

Montgomery v City of New York

2013 NY Slip Op 33534(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 113942/2011

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 113942/2011
MONTGOMERY, BYRON
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS CAL: #29

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

NOV 18 2013

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 11-13-13
NOV 13 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X

BYRON MONTGOMERY,

Plaintiff,

DECISION/ORDER
Index No. 113942/2011
Seq. No. 001

-against-

FILED

NOV 18 2013

THE CITY OF NEW YORK,

Defendant.

COUNTY CLERK'S OFFICE
NEW YORK

-----X

KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant The City of New York (“the City”), moves for an Order pursuant to CPLR§ 3211 dismissing the complaint, or in the alternative, pursuant to CPLR§3212, granting summary judgment, dismissing the complaint. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

Plaintiff seeks monetary damages for injuries he allegedly sustained on August 17, 2011. Plaintiff alleges that on that day, he had been assisting the Department of Sanitation (“DOS”), on

a collection route when he was struck in the leg by a garbage bag that DOS employee, Rodney Cumberbatch, was in the process of loading into a sanitation truck. Something sharp, (possibly a shard of glass), contained in the bag allegedly cut his leg, causing it to bleed profusely. This occurred in the roadway of 144th Street between Amsterdam Avenue and Broadway, New York County.

Consequently, on or about September 27, 2011, plaintiff served his Supplemental Amended Notice of Claim upon defendant. He then commenced the instant action with service of a Summons and Verified Complaint on or about December 13, 2011. Defendant joined issue via service of its Answer on January 4, 2012.

A synopsis of the testimony adduced at both depositions is as follows: During his deposition, plaintiff testified that he had a long standing arrangement with Cumberbatch wherein plaintiff would take garbage bags from the curb and put it in reach so it would be easier for the garbage truck to pick it up. He also testified that at times he would assist Cumberbatch in loading the garbage into the rear of the sanitation truck, and would occasionally operate the "hopper," the trash compacting device affixed to the truck. Plaintiff also testified that he performed this task for Cumberbatch for five days a week, on various routes for an indeterminate time prior to his accident, but not less than two years. Hence, in exchange for plaintiff's assistance, Cumberbatch would pay him \$20.00 per day and would also provide him with necessities such as clothing and sneakers. Additionally, plaintiff testified that he also collected bottles and cans and returned them for extra money in the area wherein he claims he was injured as well as in Bell Harbor wherein he allegedly resides.

During his deposition, Cumberbatch testified that he knew plaintiff by name as a result of observing him regularly since 2007, while working this particular route. He would observe plaintiff collecting cans and bottles to earn some money. Cumberbatch also testified that he had never

witnessed nor requested that plaintiff load garbage into the truck or bring it closer to the curb for his convenience. He denied paying plaintiff to assist him and stated that he would not be authorized to do so. Cumberbatch testified that he did not know what plaintiff was doing at the time he was injured and did not observe any garbage bags around plaintiff when he first saw him on the day of the accident. He became aware of plaintiff's plight when plaintiff informed him that something had cut plaintiff's leg and Cumberbatch personally observed plaintiff's leg bleeding profusely. As a result, Cumberbatch called 911 and an ambulance transported plaintiff to the hospital.

Plaintiff asserts that the City was negligent pursuant to the theory of respondeat superior, for the negligent acts of Mr. Cumberbatch in the performance of his duties as a sanitation worker, and in the hiring, training and supervision of its employees, agents, servants and DOS workers.

Positions of the parties:

Defendant argues that plaintiff's complaint warrants dismissal as the record is devoid of any evidence demonstrating any issues of material fact. Defendant argues that even if Cumberbatch did solicit the assistance of plaintiff in the performance of his job duties, this was an unauthorized discretionary act for which no liability can be imputed to defendant. Defendant also argues that in the alternative, even if plaintiff was voluntarily assisting Cumberbatch in the performance of his duties, either upon invitation, as a gratuity for the kindness Cumberbatch had shown him in the past, or in the hope that Cumberbatch may reward him in the future, plaintiff would still be barred from recovery based on his volunteer status.

Plaintiff first argues that defendant mistakenly designates the instant motion as one for dismissal pursuant to CPLR§3211, yet fails to specify what subsection of this statute it is moving under. Plaintiff asserts that this oversight is "understandable as there is no section of 3211 that

covers what Defendant is arguing in this motion.” (See Aff. in Opp., p. 1, ¶2). Plaintiff asserts that since defendant relies on the deposition testimony of the parties and does not base its motion on the pleadings, the instant motion is actually a summary judgment motion pursuant to CPLR§ 3212, and as such, must be denied on lateness grounds.

Plaintiff asserts that the statutorily mandated 120 days after the Note of Issue was filed, was April 21, 2013. The instant motion is dated April 26, 2013, was served on April 26, 2013 and filed on May 1, 2013. Thus, said motion was written, served and filed after the expiration of the statutory 120 days after the filing of the Note of Issue. Plaintiff also argues that the motion was even made longer after the expiration of the deadline issued by Justice Barbara Jaffe of 60 days after the Note of Issue was filed, to whom this matter had been previously assigned. Thus, that deadline ran on February 19, 2013, over two months prior to the making of the instant motion. Upon receipt of the motion of May 2, 2013, plaintiff rejected it due to its untimeliness. In reference to its lateness, plaintiff also argues that defendant has not demonstrated or even argued any good cause for the lateness.

Plaintiff further argues that none of defendant’s theories represent the direct cause of his injuries, in that he was not injured because he was purportedly assisting, volunteering, or acting in the capacity of “employee.” Rather, plaintiff argues that he was injured because Cumberbatch, working in the scope of his employment with the Sanitation Department, negligently swung a bag of garbage in plaintiff’s direction in an attempt to get the bag into the garbage truck, which was within his duties as a Sanitation worker. Therefore, this cause of action for common law negligence is made primarily out of the swing itself. Since plaintiff was injured as a result of Cumberbatch’s action, the City is responsible pursuant to the doctrine of respondeat superior, rendering this case as

one of “straight negligence.”

Plaintiff also argues that Cumberbatch’s lies provide a context to plaintiff’s action, but do not alone define it. He asserts that Cumberbatch took advantage of his indigence and mental condition by offering him a mere paltry sum to assist him in his duties as a sanitation worker. Additionally, in an effort to protect himself, he convinced plaintiff to lie to the ambulance and hospital personnel about the real cause of his injury. Plaintiff emphasizes that he can counterattack Cumberbatch’s misrepresentation of the facts by identifying three witnesses that will testify that they all observed him riding on the garbage truck.

Plaintiff also argues that the motion papers are also defective because defendant has failed to plead an Affirmative Defense in its Answer regarding the arguments proffered in the instant motion, and has failed to submit any sworn testimony, as the deposition transcripts annexed to its moving papers are not signed or sworn to. Plaintiff further argues that defendant is prohibited from asserting alternative grounds for relief or from curing the aforementioned defects via its Reply Papers.

Conclusions of law:

At the outset, the Court notes that it agrees with plaintiff’s contention that defendant’s motion is really one of summary judgment. Thus, the Court must address and consider the statutory requirements concerning such a motion.

CPLR 3212(a) provides that

Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court,

such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.”

As noted in *Brill v. City of New York*, 2 N.Y.3d 648, 652 [2004], the time requirements of CPLR §3212(a) were intended to address and end “the practice of eleventh-hour summary judgment motions.” Filing a motion for summary judgment beyond the statutory time limit renders that motion untimely as a matter of law, especially when the proponent of said motion has neither sought leave to file late nor has proffered an excuse demonstrating good cause for the lateness (see *Parker v. New York City Trans. Auth.*, 307 A.D.2d 285 [2d Dept. 2003]; *Borelli v. Gegaj*, 248 A.D.2d 299 [1st Dept. 1998]; *Phoenix Garden Rest. v. Chu*, 245 A.D.2d 164 [1st Dept. 1997]; *Rodriguez v. New York City Health & Hosps Corp.*, 245 A.D.2d 174 [1st Dept. 1997]; *Auger v. State of New York*, 236 A.D.2d 177 [3d Dept. 1997]).

“Good cause” has been defined as “a written expression or explanation by the party or his legal representative evincing a viable, credible reason for delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement” (*Surace v. Lostrappo*, 176 Misc.2d 408, 410, 1998 N.Y. Slip Op. 98221(S. Ct. Nassau County, 1998).

Indeed, even if the instant case was meritorious in nature, a late summary judgment motion would still not be deemed a sufficient excuse or good cause to undermine the statutorily imposed 120 day deadline (see *Miceli v. State Farm Mut. Auto Ins. Co.*, 3 N.Y.3d 725 [2004]. In the instant case, in its Reply Affirmation, defendant argues that its motion “was served only five days after the time period prescribed under CPLR§ 3212(a). The delay in filing the City’s motion was due to the City’s gargantuan caseload and the constraints presented by a limited public budget. A summary judgment motion made only five days after the one hundred and twenty day deadline is not prejudicial to the

nonmoving party.” (*Id.* p. 3, ¶6).

First, the Court finds defendant’s argument that this “slight delay” did not cause any prejudice to plaintiff to be devoid of merit in that the absence of prejudice to the non-moving party is not classified as good cause (see *Gibbs v. McRide Cab Co.*, 10 A.D.3d 671 [2d Dept. 2004]). Moreover, defendant’s explanation is really a perfunctory claim of law office failure, an excuse that is plainly insufficient to constitute good cause pursuant to CPLR§3212(a)(see *Giudice v. Green 292 Madison, LLC*, 50 A.D.3d 506 [1st Dept. 2008]; *Farkas v. Farkas*, 40 A.D.3d 207 [1st Dept. 2007]; *Azcona v. Salem*, 49 A.D.3d 343 [1st Dept. 2008]).

This Court understands the necessity of filing a summary judgment or any motion in a timely manner. Excusing this delay based on the aforementioned “flimsy” excuse would merely encourage such conduct in the future, which this Court cannot in good conscience do.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant’s motion for summary judgment is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: November 13, 2013

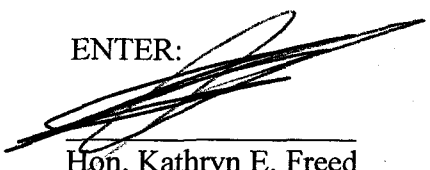
NOV 13 2013

FILED

NOV 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



Hon. Kathryn E. Freed

J.S.C.

HON. KATHRYN FREED

JUSTICE OF SUPREME COURT