

Markey v Metropolitan Tr. Auth.
2014 NY Slip Op 33610(U)
April 10, 2014
Supreme Court, New York County
Docket Number: 100574/13
Judge: Michael D. Stallman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

COLETTE MARKEY,

Plaintiff,

INDEX NO. 100574/13

MOTION DATE 1/29/14

- v -

MOTION SEQ. NO. 002

METROPOLITAN TRANSIT AUTHORITY,

Defendant.

The following papers, numbered 1 to 3 were read on this motion to amend pleadings.

Order to Show Cause— Affidavit in Support — Exhibits A-C

No(s). 1-2

Affirmation in Opposition

No(s). 3

Upon the foregoing papers, this motion is decided in accordance with the memorandum decision and order annexed to Motion Seq. No. 001.

Copies to counsel and to the client at her last known address, at 100 West 92nd Street, Apt. 6E New York, NY 10025.


FILED

APR 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 4/10/14
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED
- GRANTED X DENIED
- SETTLE ORDER
- DO NOT POST
- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

FILED

APR 14 2014

-----X
COLETTE MARKEY,

Plaintiff,

COUNTY CLERK'S OFFICE
NEW YORK
Index No. 100574/13

- against -

METROPOLITAN TRANSIT AUTHORITY,

Decision and Order

Defendant.
-----X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendant Metropolitan Transportation Authority (MTA) sued herein as "Metropolitan Transit Authority" moves to dismiss the plaintiff's complaint as against it (motion sequence 001). Plaintiff separately moves to amend the defendant named in the pleadings from the "Metropolitan Transit Authority" to New York City Transit Authority [NYCTA] (motion sequence 002).

BACKGROUND

Plaintiff alleges that, on February 2, 2012, she was injured on the 1 train at the Lincoln Center subway station (66th Street station) when the train moved suddenly as she was boarding the train.

On March 27, 2012, the NYCTA received plaintiff's notice of claim dated

March 22, 2012. (Diguida Affirm. Ex. A.) On April 15, 2013, plaintiff attempted to serve the summons and complaint on “Metropolitan Transit Authority” at the NYCTA’s address - 130 Livingston Street, Brooklyn, New York 11201, but the NYCTA refused the service with the explanation that the NYCTA does not accept papers for the “Metropolitan Transit Authority.” On April 19, 2013, plaintiff served the summons and complaint on the MTA.

On January 29, 2014, defendant MTA moved to dismiss the complaint as against it on the grounds that plaintiff failed to state a cause of action against it because the MTA does not own, maintain, operate or control the subways. Plaintiff did not formally oppose the motion and instead, on January 29, 2014, separately moved to amend the defendant named in the pleadings from “Metropolitan Transit Authority” to the NYCTA. Plaintiff states in her affidavit, “I made a mistake. I should have named the defendant as [NYCTA] instead of Metropolitan Transit Authority. I did not realize that the parties mentioned were two separate agencies.” (Markey Aff., ¶ 2.)

Defendant MTA opposes the amendment arguing that plaintiff failed to properly serve the NYCTA; NYCTA would be prejudiced by the amendment; and the Court may not amend the pleadings after the statute of limitations.

DISCUSSION

Where there has been a misnomer as to the defendant, “the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.” (CPLR 305 [c])

“Such amendment of a summons is justified where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it.”

(*Fink v Regent Intern. Hotels, Ltd.*, 234 AD2d 39, 41 [1st Dept 1996] [citations omitted].) However, although CPLR 305 (c) allows for the correction of the name of an existing defendant, it cannot be used as a device to add or substitute a defendant. (See *Benware v Schoenborn*, 198 AD2d 710, 711-712 [2d Dept 1993].) A plaintiff may not invoke CPLR 305 (c) to proceed against a new defendant, who was not served, after the expiration of the statute of limitations. (See *Issing v Madison Sq. Garden Ctr., Inc.*, 62 AD3d 407 [1st Dept 2009].)

In *Lopez v Metro. Transp. Auth.*, (267 AD2d 359 [2d Dept 1990]), the plaintiff served the MTA with the summons and complaint, but failed to serve the

NYCTA with the summons and complaint. The plaintiff moved to add the NYCTA as a defendant, but the court denied the motion because the statute of limitations had expired and the MTA and NYCTA are two separate agencies, not united in interest. (*See also Issing*, 62 AD3d at 408 [denying leave to amend where plaintiff failed to show that MSG Center, the properly served defendant, and MSG LP, the improperly served defendant, were the same entity]; *Associated Geriatric Info. Network, Inc. v Split Rock Multi-Care Center, LLC*, 111 AD3d 861 [2d Dept 2013] [denying leave to amend because there was no proof in the record that the proposed defendant and the defendant actually served were the same entity].)

Here, like the plaintiff in *Lopez*, plaintiff fails to establish that she properly served the NYCTA before the statute of limitations had expired. According to the affidavit of service, plaintiff served the MTA with the summons and complaint on April 19, 2013. The Court takes judicial notice that plaintiff filed an affidavit of due diligence with the County Clerk's office indicating that on April 15, 2013, Brian R. Ricks attempted to serve the "Metropolitan Transit Authority" at the NYCTA's address - 130 Livingston Street, Brooklyn, New York 11201 but the service was refused. The additional notes section of the affidavit stated, "[NYCTA] Law Dept stated they do not accept papers for Metropolitan

Transit Authority. . . . Search performed indicating 347 Madison Ave New York, New York as the correct location for service on Metropolitan Transit Authority.”

Whether or not plaintiff was confused about which entity to sue is immaterial. It was plaintiff who caused the confusion in nomenclature by opting to sue the “Metropolitan Transit Authority” instead of the NYCTA on whom she served a notice of claim. Given plaintiff’s choice of “Metropolitan Transit Authority” as the name of the defendant, it is understandable that the NYCTA told plaintiff’s process server that it did not accept papers for the MTA. Given plaintiff’s choice of nomenclature, the summons appeared to apply to the MTA, not the NYCTA. Neither the attempted service at the NYCTA nor the service on the MTA effected service on the NYCTA. Therefore, plaintiff’s motion to amend the pleadings is denied.

Plaintiff served a notice of claim on the NYCTA, which was received on March 27, 2012, within the statute of limitations period. However, such service is not sufficient as a basis on which to amend the pleadings under CPLR 305 (c). (*See Perez v City*, 74 AD3d 638 [1st Dept 2010] [rejecting plaintiff’s argument that “the circumstances including the naming of the Department of Education as well as the City in the notice of claim, show that the naming of only the City in the summons was a nonprejudicial misnomer correctable under CPLR 305 [c].”])

As to the MTA, "it is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." (*Delacruz v Metro. Tr. Auth.*, 45 AD3d 482, 483 [1st Dept 2007], quoting *Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2d Dept 1984].) Therefore, the complaint must be dismissed as against the MTA because it does not own, operate, maintain or control any of the subway facilities.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant MTA's motion to dismiss (motion sequence 001) is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

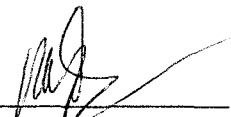
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion to amend the pleadings (motion sequence 002) is denied; and it is further

* 8]
ORDERED that the status conference rescheduled for June 5, 2014 at
2:15 p.m., Part 21, 80 Centre Street Room 278, New York, New York is cancelled.

Dated: April 10, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED
APR 14 2014
COUNTY CLERK'S OFFICE
NEW YORK