

Melton v City of New York

2016 NY Slip Op 30816(U)

April 29, 2016

Supreme Court, New York County

Docket Number: 451703/15

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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TASELA MELTON,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, and P.O. DUVAN CASTRO,
a New York City Police Officer,

Defendants.
-----X

DECISION AND ORDER
Index No. 451703/15
Mot. Seq. No. 001

Hon. James E. d'Auguste

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 (Exs. A-H)
NOTICE OF CROSS-MOTION AND AFFIDAVITS ANNEXED.....	3, 4 (Ex. A)
REPLY AFFIRMATION.....	5 (Exs. A-B)

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

In this action for personal injuries allegedly sustained by plaintiff Tasela Melton, the motion by defendants The City of New York ("City"), The City of New York s/h/a New York City Police Department ("NYPD"), and P.O. Duvan Castro ("P.O. Castro") (hereinafter, collectively "defendants") seeking an order, pursuant to CPLR 3211(a)(7), to: (1) dismiss the complaint on the ground that the instant action is barred by the Workers' Compensation Law; and (2) dismiss the action against the NYPD as it is a non-suable entity, is granted in its entirety. Plaintiff's cross-motion seeking an order to amend her complaint, pursuant to CPLR 3025(b), and to deny defendants' motion is hereby denied.

Factual and Procedural History

The instant action arises out of an incident that occurred on July 13, 2014, at about 12:35 a.m. when plaintiff, a traffic enforcement agent employed by the NYPD, while operating an NYPD vehicle in the course of her employment, allegedly sustained personal injuries when her vehicle was struck by an NYPD vehicle operated by P.O. Castro at the intersection of Avenue A and East 4th Street in the County,

City and State of New York. On or about August 21, 2014, plaintiff served a notice of claim on the named defendants in this action alleging personal injuries sustained from the above incident. On or about January 5, 2015, plaintiff filed a summons and verified complaint against defendants.¹ Plaintiff served a verified bill of particulars and response to the City's combined demands on or about October 29, 2015. An amended answer was then served on behalf of P.O. Castro on or about November 24, 2015, which raised the affirmative defense that plaintiff's action is barred since workers' compensation is her exclusive remedy.

Discussion

As an initial procedural matter, although the NYPD listed as a defendant, it is a non-suable entity and is not legally subject to suit. N.Y. City Charter, Ch. 17 § 396; *Alvarez v. City of New York*, 134 A.D.3d 599, 600 (1st Dep't 2015) (Sweeny, J., concurring) (dismissing claims "against the NYPD on the ground that it is a 'non-suable entity'"). Although unopposed by plaintiff, as an agency of the City, all claims against the NYPD are dismissed. *Gutierrez v. City of New York*, 756 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2010) (holding that the NYPD is a non-suable entity); *Simpson v. City of New York*, 2014 WL 273858, at *1 (Sup. Ct., N.Y. County Jan. 16, 2014) (Chan, J.) (same).

As a second procedural matter, plaintiff and defendants, respectively, dispute the proper service in regard to defendants' motion and plaintiff's cross-motion. Specifically, plaintiff asserts that it was never served with defendants' motion, except for an email reminder by eCourts. However, service is proper pursuant to the mandatory e-filing rules located at 22 NYCRR 202.5-bb. *See Castlepoint Ins. Co. v. Vines*, 2015 WL 4164863, at *2 (Sup. Ct., N.Y. County July 8, 2015) (Rakower, J.). The Court will also decide plaintiff's cross-motion on its merits despite defendants' assertion that it was untimely filed.

¹ The summons and verified complaint was initially filed in Supreme Court, Kings County. The City joined issue by service of a verified answer on or about February 11, 2015 and subsequently moved to change venue to New York County on or about February 18, 2015. The City's motion was granted, and the action was transferred to New York County on May 16, 2014.

Turning to the merits of defendants' motion and plaintiff's cross-motion, the Court of Appeals has held that "the tort plaintiff carries the burden of disproving [workers'] compensation coverage" and "the unavailability of workmen's compensation benefits or insurance for compensation benefits is a matter integral to plaintiff's cause of action, and, as such, must be alleged and proved by the tort plaintiff." *O'Rourke v. Long*, 41 N.Y.2d 219, 225-26 (1976). Further, the Appellate Division, First Department has held that a "[p]laintiff could not proceed with her tort claims, because she failed to sustain her burden of establishing the unavailability of workers' compensation benefits or insurance." *Nepomuceno v. City of New York*, 137 A.D.3d 646, 646 (1st Dep't 2016). Here, plaintiff failed to even mention anything pertaining to the availability of workers' compensation until after defendants' moved to dismiss the complaint on this ground, when plaintiff then cross-moved to amend her summons and complaint to assert that "Plaintiff's claim is not barred by any provision of the Workers' Compensation Law" (Russo Aff. Ex. A, ¶ 33) without providing any additional documentation showing whether or not plaintiff filed for (and was paid) any workers' compensation benefits or whether any such benefits were available to plaintiff. Defendants, however, supply an affidavit of Assistant Corporation Counsel Mindy Roller, Deputy Chief of the Workers' Compensation Division of the New York City Law Department, who supervises workers' compensation claims filed by City employees against the City and attests that plaintiff filed a workers' compensation claim arising out of this incident—Claim # W056-14-09016. Calliste Aff. Ex. H, ¶ 3. Ms. Roller further attests that as of November 16, 2015, plaintiff received \$5,100.00 and the City has paid approximately \$11,500.00 for plaintiff's medical treatment. *Id.* Based on the above analysis alone, this Court grants defendants' motion to dismiss plaintiff's complaint.²

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² Such dismissal is not prejudicial to plaintiff because defendants' pleaded in their amended answer that workers' compensation was plaintiff's sole remedy as an affirmative defense and again raised the issue in the instant motion, which was filed on December 3, 2015, approximately nine months prior to the expiration of the two-year statute of limitations set forth in Workers' Compensation Law section 28. *Nepomuceno*, 137 A.D.3d at 646.

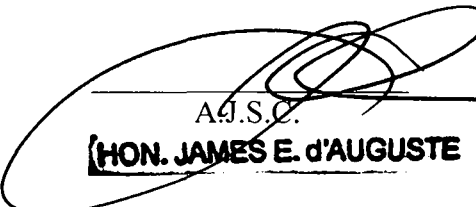
Moreover, the Court notes that plaintiff, a traffic enforcement agent, is not permitted to avail herself of the provisions of General Municipal Law (“GML”) section 205-e(1). This is because GML 205-e covers “a police officer employed by the police department.” *Sierk v. Frazon*, 32 A.D.3d 1153, 1155 (4th Dep’t 2006). As such, the workers’ compensation benefits plaintiff received are “[t]he sole and exclusive remedy of an employee against [her] employer for injuries in the course of employment.” *Weiner v. City of New York*, 19 N.Y.3d 852, 854-55 (2012) (alteration in original) (quoting *Gonzales v. Armac Indus.*, 81 N.Y.2d 1, 8 (1993)) (discussing the legislative intent of the statute).

Plaintiff’s cross-motion to amend her summons and complaint to state that any tort claim she has asserted herein is not barred by Workers’ Compensation Law is denied because, as noted above, she is not permitted to proceed against her employer outside the comprehensive scheme established by the Workers Compensation Law. Moreover, to the extent that GML 205-e(1) may apply, plaintiff (1) does not move to assert a claim pursuant to GML 205-e and (2) is procedurally barred from bringing such a claim under this section because it was not alleged in her notice of claim as required by GML 205-e(2). Accordingly, the cross-motion is denied. *See Mosaic Caribe, Ltd. v. AllSettled Group, Inc.*, 117 A.D.3d 421, 422 (1st Dep’t 2014) (“The court correctly noted that if the proposed amendments are totally devoid of merit and legally insufficient, leave to amend should be denied.”)

Conclusion

Accordingly, defendants’ motion to dismiss the complaint is granted in its entirety and plaintiff’s cross-motion to amend the complaint is denied. This constitutes the decision and order of this Court.

Dated: April 29, 2016


A.J.S.C.
HON. JAMES E. d'AUGUSTE