

Lopez v Metropolitan Tr. Auth.
2019 NY Slip Op 31580(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 162233/2015
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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JUAN LOPEZ,

Plaintiff,

- v -

METROPOLITAN TRANSIT AUTHORITY, NEW YORK TRANSIT
AUTHORITY, THE CITY OF NEW YORK

Defendants.

INDEX NO. 162233/2015
MOTION DATE 01/17/2019
MOTION SEQ. NO. 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 140, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 160, 161, 163, 164, 166, 180, 181, 182, 183, 184, 185, 186, 187

were read on this motion to/for SUMMARY JUDGMENT AFTER JOINDER.

In this personal injury action, defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment on all of the claims in the complaint and also seeks leave to correct and/or amend the caption and to serve a proposed supplemental summons and amended complaint adding 86th Street Constructors Joint Venture as an additional defendant.

Pursuant to the Part Rules, summary judgment motions must be filed no later than sixty (60) days after the filing of the note of issue. Here, plaintiff filed his note of issue on March 15, 2018 but defendants' motion for summary judgment was not file until May 29, 2018, or 75 days later. Therefore, the defendants' motion and the plaintiff's cross-motion for summary judgment are untimely.

Defendants argue that they were confused about the summary judgment deadline because the prior judge's rules and the preliminary conference order provided 90 days for filing summary judgment motions. However, this is insufficient to demonstrate good cause for the belated filing.

Appleyard v. Tigges, 171 A.D.3d 534, 536 (1st Dep't 2019). Thus, the defendants' motion and the plaintiff's cross-motion for summary judgment must be denied as untimely.

Plaintiff also cross-moves to amend the caption and serve a supplemental summons and amended complaint, in the form annexed to the motion papers, adding 86th Street Constructors Joint Venture as a defendant. Affirmation of Elliot Pasik dated September 5, 2018, Exh. H. "It is well settled that an application to amend the caption to reflect the true name of the defendant should be granted where, as here, the designated entity was the intended subject of the law suit, knew or should have known of the existence of the litigation against it, and will not be prejudiced thereby." *Fink v. Regent Hotel*, 234 A.D.2d 39, 41 (1st Dep't 1996); *see also Gross v. Neiman*, 147 A.D.3d 505, 508 (1st Dep't 2017). Here, defendants Schiavone Construction Co. LLC and John P. Picone, Inc. were members of the proposed defendant 86th Street Constructors Joint Venture, and thus the proposed defendant was aware of the existence of this lawsuit and will not be prejudiced thereby. Moreover, as joint venturers, Schiavone, Picone and 86th Street Constructors are united in interest, and thus the proposed supplemental summons and amended complaint relates back to the filing of the original summons and complaint and is timely under CPLR 203. *See Benn v. Lasquadro Ice Co.*, 65 A.D.3d 655, 656 (2d Dep't 2009). Nevertheless, the defendants must be afforded an opportunity to answer the amended complaint. *R & G Brenner Income Tax Consultants v. Gilmartin*, 166 A.D.3d 685, 688 (2d Dep't 2018).

Accordingly, it is

ORDERED that defendants' motion and plaintiff's cross-motion for summary judgment are denied as untimely; and it is further

ORDERED that the plaintiff's cross-motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

JUAN LOPEZ,

Plaintiff,

-against-

METROPOLITAN TRANSIT AUTHORITY, NEW YORK

TRANSIT AUTHORITY, THE CITY OF NEW YORK,

SCHIAVONE CONSTRUCTION CO. LLC, JOHN P. PICONE, INC.,

and 86TH STREET CONSTRUCTORS JOINT VENTURE,

Defendants

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse*

and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)).

6/3/19
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE