATO,
SHIELD #21393, INDIVIDUALLY AND AS A
POLICE OFFICER, and POLICE OFFICER JOHN
DOE, INDIVIDUALLY AND AS AN OFFICER,

Defendants.

FILED

JUL 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X

BARBARA JAFFE, J.:

For plaintiff:
Jeffrey L. Emdin, Esq.
Emdin & Russell, LLP
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212-683-3995

For defendant City:
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By notice of motion dated April 1, 2011, plaintiff moves, without opposition, pursuant to CPLR 306(b) for an order extending her time to serve, *nunc pro tunc*, the summons and complaint upon defendants New York City police officers and to permit alternative service on them.

I. BACKGROUND

On January 16, 2010, plaintiff was allegedly assaulted and arrested by the named officers, charged with assault in the third degree, obstruction of governmental administration, resisting arrest, and unlawful possession of marijuana, and eventually released on her own recognizance. (Affirmation of Jeffrey L. Emdin, Esq., dated April 1, 2011 [Emdin Aff.], Exh. A).

Proposed defendant, Officer Ruger, in the criminal court complaint she filed against plaintiff, confirms that both she and proposed defendant, Officer Burrafato, serve in the Patrol Borough Manhattan North Street Crime Unit. (Emdin Aff., Exh. C).

On September, 8, 2010, all of the charges against plaintiff were dismissed. (*Id.*) On or about December 8, 2010, she filed her summons and complaint, naming as defendants City and the officers, and advancing causes for action for false imprisonment, false arrest, assault and battery, negligence, violations of her federal constitutional rights under 42 USC 1983, intentional infliction of emotional distress, and malicious prosecution. (*Id.*) City joined issue with its answer. (*Id.*)

On March 3, 4, and 9, 2011, plaintiff learned that the officers were stationed at the Manhattan North Anti Crime Unit at 530 West 126th Street. Two attempts were made to serve them, one on January 5, 2011 at the 25th precinct located at 120 East 119th Street, and the other on January 7, 2011 at the Manhattan North Anti Crime Unit. (Emdin Aff.). The officers have not been served. (*Id.*)

II. CONTENTIONS

Plaintiff alleges that good faith attempts were made to serve the officers and that despite information to the contrary, precinct personnel denied that the officers worked there. She thus seeks an extension of time to serve the officers along with permission to employ an alternative mode of service. (*Id.*)

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 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 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 the 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 evidence that plaintiff identified the officers in a notice of claim, there is no basis for extending the time to serve the officers with a summons and complaint containing the state law claims. (See *Gonzalez v New York City Health and Hosps. Corp.*, 29 AD3d 369 [1st Dept 2006] [as action 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 need not plead her federal civil rights claims in her notice of claim (*Tannenbaum*, 30 AD3d at 358), and as these claims are not time-barred, plaintiff has established her entitlement to an order extending her time to serve a summons and complaint containing her federal claims as she twice attempted to serve the officers within the 120-day period and at their workplace and there is no evidence that defendants are prejudiced by a delay in service.

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:



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

DATED: June 29, 2011
New York, New York

JUN 29 2011

FILED
JUL 03 2011
COUNTY CLERK'S OFFICE