

<b>Burke v New York City Educ. Constr. Fund</b>
2017 NY Slip Op 32328(U)
November 2, 2017
Supreme Court, New York County
Docket Number: 153677/2017
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

-----X

DENNIS BURKE

**INDEX NO. 153677/2017**

Plaintiff,

**MOTION DATE 10/03/2017**

- v -

NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND,

**MOTION SEQ. NO. 001**

Defendant.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this application to/for DISMISSAL.

Upon the foregoing papers, it is

ORDERED that the motion of defendant New York City Educational Construction Fund to dismiss the complaint is granted pursuant to CPLR 3211(a)(5) and (a)(7); and it is further

ORDERED that the cross-motion of plaintiff to file a late notice of claim against defendant is denied; and it is further

ORDERED that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

DECISION

In this action, while employed as a construction worker on a site owned by defendant New York City Educational Construction Fund (NYCEF) on January 6, 2015, plaintiff alleges that he

suffered injuries arising out of the negligence of NYCEF. He served the summons and complaint in this action upon NYCEF on or about April 20, 2017.

NYCEF now moves to dismiss the complaint pursuant to CPLR 3211(a)(5), (a)(7) and (a)(8) for plaintiff's failure to serve a notice of claim upon it, as required by New York Education Law § 467 and General Municipal Law § 50-e. Plaintiff cross moves for an order permitting him to serve a late notice of claim upon NYCEF.

NYCEF is correct that New York Education Law § 467(3) sets the statute of limitations period for personal injury actions against NYCEF as one year and ninety days and provides that the service of a notice of claim upon it within the time under General Municipal Law § 50-e is a condition precedent to commencing such lawsuit. As NYCEF contends, the time set for the service of such notice of claim is within ninety days after the accident. NYCEF is likewise correct that service of a notice of claim is "an indispensable element of the substantive cause of action" Mojica v. City of New York, 117 AD2d 722, 724 (2<sup>nd</sup> Dept. 1986). NYCEF further argues, inter alia, that this action is untimely as plaintiff has not commenced an action on a sufficiently pled claim against NYCEF within one year and ninety days.

On his cross motion, plaintiff argues that the court should grant him leave to serve and file a late notice of claim upon NYCEF. He argues that NYCEF has the same lawyer as two other municipal defendants that he sued in two prior negligence actions involving the same accident (which lawsuits have now been consolidated). He notes that he timely served notices of claim upon such other municipal defendants prior to commencing those actions. He contends that NYCEF, through its attorney, misled him with respect to the fact that NYCEF was the actual owner of the accident site, and should therefore be estopped from asserting that his cross motion to file a late notice of claim should be denied as untimely made after the expiration of the statute of limitations.

This court agrees with NYCEF that plaintiff has not shown that he was misled about the identity of the ownership of the accident site by NYCEF's lawyers, who also represent the municipal defendants in the other two lawsuits.

Plaintiff commenced the prior two actions on May 7, 2015, and September 1, 2015, wherein issue was joined on June 5, 2015 and September 30, 2015, respectively. Plaintiff does not explain how the lawyers for NYCEF, who also represented the municipal defendants in those cases, impeded him from discovering that NYCEF was the true owner of the accident site during the eight months that remained on the statute of

limitations after joinder of issue in those lawsuits. The fact that on September 28, 2015, one of the non-municipal co-defendants in the first of the prior actions propounded a Notice to Admit with respect to Memorandum of Lease for the accident site between NYCEF and such co-defendant, specifying an effective date as of January 19, 2015 (a date that was confoundedly two weeks after the accident), did not foreclose plaintiff from pursuing further discovery based upon the explicit terms of the Memorandum of Lease. Such Memorandum of Lease, though unverified, explicitly named NYCEF as landlord of the accident site, as of February 18, 2014. Nor does the fact that on May 6, 2016, in the second prior action, such same non-municipal defendant propounded a Notice of Admit that specified the effective date of the Memorandum of Lease as January 10, 2015 (as opposed to January 6, 2015, the date of the accident in question), show that plaintiff was misled. In fact, plaintiff could not have relied upon such latter Notice of Admit in forbearing to move to file a late Notice of Claim on NYCEF since by that time the one year and ninety days statute of limitation had already run.

As argued by NYCEF, the court lacks discretion to entertain a motion to extend the time to serve a Notice of Claim after the applicable statute of limitations has expired. See Pierson v City of New York, 56 NY2d 950, 954 (1982).

For failure to comply and allege the condition precedent of compliance with General Municipal Law § 50-e, the complaint at bar fails to state a cause of action pursuant to CPLR 3211(a)(7). See Martinez v City of New York, 104 AD3d 407 (1st Dept. 2013).

11/2/2017  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
DO NOT POST

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE