

Tong v Town of Greenburgh

2013 NY Slip Op 32765(U)

July 8, 2013

Sup Ct, Westchester County

Docket Number: 52380/2012

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
DICKON TONG,

Plaintiff,

-against-

Index No. 52380/2012
Decision & Order
Motion Sequence 1

TOWN OF GREENBURGH,

Defendant.
-----X

Defendant moves this Court to reargue the decision and order dated October 11, 2012 which granted defendant's motion to Dismiss pursuant to CPLR 3211(a) (5). The following papers were received and considered in deciding the present motion:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation in Support/Exhibits A-C	1-5
Affirmation in Opposition	6

Defendant moved to dismiss Plaintiff's Complaint on the grounds that the underlying action was not timely commenced pursuant to GML §50-i(1)(c). Plaintiff initiated the underlying action by filing a Summons and Complaint on February 17, 2012. In his complaint, Plaintiff alleges that he sustained property damage as a result of a police raid by the Town of Greenburgh which occurred on November 4, 2010. In opposition to Plaintiff's Complaint, in its

Amended Verified Answer, Defendant asserted the affirmative defense that the statute of limitations had expired on Plaintiff's claim. Specifically, that Plaintiff had commenced his action fifteen days after the applicable statute of limitations had run, and that his action was therefore time-barred. By Decision and Order dated October 9, 2012, the Court granted Defendant's motion, holding that "Defendant has established Plaintiff's failure to timely commence the present action, and Plaintiff fails to adequately challenge Defendant's showing."

Plaintiff now moves to reargue on the grounds that this Court has not yet considered relevant facts, evidence, and points of law that would have enabled the court to deny the motion to dismiss. A motion to reargue is designed to give a party a chance to convince the court that relevant facts were overlooked or misapprehended or a controlling principle of law was misapplied and is addressed to the court's reasonable discretion. Its purpose is not to permit a party to reargue once again the very questions the court has already decided. *Foley v. Roche*, 68 A.D.2d 558, 567(1st Dept., 1979), citing, *Fosdick v. Town of Hempstead*, 126 N.Y. 651 (1891); *American Trading v. Fish*, 87 Misc.2d 193 (N.Y. Sup., 1975).

Plaintiff argues that the Court should "extend the time for service" of the summons and complaint in conformity with the criteria for granting that relief set out in the Court of Appeals decision in *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001), and by the Second Department in several other cases. However Plaintiff's arguments are misplaced. In 1992 with the enactment of CPLR §306-b, New York State was transformed from a commencement-by-service jurisdiction to a commencement-by-filing jurisdiction. Today, an action is commenced in New York by filing a summons and complaint with the clerk of the county in which the action is brought. CPLR § 304. New York's General Municipal Law

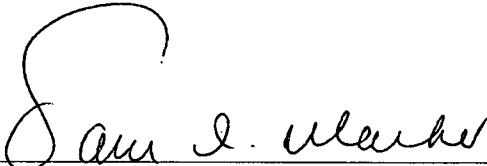
requires that an action against a municipality for, among other things, "damage to real or personal property alleged to have been sustained by reason of negligence" must be commenced "within one year and ninety days after the happening of the event upon which the claim is based." GML §50-i(1)(c). There is no dispute that here, Plaintiff filed 15 days after this statute ran.

Where a summons and complaint is timely filed pursuant to CPLR §304 (which was not the case here), a plaintiff has 120 days after the filing to effect service, but, if service is not made within the required 120 days, a court may, in its discretion "extend the time for service." CPLR §306-b. Plaintiff's motion to reargue confounds CPLR §304 with CPLR §306-b, which does not speak to the issue of when an action is "commenced." Plaintiff failed to timely commence his action, so the case law cited by Plaintiff interpreting the criteria for allowing an extension of time to serve a summons and complaint after timely commencement of an action by filing with the clerk, is completely inapplicable to the facts before this Court.

Plaintiff also reasserts an argument which was made with respect to the previous motion, that Plaintiff be allowed to serve a late Notice of Claim pursuant to the criteria set out in GML §50(e)(5). However, as was clear when the argument was previously offered, Plaintiffs Notice of Claim in this matter was timely served; and the criteria for extending the time to serve a late Notice of Claim set out in GML §50(e)(5) are plainly irrelevant and inapplicable to the issue of tolling a statute of limitations, given the express command of CPLR §201 that "[n]o court shall extend the time limited by law for the commencement of an action."

Accordingly, Plaintiff's motion to reargue is hereby DENIED. To the extent any relief requested in Motion Sequence 2 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
July 8th 2013


HON. SAM D. WALKER, J.S.C.