

Bonilla v Tutor Perini Corp.

2014 NY Slip Op 33794(U)

February 10, 2014

Supreme Court, Westchester County

Docket Number: 68553/12

Judge: Mary H. Smith

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

DECISION AND ORDER

FILED & ENTERED

2/10/14

To commence the statutory period of 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
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

-----X

RAYMOND BONILLA,

Plaintiff,

MOTION DATE: 1/31/14
INDEX NO.: 68553/12

-against-

TUTOR PERINI CORPORATION and BRADLEY W.
RODIER,

Defendants.

-----X

The following papers numbered 1 to 12 were read on this motion by plaintiff for an order pursuant to CPLR 306-b extending the time for service, and on this cross-motion by defendants for an Order pursuant to CPLR 205 dismissing the complaint.

Papers Numbered

- Notice of Motion - Affirmations (Jacobson) - Exhs. (A-D) 1-4
- Notice of Cross-motion - Affirmation (Rigby) - Affirmation (Weiss) - Exhs. (A-S) 5-8
- Answering/Replying Affirmation (Jacobson) - Exhs. (A-F) 9-10
- Replying Affirmation (Rigby) - Affirmation (Weiss) - Exhs. (T-BB) 11-12

Upon the foregoing papers, it is Ordered that this motion and cross-motion are disposed of as follows:

This is a pedestrian knock-down action wherein plaintiff allegedly sustained serious

[* 2]

injuries, on October 28, 2009, when, while during the course of his employment, he was struck by a vehicle owned by defendant Tutor Perini Corporation and driven by defendant Rodier.

Plaintiff had commenced a prior action against these defendants, Westchester County Index No. 22300/10. It is asserted by plaintiff's present counsel that plaintiff's prior counsel had withdrawn from their representation of plaintiff and that he had not been able to get a signed retainer from plaintiff prior to the scheduled September 17, 2012 conference.¹ Counsel argues that his written request to defendants seeking a short consent adjournment of that conference so that a retainer agreement could be executed had been refused. Upon plaintiff's ensuing default in appearance on September 17, 2012, and upon defendants' application for dismissal, the Court (Lefkowitz, J.) had dismissed plaintiff's prior action, without prejudice, on September 17, 2012.

Thereafter, according to plaintiff's present counsel, due to the soon to be expiring statute of limitations, he commenced this entirely new action, on October 29, 2012. On March 4, 2012, plaintiff's present counsel had requested that defendants' counsel in the prior action accept service of process upon defendants; defendants' counsel had refused this request. Plaintiff's present counsel also notes that, despite written requests to plaintiff's former attorneys, who are asserting a charging lien, he could not obtain plaintiff's file from plaintiff's original counsel, until early June, 2013.

Presently, plaintiff is moving for an Order pursuant to CPLR 306-b extending the

¹Plaintiff's counsel and plaintiff himself states that plaintiff had been in Puerto Rico at the time, assisting his mother with a medical emergency. No proof of same has been submitted.

time for personal service upon defendants. Plaintiff maintains that the interests of justice will be served by allowing that relief and that there is no surprise to defendants since the previous action had been litigated and there had been a request made to defendants' counsel to accept service; nor is there any prejudice to defendants, according to plaintiff, since the prior action had been dismissed after almost all discovery had been completed.

Defendants oppose the motion and are cross-moving to dismiss this action. Defendants add to certain of the foregoing facts. Apparently, plaintiff's former counsel had moved to be relieved in the underlying action, which relief had been granted, by Decision and Order (Connolly, J.), dated July 16, 2012. Therein, Justice Connolly had stayed that action for thirty (30) days and had directed plaintiff to obtain new counsel. Accordingly, the compliance conference that had been scheduled for July 30, 2012, was adjourned for personal appearances, on August 30, 2012.

Neither plaintiff nor new counsel now representing him had appeared at the August 30, 2012, conference. Defendants' counsel had written to plaintiff, advising of the non-appearance and that the Court further had adjourned the conference to September 30, 2012, for personal appearances. As per the Court's directive, defendants further had advised plaintiff that any non-appearance at the September 30th conference would constitute a basis for dismissal of that action.

On September 6, 2012, plaintiff's present counsel had advised the Court in writing that he only had been contacted to represent plaintiff two days prior and that he needed additional time to have plaintiff execute a retainer agreement. Counsel had requested that the September 30, 2012, conference be further adjourned to a date after the Jewish holidays, "October 16th or 30th." Nowhere in said letter did plaintiff's counsel advise the

Court that plaintiff was then incarcerated and unavailable to counsel. On September 12, 2012, counsel had been informed by Court e-mail response that plaintiff's request for an adjournment had been denied, "all parties to appear 9/13 at 9:30."

Upon plaintiff and his counsel's ensuing failure to have appeared on September 13, 2012, the Court (Lefkowitz, J.) , upon defendants' ex parte application, had dismissed plaintiff's action "without prejudice to move to vacate the dismissal upon a showing of good cause for the failure to appear," which motion was to be made by Order to Show Cause within ten (10) days after the date of entry of that Order.

Defendants argue that plaintiff, rather than properly having complied with the Court's directive and timely moving to vacate his default, instead had commenced this action. Defendants contend that CPLR 205 prohibits this action because the statute of limitations on plaintiff's claims had expired on October 28, 2012, and this action had not been filed until October 29, 2012. Additionally, defendants argue that plaintiff has failed to timely effect service and obtain personal jurisdiction over defendants, in accordance with both CPLR 205, subdivision (a), and CPLR 306-b, the latter of which expressly requires personal service within 120 days after commencement, and that there is no good basis to excuse his failure, particularly in light of his repeated failures to appear for deposition. Finally, in light of plaintiff's refusal since March 12, 2013, to withdraw this action and plaintiff's bringing of this allegedly frivolous motion, defendants seek, in addition to dismissal, an Order imposing costs upon plaintiff, presumably for his allegedly frivolous conduct herein.

In response to defendants' opposition and cross-motion, plaintiff submits his supporting/opposing affidavit stating that he had been detained in the County jail from

August 29th to September 29, 2012, and therefore he could not attend the scheduled August 30th conference, nor the scheduled September 13th conference, and that it was only after his release on September 29, 2012, that he had received a copy of the Court's dismissal Order directing him, impossibly under the circumstances, to move for relief, on or before September 27, 2012. No supporting proof of the foregoing has been submitted.

Plaintiff also maintains that he had appeared for two days of extensive depositions, that he had not been able to attend other continued depositions due to his being "heavily affected by the pain killers and relaxant medications that [he] was taken (sic) to relieve the pain caused by the injuries [] suffered in this accident." Sometimes he would "forget" about his scheduled depositions, other times he was "too weak to attend." Plaintiff notes that defendants themselves had cancelled a number of scheduled depositions and had failed to appear at one scheduled deposition.

Initially, the Court notes that plaintiff's counsel's inability to have obtained plaintiff's underlying file is not material to the issues presented. This Court also observes that, at the time of plaintiff's counsel's September 6, 2012, written request to the Court for an adjournment of the scheduled September 13, 2012, conference, which request had been denied, counsel had not yet been retained to represent plaintiff. No copy of the executed retainer agreement is before this Court, and despite all of the submissions at bar this Court still does not know on what date counsel eventually had been retained. This Court cannot re-visit the decision of another Justice denying a request for an adjournment in a matter pending before her. Similarly, this Court also finds that the dismissal of plaintiff's earlier action by Justice Lefkowitz expressly had been based, at least in part, upon plaintiff's non-appearance at a scheduled conference and that, regardless of defendants' ex parte

[* 6]

application at that time seeking dismissal of the action and/or the appropriateness of same upon all of the circumstances presenting, the Court had been empowered sua sponte to dismiss same, particularly given that plaintiff had missed a previously scheduled Court appearance. See 22 N.Y.C.R.R. 202.27. Again, this Court cannot otherwise address another Court's decision dismissing the earlier action upon the circumstances presenting. Finally, the Court cannot agree with defendants' claim herein that Justice Lefkowitz's dismissal was in actuality a "failure to prosecute" dismissal. Cf. Marrero v. Crystal Nails, 978 N.Y.S.2d 257 (2nd Dept. 2013).

The inescapable fact remains that, regardless of the merit of plaintiff's explanation for his failure to timely have moved for relief from the September 13, 2012, dismissal of his earlier action in accordance with the terms of Justice Lefkowitz's September 13, 2012, dismissal Order, plaintiff also never timely had moved, as he seemingly would have been entitled to, pursuant to CPLR 5015, subdivision (a), for an Order vacating said dismissal Order upon his demonstration both of his excusable default and meritorious claim(s). Since more than one year has lapsed since service of that dismissal Order upon him, plaintiff is precluded from seeking relief from Justice Lefkowitz's dismissal Order pursuant to CPLR 5015, subdivision (a). See Wold v. City of New York, 85 A.D.3d 776 (2nd Dept. 2011).

CPLR 205, subdivision (a), upon which defendants properly rely, permits commencement of a new action where the underlying action had been terminated on a basis other than on the merits, and the re-filing occurs within the limitation period and defendants are served within the statutory 6-month period.

Applying CPLR 205, subdivision (a), to the facts at bar, plaintiff had until March 13,

2013, to have commenced and served defendants in an any newly filed action, said date being 6 months from the date of Justice Lefkowitz's dismissal. Plaintiff had re-filed his action, on October 29, 2013, clearly within this six-month required period of time.

Contrary to defendants' claim that commencement of this action on October 29, 2013, had been untimely by one-day since the statute of limitations on plaintiff's claims had expired on October 28, 2013, October 29, 2013, had been a Sunday. Thus, Judiciary Law section 282-a deems plaintiff's commencement of this action on Monday, October 29, 2013, timely. See Richey v. Hamm, 78 A.D.3d 1600 (4th Dept. 2010).

In this Court's view, the only requirement of CPLR 205, subdivision (a), that plaintiff had not fulfilled had been timely service of process upon defendants within the six month period of time. The questions presented are whether CPLR 306-b affords plaintiff a basis to extend the six-month service date set forth in CPLR 205, subdivision (a), and whether plaintiff has demonstrated entitlement to an extension of time to serve either based upon reasonable diligence or in the interests of justice. This Court, noting defendants' failure to have cited any case law on point which precludes a Court from applying CPLR 306-b to extend the six-month time limit in CPLR 205, finds in the exercise of its discretion that plaintiff is entitled to the relief sought based upon the interests of justice. Cf. Rinaldi v. Rochford, 77 A.D.3d 720 (2nd Dept. 2010).

In *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95, 105-106 [2001]), the Court of Appeals stated: "The interest of justice standard [of CPLR 306-b] requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of

delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." Here, plaintiff's counsel exercised little, if any, diligence in serving the City. Moreover, plaintiff's request for the extension of time to serve the City was not prompt. Nevertheless, there are factors which support an interest of justice extension, and the City has not demonstrated that it would be prejudiced if the extension were granted. In this regard, the City has not established that, as a result of plaintiff's failure to serve it timely or plaintiff's delay in seeking an extension, the City has lost some special right, or incurred some change of position or some significant expense (see *Murray v City of New York*, 51 AD3d 502, 503 [2008], lv denied 11 NY3d 703 [2008], citing *Barbour v Hospital for Special Surgery*, 169 AD2d 385 [1991]). Because some factors weigh in favor of granting an interest of justice extension and some do not, we should not disturb Supreme Court's discretion-laden determination.

Sutter v. Reyes, 60 A.D.3d 448, 449 (1st Dept. 2009); see also Estey-Dorsa v. Chavez, 27 A.D.3d 277 (1st Dept. 2006).

Here, although plaintiff has not demonstrated diligent efforts to serve defendants, the Court finds that, given the expiration of the statute of limitations, the demonstrated merits of plaintiff's claim, the lack of claimed or established prejudice to defendants and that defendants' and their insurance company had early knowledge of plaintiff's claims and an opportunity to fully investigate in the course of the earlier litigation and the discovery had there within, that plaintiff is entitled to an extension of time in which to serve defendants.

Accordingly, defendants' cross-motion is denied in all respects and plaintiff's motion for an Order extending his time to serve defendants is granted. Plaintiff is hereby afforded an additional sixty (60) days in which to effect personal jurisdiction over defendants.

Finally, in light of the tenor of and some statements included in the papers at bar, the Court is compelled to admonish counsel to litigate this action in a professional manner, without personalizing and without resort to ad hominem attacks.

The parties shall appear in the Preliminary Conference Part, Room 811, at 9:30 a.m., on June 2, 2014.

Dated: February 10, 2014
White Plains, New York



MARY H. SMITH
J.S.C.

Law Offices of M. Ari Jacobson
Attys. For Pltf.
1029 Teaneck Road, Suite 2D
Teaneck, New Jersey 07666

The Law Offices of Kenneth Arthur Rigby, PLLC
Attys. For Defts.
15 Maiden Lane, Suite 1500
New York, New York 10038

Frances Schiel Doyle