

Akal Taxi NYC LLC v City of New York

2017 NY Slip Op 32913(U)

November 1, 2017

Supreme Court, Queens County

Docket Number: 708602/17

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

AKAL TAXI NYC LLC, et al.,

Index No. 708602/17

Plaintiffs,

Motion
Date September 25, 2017

-against-

Motion
Cal. No. 3

THE CITY OF NEW YORK and THE NEW
YORK CITY TAXI AND LIMOUSINE
COMMISSION,

Motion
Seq. No. 1

Defendants.

FILED
NOV 13 2017
COUNTY CLERK
QUEENS COUNTY

Papers
Numbered

Notice of Motion.....	EF 7
Affirmation.....	EF 8
Exhibits.....	EF 9-12
Memo of Law.....	EF 13
Addendum-General.....	EF 16
Amended Complaint.....	EF 17
Aff. In Opposition.....	EF 22

Upon the foregoing papers it is ordered that the branch of defendants' motion seeking to dismiss plaintiffs' Complaint pursuant to CPLR 3211(a)(4) on the grounds that there is another action pending between the same parties for the same causes of action is hereby denied.

CPLR 3211(a)(4) states in relevant part, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... (4) there is another action pending between the same parties for the same cause of action."

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83 [1994]).

In the instant case, defendants contend that in this action

and a pending action under Index No. 713014/15, plaintiffs have brought the same claims. Such branch of defendants' motion is denied as the record reflects that an Appeal was filed with the Supreme Court, Appellate Division appealing an Order of the Supreme Court, Queens County dated May 2, 2017, which order dismissed the action under Index No. 713014/15; and by Order of the Appellate Division, Second Department dated July 20, 2017 the Appeal was subsequently withdrawn. As there are not now two actions pending for the same causes of action, this branch of the motion is denied.

That branch of defendants' motion seeking to dismiss plaintiffs' Complaint pursuant to CPLR 3211(a)(7) is hereby granted.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

Defendants maintain that plaintiffs have failed to comply with the notice of claim requirement set forth in New York General Municipal Law § 50-e, and as such, the claims sounding in tort and wrongful conduct in the nature of tort are jurisdictionally barred since petitioner's time to file a Notice of Claim expired ninety (90) days after the causes of action arose on February 26, 2014.

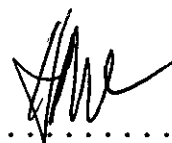
In opposition, plaintiffs submit as "Exhibit B" notices of claim filed pursuant to Section 7-201 of the New York City

Administrative Code on December 16, 2016 and February 9, 2017. The Court finds that such notices of claim have not been timely filed. As such, the claims sounding in tort and wrongful conduct in the nature of tort are time-barred.

Accordingly, this branch of the motion is granted.

This constitutes the decision and order of the Court.

Dated: November 1, 2017



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Howard G. Lane, J.S.C.

FILED
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QUEENS COUNTY