

**Marte-Gonzalez v City of New York**

2014 NY Slip Op 32642(U)

September 16, 2014

Supreme Court, Bronx County

Docket Number: 304023/13

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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ALTAGRACIA MARTE-GONZALEZ,

**DECISION AND ORDER**

Plaintiff(s), Index No: 304023/13

- against -

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, NEW YORK CITY  
TRANSIT AUTHORITY (NYCTA) AND METROPOLITAN  
TRANSIT AUTHORITY (MTA) AND WALGREEN CO.,

Defendant(s).  
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In this action for alleged personal injuries arising from the negligent maintenance of the public sidewalk, defendants THE CITY OF NEW YORK (the City) and NEW YORK CITY DEPARTMENT OF TRANSPORTATION (the DOT) move seeking an order, *inter alia*, dismissing this action as barred by the applicable statute of limitations. Specifically, the City and the DOT contend that this action was commenced against them by the filing of the first amended complaint two months after the expiration of the one year and ninety day statute of limitations prescribed by General Municipal Law §50-i. Plaintiff opposes the instant motion conceding that this action was untimely commenced against the City and the DOT, but averring that because the City and the DOT have not, *inter alia*, been prejudiced by the untimely commencement of this action against them, the first amended complaint should be

deemed to relate back to the complaint so as to deem this action timely pursuant to CPLR § 203(b). Plaintiff, by affirmation, cross-moves for an order allowing her to amend the complaint *nunc pro tunc* to name the City and the DOT as defendants. Plaintiff offers no reasons in support of her cross-motion and the City and the DOT fail to oppose the same.

For the reasons that follow hereinafter, the City and the DOT's motion is granted and plaintiff's cross-motion is denied as moot.

This is an action for alleged personal injuries resulting from a trip and fall on the public sidewalk. The first amended complaint, filed on April 16, 2014 alleges that on December 1, 2012, plaintiff tripped and fell while traversing the sidewalk located near the corner of Simpson Street and Westchester Avenue. Specifically, plaintiff alleges that she fell on a depressed area of sidewalk around a lamppost. Plaintiff alleges that defendants were responsible for the maintenance of the aforementioned sidewalk, were negligent in failing to maintain the same, such negligence causing her accident and the resulting injuries.

The City and the DOT's motion seeking dismissal of this action as barred by the applicable statute of limitations is hereby granted insofar as it is clear that this action was not commenced against the foregoing defendants until after the expiration of the applicable statute of limitations.

A defendant seeking to dismissal of an action as barred by the applicable statute of limitations, bears the burden of establishing that the applicable statute of limitations expired prior to the commencement of the action (*Swift v New York Medical College*, 25 AD3d 686, 687 [2d Dept 2006]; *Gravel v Cicola*, 297 AD2d 620, 620 [2d Dept 2002]; *Duran v Mendez*, 277 AD2d 348, 348 [2d Dep 2000]). If defendant meets his burden, in order to avoid dismissal, it is incumbent upon the plaintiff to present evidence establishing that the cause of action falls within an exception to the statute of limitations (*Gravel* at 621). The statute of limitations for any actions against the City, its agencies, and employees is prescribed by GML 50-i, which states, in relevant part that any such action "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based."

Here, plaintiff's first amended complaint alleges that her accident occurred on December 1, 2012, but also evinces that it wasn't filed until April 16, 2014. Since pursuant to CPLR § 304, [a]n action is commenced by filing a summons and complaint or summons with notice," here, this action naming the City and the DOT was not commenced until April 16, 2014, almost two months after the expiration of the applicable statute of limitations. Thus, the action is untimely and, therefore, barred and must be dismissed.

Contrary to plaintiff's assertion, her papers are bereft of sufficient evidence entitling her to receive the benefit of CPLR §

203(c)<sup>1</sup>. It is certainly true that under CPLR § 203(c), "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced." In fact, pursuant to the foregoing, our courts have promulgated the "relation back doctrine," which "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are united in interest" (*Buran v Coupal*, 87 NY2d 173, 177 [1995] [internal quotation marks omitted]). However, the relation back doctrine only allows an otherwise untimely claim against a party who was not timely sued to survive if it is established that (1) both claims - meaning, the one timely interposed and the untimely claim which plaintiff seeks to assert arose out of same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and; (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*id.* at 178).

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<sup>1</sup> Plaintiff mistakenly relies on CPLR § 203(b), which only applies to actions commenced by service. Here, where an action is commenced by filing, the relevant section is CPLR § 203(c).

Here, while arguably plaintiff establishes that the City and DOT were not timely sued as a result of a mistake and that no prejudice would befall them if the Court deemed the amended complaint timely, plaintiff fails to assert, let alone describe how the City and the DOT are united in interest with the other defendants in this action. Parties are united in interest when a "judgment against one will similarly affect the other" (*27th Street Block Ass'n. v Dormitory Authority of State of New York*, 302 AD2d 155, 164 [1st Dept 2002]). Notwithstanding plaintiff's failure to meet her burden of demonstrating unity of interest between the City, the DOT and the other defendants, it is hard to fathom how a judgment against the other defendants will have a similar affect on the City and the DOT. This is especially true here, where undoubtedly, the defendants - all of whom are separate and distinct legal entities from the City and the DOT - will likely point the finger at each other, likely asserting that they had no legal obligation to maintain the area in question. Accordingly, the City and DOT's motion is granted.

Based on the foregoing, plaintiff's cross-motion is denied as moot. It is hereby

**ORDERED** that plaintiff's first amended complaint be dismissed as against the City and the DOT, with prejudice. It is further

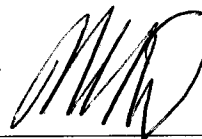
**ORDERED** that the Clerk of the Court transfer this case out of the City Part (Part 3), and to the Public Authorities Part (Part

17). It is further

**ORDERED** that the City and the DOT serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : September 16, 2014  
Bronx, New York



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MITCHELL J. DANZIGER, J.S.C.