

Anza v City of New York
2018 NY Slip Op 33962(U)
February 9, 2018
Supreme Court, Bronx County
Docket Number: 22630/2017e
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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VIOLET A. ANZA,

Index No.: 22630/2017e

Plaintiff(s),

DECISION/ORDER

-against-

Present:

HON. MITCHELL J. DANZIGER

THE CITY OF NEW YORK, et. al.,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this motion to extend time to serve complaint and cross-motion to dismiss

Papers Numbered

Notice of Motion and Affirmation in Support with Exhibits	<u>1</u>
Affirmation in Opposition by Transit	<u>2</u>
Notice of Cross-Motion by City of New York, Affirmation in Support of Cross-Motion and in Opposition to Motion	<u>3</u>
Reply Affirmation in Support of Motion and in Opposition to Cross-motion.....	<u>4</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Plaintiff moves for an order pursuant to CPLR §306-b extending her time to serve the summons and complaint beyond the statutory 120 day period from the commencement of the action. Defendant, CITY OF NEW YORK (“City”), cross-moves to dismiss the complaint on the basis that plaintiff failed to serve the summons and complaint within the 120 period and further pursuant to CPLR 3211(a)(5) on the basis that the action is allegedly barred by the 1 year and 90 day statute of limitations set forth by GML §50-i. Defendants, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and MTA BUS COMPANY (hereinafter collectively referred to as “Transit”), also oppose plaintiff’s motion but do not cross-move to dismiss the complaint.

Plaintiff seeks damages for injuries allegedly sustained after she tripped and fell on a defective portion of the roadway on White Plains Road between Turnbull and Lafayette Streets in the Bronx. The accident allegedly took place near a bus stop and occurred on October 14, 2015(see

notice of claim, exhibit A to the motion). Plaintiff served notices of claims on all defendants, and a GML §50-h hearing was held by Transit. There is nothing in the record to indicate that the City noticed a §50-h hearing after receiving plaintiff's notice of claim.

This matter is an e-file case. Upon review of the record submitted by the parties and upon the Court's review of the New York State Courts Electronic Filing ("NYSCEF") website, plaintiff initially presented a summons and complaint for filing, and payment for the issuance of an index number, on January 11, 2017 - one day before the statute of limitation was due to expire on January 12, 2017. Plaintiff's filing is confirmed by the summons and complaint on the NYSCEF website where the same is clearly marked, in bold lettering, "FILED: BRONX COUNTY CLERK 1/11/2017 5:35 PM." However, a clerk rejected the summons and complaint. Plaintiff's attorney affirms that the rejection was based upon typographical errors. Notwithstanding the above, there is nothing in the record to confirm the basis for the clerk's rejection of the summons and complaint. Almost three months later, the clerk processed a "corrected" version of the summons and complaint on April 3, 2017. The City argues in its cross-motion that this matter should be dismissed because based upon the April 3, 2017 filing of the "corrected" summons and complaint, the action is barred by the statute of limitations. The Court disagrees.

22 NYCRR 202.5-bb(b)(1) provides that e-filed cases, "shall be commenced by "electronically filing the initiating documents with the County Clerk through the NYSCEF site." 22 NYCRR §202.5(d)(1) sets forth specific and limited circumstances under which a County Clerk shall reject papers filed therewith. §202.5(d)(2) further provides that the clerk refusing to accept papers for filing must, "signify a refusal to accept a paper by use of a stamp on the paper indicating the date of the refusal and by providing on the paper the reason for the refusal." However, there is nothing in the record, or on the NYSCEF website, to confirm whether the clerk adhered to the mandate of §202.5(d)(2) as there is no reason for the refusal indicated on the originally filed summons and complaint. Therefore, the Court cannot determine whether the clerk's initial "rejection" of plaintiff's summons and complaint was appropriate or even valid. Moreover, the Court notes that it took almost 3 months for the clerk to process the summons and complaint and there is absolutely no paper trail to indicate the reasons for the rejection(s). However, plaintiff's counsel affirms that the check he submitted for payment of the fee for the index number was accepted when he initially filed the

complaint in January.

If the Court were to adopt the City's argument that the action was not commenced timely based upon a clerk's baseless rejection of the initiating documents, a grave miscarriage of justice would result. Based upon the clear language of 22 NYCRR 202.5(b)(1), plaintiff commenced the action on January 11, 2017 when she filed the summons and complaint with the County Clerk through the NYSCEF site. The Court finds that plaintiff timely commenced the action and the same is therefore, not barred by the statute of limitations. Consequently, the City's cross-motion is denied in that respect.

Turning to the underlying motion, plaintiff seeks an extension of time to serve the summons and complaint. Plaintiff's counsel affirms that the summons and complaint was not served within the initial 120 days of filing the complaint because of law office failure. Specifically, plaintiff's counsel affirms that, "due to an inadvertent office clerical, the summons and complaint were not served within the 120 day period." Further plaintiff's attorney affirms that the delay in the clerk issuing an index number shortened his time to serve the complaint from 120 days from the original filing, to less than one month, after the index number was assigned by the clerk's office. Defendants each oppose the motion on the basis that plaintiff fails to show that she exercised reasonable diligence in attempting to serve the summons and complaint within the initial 120 days.

CPLR §306-b permits a court to extend a plaintiff's time to serve a summons and complaint beyond 120 days from commencement upon good cause shown or in the interest of justice. Defendants contend that a plaintiff is required to show reasonable diligence in attempting service in order to be granted an extension. However, unlike a request for an extension of time premised on good cause, a plaintiff who makes such a request under the "interest of justice" standard, as here, need not establish diligence efforts to serve (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y. 2d 95, 105-106 [2001]). Under the interest of justice standard, 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. Indeed, the statute, "empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative—the calculus of the court's

decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served” (*Id.* at 106) see also; *Matthews v St Vincent’s Hospital Hosp. & Med. Ctr. of New York*, 303 A.D.2d 327 [1st Dep’t., 2003]). Further, the “interest of justice” standard is intended to be an additional and broader standard to accommodate late service that might be due to mistake, confusion or oversight (*Wideman v Barbel Trucking, Inc.*, 300 AD2d 184, 185 [1st Dept 2002]).

Under the interest of justice standard, the Court finds that permitting an extension of time to serve the summons and complaint is appropriate. Indeed, plaintiff’s statute of limitations expired during a quagmire where a clerk, without grounds, refused to issue an index number to plaintiff. Therefore, dismissing plaintiff’s claim now would leave her without recourse for what she alleges are severe injuries. Further, both defendants were served with notices of claim and a §50-h hearing was conducted by Transit. Therefore, they have been on notice of the claims for sometime, and defendants will suffer no prejudice by permitting an extension of time. Further plaintiff has demonstrated a meritorious claims so as to permit, at the very least, the service of the summons and complaint.

Based on the foregoing, the motion is granted and the cross-motion is denied.

Plaintiff’s time to serve the summons and complaint is extended to thirty days from the entry date of this order.

Plaintiff shall serve a copy of this order with notice of entry upon all parties within 30 days of the entry.

This constitutes the decision and order of the Court.

Dated:

2/9/18

Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.