

**McLean v Port Auth. of N.Y. & N.J.**

2011 NY Slip Op 33707(U)

May 10, 2011

Sup Ct, Bronx County

Docket Number: 307196/10

Judge: Mary Ann Brigantti-Hughes

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

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**PRESENT:** Honorable Mary Ann Brigantti-Hughes

-----X  
KAMALL A. McLEAN,  
Plaintiff,

-against-

**DECISION / ORDER**  
Index No. 307196/10

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY and COVENANT AVIATION  
SECURITY, LLC.,

Defendants.  
-----X

The following papers numbered 1 to read on the below motions noticed on **October 26, 2010** and duly submitted on the Part IA15 Motion calendar of :

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Port Authority's Notice of Motion, Exhibits	1,2
Pl. Affirmation in Opposition, Exhibits	3,4
Def. Covenant's Affirmation in Opposition, Exhibits	5,6
Def. Port Authority's Affirmation in Reply, Exhibits	7,8

In an action for damages resulting from personal injuries, defendant, The Port Authority of New York and New Jersey (hereinafter the "Port Authority"), moves to dismiss the complaint of the plaintiff, Kamall A. McLean (hereinafter "Plaintiff"), pursuant to *CPLR* 3211(a)(2). Plaintiff along with co-defendant, Covenant Aviation Security, LLC. (hereinafter "Covenant") oppose the motion.

I. Factual and Procedural History

On June 8, 2009, Plaintiff occupied a motor vehicle parked on "Taxiway Y" a John F. Kennedy International Airport ("JFK Airport") in Queens, New York. At that time, a Boeing 747-400 aircraft was cleared to land on a nearby runway. After landing, the subject aircraft began taxiing on Taxiway Y when its number four engine struck the vehicle occupied by Plaintiff, causing injury. Plaintiff alleges that the Port Authority negligently directed the aircraft to taxi on the occupied taxiway. At relevant times, co-defendant Covenant was contracted by the Port Authority to provide personnel to ensure the safety of construction sites at JFK Airport,

which included the situs of this accident. Plaintiff alleges that Covenant was negligent in directing Plaintiff's vehicle to park on the taxiway where the subject aircraft was instructed to proceed.

Plaintiff filed a notice of claim against the Port Authority on September 4, 2009. Plaintiff's Summons and Verified Complaint was filed on August 30, 2010.

Defendant alleges that Plaintiff failed to meet the conditions precedent set forth in New York Unconsolidated Laws §7107, requiring a plaintiff to commence an action within one year from the date upon which their alleged cause of action accrued. Plaintiff argues that, 1) the Port Authority had timely notice of the claim, 2) this matter is related to an action currently pending in Federal Court, wherein the Port Authority, Covenant, and Plaintiff herein are being sued by Korean Airlines. In response to that timely federal lawsuit, Plaintiff argues that the Port Authority has conducted extensive investigation regarding this accident, and thus the Port Authority had adequate notice that Plaintiff's lawsuit was forthcoming and will not be prejudiced in this action; 3) Defendant Covenant is united in interest with the Port Authority, so accordingly Plaintiff's claim against the Port Authority should relate back to his timely claim against Covenant pursuant to the provisions of *CPLR* 203.

Co-defendant Covenant also opposes the motion. Covenant argues that, in the event the Court grants dismissal of Plaintiff's complaint as to the Port Authority, Covenant's cross-claims for common law indemnity and contribution should remain.

## II. Analysis

### *(i) The Port Authority's Motion with respect to Plaintiff's Complaint*

Under New York Unconsolidated Laws §7107, the Port Authority's consent to suit "is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced **within one year** after the cause of action therefore shall have accrued." (Emphasis added). It is well settled that this one-year period in which to commence an action against the Port Authority is a condition precedent to the lawsuit, rather than a statute of limitations, and cannot be extended by tolling provisions of *CPLR* 203. See, *Savino v. Demiglia*, 133 A.D.2d 389 (2<sup>nd</sup> Dept. 1987); *DeLuca v. New York City Transit Auth.*, 119 Misc. 2d 523

(Sup. Ct. N.Y. Cty. 1983). If a plaintiff does not comply with the statute, the court has no subject matter jurisdiction over the action. *Id.*

The Court of Appeals has recognized that these suitability statutes are jurisdictional and that strict compliance is required. See *Yonkers Contracting Co., Inc. v. The Port Authority Trans-Hudson Corporation*, 93 N.Y.2d 375 (1999)(holding that the one year period in which to commence an action constitutes a condition precedent rather than a mere statute of limitations.) Importantly, the Court in *Yonkers* recognized the difference between a Statute of Limitations as opposed to a condition precedent to a lawsuit. “The former merely suspends the remedy provided by a right of action, but the latter *conditions* the existence of a right of action, thereby creating a substantive limitation on the right.” *Id.*, citing *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 55 (1999).

When a matter involves condition precedent prior to a right of action, rather than a statute of limitations issue, the “relation back” doctrine of *CPLR* 203 does not apply to keep alive a claim that would otherwise be time-barred. See *Astudillo v. Port Authority of New York and New Jersey*, 7 Misc.3d 1004(A) (Sup. Ct. Bronx Cty. 2004), citing *Kahn v. Trans World Airlines, Inc.*, 82 A.D.2d 696 (2<sup>nd</sup> Dept. 1981); See also *DaCruz v. Towmasters of New Jersey, Inc.*, 22 A.D.3d 629 (2<sup>nd</sup> Dept. 2005)(affirming dismissal of complaint asserted against Port Authority filed outside of one-year mandate, holding that Plaintiff’s reliance on the “relation-back” doctrine to remedy this failure was misplaced).

In this matter, the cause of action accrued on June 8, 2009. While Notice of Claim was filed on September 4, 2009, the present complaint was not filed until August 30, 2010. It is of no moment that a timely Federal Action was filed by plaintiff Korean Airlines against Plaintiff, Covenant, and the Port Authority. Issues of notice of a possible action, or prejudice to a party are not considered when a condition precedent must be satisfied before an action may be commenced. See *Lyons v. Port Auth. Of New York and New Jersey*, 228 A.D.2d 250 (1<sup>st</sup> Dept. 1996). As strict compliance with the statute is required, this court must grant the motion to dismiss as to the Port Authority pursuant to *CPLR* 3211(a)(2).

(ii) *The Port Authority's Motion with respect to Covenant's Cross-Claims*

Covenant argues that its cross-claims for common-law indemnification and contribution should not be dismissed because they are timely. Such a cause of action, Covenant argues, does not accrue until Covenant was required to make payment in the amount which exceeds its pro rata share of the judgment. *Bay Ridge Air Rights, Inc. v. State of New York*, 44 N.Y.2d 49 (1978). The Port Authority counters that Covenant agreed to indemnify and hold Port Authority harmless for any claims arising out of or allegedly connected to the services and activities of Covenant in its performance of the parties' contract. Accordingly, any cross-claims for contribution or indemnity must be dismissed.

The First Department has stated that "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." *Torres v. Morse Diesel Intern., Inc.*, 14 A.D.3d 401, 403 (1st Dept. 2005); *Masciotta v. Morse Diesel International, Inc.*, 303 A.D.2d 309, 310 (1st Dept. 2003) (citing *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 (1987); *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 (1973)).

In this matter, Covenant agreed to indemnify and hold the Port Authority harmless for any claims arising out of or allegedly connected to the services and activities of Covenant in performance of its duties called for in its contract with the Port Authority. The January 26, 2007 contract states, in pertinent part:

Part II.

Section 20: Indemnification and Risks Assumed by the Contractor

To the extent permitted by law, the Contractor shall indemnify and hold harmless the Port Authority...from and against all claims and demands, just or unjust, of third persons (including employees, officers, and agents of the Port Authority) arising out of or in any way connected...with the Contract and all other services and activities of the Contractor under this Contract and for all expenses incurred by it and by them in the defense, settlement or satisfaction thereof, including without limitation thereto, claims and demands for death, for personal injury or for property damage, direct or consequential, whether they arise from the acts or omissions of the Contractor, of the

Port Authority, of third persons, or from acts of God or the public enemy, or otherwise, including claims and demands of any local jurisdiction against the Port Authority in connection with this Contract.

Section 20(d)

The Contractor assumes the following risks, whether such risks arise from acts or omissions...of the Contractor, the Port Authority, or third persons or from any other cause, excepting only risks occasioned solely by affirmative and willful acts of the Port Authority done subsequent to the opening of proposals on this Contract...

...(d) the risk of claims for injuries, damage or loss of any kind just or unjust of third persons arising or alleged to arise out of the performance of work hereunder, whether such claims are made against the Contractor or Port Authority.

Here, Plaintiff is alleging damages for personal injuries when his work vehicle parked on Taxiway "Y" at JFK, was struck by a taxiing airplane's engine. Under the terms of its contract with the Port Authority, Covenant was tasked with providing security guards who were responsible for, among other things, monitoring vehicles and personnel located in secured or restricted areas. The Port Authority accident investigation report, provided by movant, notes that Covenant security personnel were interviewed at the scene and stated that their duties had been to oversee a construction site near the taxiway and to ensure workers do not do beyond designated areas into runways or taxiways. Accordingly, it is clear that this incident is based on alleged acts or omissions that arise out of duties outlined in the parties' contract.

The Court finds that the unambiguous language of the hold harmless provision of the contract requires Covenant to indemnify the Port Authority in this matter. The key language being: "the Contractor shall indemnify and hold harmless the Port Authority . . . , claims arising out of or in any way connected with the Contract...for personal injury...whether they arise from the acts or omissions of the Contractor [or] the Port Authority...or otherwise..." Given the broadly worded language of the contractual indemnification provision, the allegations of Plaintiff's complaint are sufficient to trigger Covenant's obligation to indemnify the Port Authority. *See, e.g., Keena v. Gucci Shops, Inc.*, 300 A.D.2d 82 (1st Dept. 2002) (finding that owner was entitled to contractual indemnification since defendant agreed in its subcontract with the general contractor to indemnify owner for "all claims ... arising in whole or in part and in any manner" from defendant's "acts, omissions, breach or default" in connection with "any work");

*Velez v. Tishman Foley Partners*, 245 A.D.2d 155, 156 (1st Dept. 1997) (upholding lower court's decision to grant owner's cross-claim for contractual indemnification as the contract obligated defendant to indemnify owner from "any and all loss, damages, injury or liability ..., however caused and of whatever nature, arising directly or indirectly from the acts or omissions of [defendant], its agents, employees, vendors or lower-tier subcontractors and their agents or employees, in the performance of the work under the subcontract.). Accordingly, the Port Authority's motion to dismiss shall be granted and include any and all cross-claims for indemnification or contribution asserted by Covenant.

III. Conclusion

Accordingly, it is hereby

ORDERED, that the motion of the Port Authority of New York and New Jersey, dismissing the complaint of plaintiff Kamall McLean is hereby GRANTED, and it is hereby

ORDERED, that the complaint of plaintiff Kamall McLean is hereby DISMISSED WITH PREJUDICE as to the Port Authority of New York and New Jersey only, and it is further,

ORDERED, that any and all cross-claims asserted by co-defendant Covenant Aviation Security, LLC. are hereby DISMISSED WITH PREJUDICE as to the Port Authority of New York and New Jersey only.

The above constitutes the Decision and Order of this Court.

Dated: May 10, 2011



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Hon. Mary Ann Brigantti-Hughes, J.S.C.