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| <b>Cabrera v Port Auth. of New York</b>                                                                                                                                                                                                                          |
| 2015 NY Slip Op 32139(U)                                                                                                                                                                                                                                         |
| November 17, 2015                                                                                                                                                                                                                                                |
| Supreme Court, Queens County                                                                                                                                                                                                                                     |
| Docket Number: 705716/13                                                                                                                                                                                                                                         |
| Judge: Kevin J. Kerrigan                                                                                                                                                                                                                                         |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN  
Justice

Part 10

**FILED**  
OCT 26 2015  
COUNTY CLERK  
QUEENS COUNTY

-----X  
Ralph Cabrera,

Index  
Number: 705716/13

Plaintiff,

- against -

Motion  
Date: 10/2/15

The Port Authority of New York and New  
Jersey, The Port Authority Police  
Department, and Port Authority Police  
Officers John Doe 1-3, Individually and  
in their Official Capacities,

Motion  
Cal. Number: 20

Defendants.  
-----X

Motion Seq. No.: 4

The following papers numbered 1 to 5 read on this motion by  
defendant, The Port Authority of New York and New Jersey, for  
summary judgment.

Papers  
Numbered

|                                            |     |
|--------------------------------------------|-----|
| Notice of Motion-Affirmation-Exhibits..... | 1-3 |
| Affirmation in Opposition.....             | 4   |
| Reply.....                                 | 5   |

Upon the foregoing papers it is ordered that the motion is  
decided as follows:

Motion by defendants to dismiss the complaint, pursuant to  
CPLR 3211(a)(2) and 306-b, is granted.

Plaintiff was involved in a motor vehicle accident on the  
Brooklyn-Queens Expressway (BQE) on October 7, 2013 in which he  
rear-ended another vehicle. Port Authority Police Deputy Inspector  
Lisha Harper was driving her unmarked vehicle on the BQE when she  
observed plaintiff's vehicle with front-end damage coasting to the  
left shoulder of the roadway and coming to a stop. She stopped her  
vehicle in front of plaintiff's, exited and walked over to  
plaintiff's vehicle and asked plaintiff if he was okay. Since  
plaintiff's vehicle was partially in the left lane of traffic and  
plaintiff indicated that he was unable to move the vehicle, and  
since Harper noticed that the vehicle was occupied by plaintiff and

his two-year-old daughter, she asked him to take his daughter out of the vehicle, and he complied. Harper called the LaGuardia (LGA) police command desk on her cell phone and apprised them of the situation and requested that they notify the NYPD to respond to the location. The other vehicle involved in the accident had stopped on the right shoulder of the highway, and Harper walked across the highway to speak to its occupants. According to Harper, plaintiff then proceeded to cross the BQE with his daughter, in medium to heavy traffic, screaming at the driver of the other vehicle. She then went over to him and held out her left arm at the oncoming traffic and held her right arm up and out in front of her across plaintiff, who continued to scream at the other vehicle's occupants. Harper asked plaintiff to go back to the side of the BQE from where he had come and plaintiff walked backwards and tripped and fell. Plaintiff got up from the ground, continuing to yell, but did not complain of pain. Harper then called the LGA command again to request an ambulance. Thereafter, Harper went back to the other vehicle to speak to its occupants, and plaintiff followed with his daughter, continuing to yell. An FDNY EMS ambulance subsequently arrived and the EMT personnel examined plaintiff, who refused treatment or transport to the hospital. Plaintiff thereafter departed the scene of the accident in a minivan that arrived at the location occupied by plaintiff's brother and other individuals.

According to plaintiff, Harper had instructed him to walk across the BQE with her to the other vehicle and suddenly, and for no reason, pushed his shoulder, causing him to fall.

The NYPD did not respond to the location and, therefore, Port Authority Police Officer Nicole Dalton was dispatched to prepare a Port Authority Motor Vehicle Crash Report.

The aforementioned events transpired between 1:30 p.m. and 4:00 p.m. on October 7, 2013.

Plaintiff commenced this action by filing a summons and complaint on December 6, 2013. The complaint alleges, as a first cause of action, false arrest and imprisonment and excessive force, as a second cause of action, assault and battery in the course of the false arrest and detention, and as a result of being handcuffed, and as a third cause of action, a claim under 42 U.S.C. §1983 based upon a violation of his Fourth and Fourteenth Amendment rights.

The Port Authority is a direct agency of the State of New York and, as such, is protected by the State's sovereign immunity and is, in the absence of consent by the State, completely immune from suits of any sort (see Trippe v. Port of New York Authority, 14 NY

2d 119 [1964])). In 1950, the Port Authority consented to be subject to suits (see NY L. 1950, Ch. 301; NJ Stat. Ann. §32:1-157 [1963])). However, said consent was granted, inter alia, "upon the condition that any suit, action or proceeding . . . shall be commenced within one year after the cause of action therefor shall have accrued, and upon the further condition that. . . a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced" (McKinney's Unconsolidated Laws of NY §7107). The failure to satisfy these conditions will result in the withdrawal of the Port Authority's consent to be subject to suit, thus compelling dismissal of the action for lack of subject-matter jurisdiction (see Lyons v. Port Authority of New York and New Jersey, 228 AD 2d 250 [1<sup>st</sup> Dept 1996])).

Moreover, this Court notes that although the defense of subject-matter jurisdiction was not raised in Port Authority's answer, subject-matter jurisdiction may be raised at any time and may not be waived (see Re Metropolitan Transportation Authority, 32 AD 3d 943 [2<sup>nd</sup> Dept 2006])).

Plaintiff does not dispute, and indeed he alleges in his complaint, that he served upon the Port Authority a predicate notice of claim on November 12, 2013, only 24 days before commencing this action.

Since plaintiff failed to satisfy the condition to the Port Authority's waiver of immunity from suit, and such failure constituted a withdrawal of the Port Authority's consent to be subject to suit, the action against the Port Authority must be dismissed for lack of subject-matter jurisdiction. Plaintiff's counsel, in opposition, does not oppose dismissal of the action against the Port Authority upon the ground of lack of subject-matter jurisdiction. Indeed, counsel does not even address the issue.

Furthermore, since the Port Authority Police Department is not a separate entity but is merely an agency, or department, of the Port Authority, it is an improper party and, thus, this Court, sua sponte, dismisses the action as against the Port Authority Police Department.

The action must also be dismissed as to the individual defendants, designated as "Port Authority Police Officers John Doe 1-3", pursuant to CPLR 306-b. Although defendants' counsel seeks dismissal under CPLR 3211(a)(7), failure to state a cause of action, this Court notes that counsel also argues that the action must be dismissed, inter alia, because Harper and Dalton were not

served within 120 days or within the extended period afforded by the Court in its order issued on January 22, 2015, pursuant to CPLR 306-b. Therefore, this Court deems the relief requested to include dismissal pursuant to CPLR 306-b.

Pursuant to CPLR 306-b, service of the summons and complaint must be made within 120 days after filing. If service is not effected within the 120-day period, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown, or in the interest of justice, extend the time for service." Even where the identity of defendants, after due diligence efforts to ascertain it, was unknown to the plaintiff and the action was commenced by designating defendants as "John Doe", the plaintiff is still required to name and serve the actual defendants within the 120-day time frame (see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1024).

On January 16, 2015, plaintiff moved for leave to amend the complaint to substitute Port Authority Officer Lisha Harper and Port Authority Officer Nicole Dalton as defendants in place and stead of John Doe 1-3. That motion was granted pursuant to the order of this Court issued on January 22, 2015, and plaintiff was given leave to serve a supplemental summons and amended complaint in the form annexed to the moving papers within 20 days after entry of the order. Even though the 120-day period had expired and plaintiff had not moved for an extension of time to serve the summons and complaint upon defendants Harper and Dalton, since defendants did not appear to oppose the motion, this Court, without so stating explicitly, extended plaintiff's time to serve the individual defendants, in the interest of justice, by granting plaintiff's motion to amend the caption and granting leave to serve the individual defendants within 20 days after entry of the order.

The order was entered on February 2, 2015. Therefore, plaintiff was granted an extension of time until February 23, 2015 to serve a supplemental summons and amended complaint upon Lisha Harper and Nicole Dalton. Harper and Dalton aver in their affidavits annexed to the moving papers that they have not been served with the summons and complaint, and plaintiff's counsel, in opposition, does not dispute, or even address, their averment that they have not been served with the summons and complaint, and has not moved or cross-moved for an extension of time to serve the supplemental summons and amended complaint upon Harper and Dalton. Having failed to serve Harper and Dalton by February 23, 2015, the action against them must be dismissed, pursuant to CPLR 306-b. The dismissal, pursuant to that section, however, is without prejudice.

Although defendants' counsel also contends that the action

against Harper and Dalton must be dismissed upon the grounds of statute of limitations and lack of personal jurisdiction, this Court notes, upon examining the Court record (necessitated by counsel's failure to annex a copy of defendants' answer to the moving papers), that defendants did not interpose the affirmative defenses of statute of limitations or lack of personal jurisdiction in their answer and, thus, have waived those defenses in the present action (see CPLR 3211[e]). Moreover, counsel has not moved to amend the answer to allege those affirmative defenses. Thus, those branches of the motion for dismissal upon the grounds of statute of limitations and lack of personal jurisdiction must be denied.

This Court need not reach, and will not decide, the remaining branches of the motion for summary judgment.

Accordingly, the action is dismissed.

Dated: October 19, 2015

  

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KEVIN J. KERRIGAN, J.S.C.

**FILED**  
OCT 26 2015  
COUNTY CLERK  
QUEENS COUNTY