

City of New York v Atlantic Testing Labs., Ltd.

2019 NY Slip Op 32380(U)

August 1, 2019

Supreme Court, New York County

Docket Number: 451296/2018

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

-----X

INDEX NO. 451296/2018

CITY OF NEW YORK,

MOTION DATE 07/31/2019

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

ATLANTIC TESTING LABORATORIES, LIMITED, GOMEZ
& SULLIVAN ENGINEERS, DPC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 28

were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons set forth below, defendants' motions to dismiss are denied and plaintiff's cross-motion is granted.

Defendant, Atlantic Testing Laboratories, Limited (ATL), and Defendant, Gomez & Sullivan Engineers, D.P.C (GSE) (Defendants) bring the instant motions pursuant to CPLR 3211(a)(8) and 306-b to dismiss the above-captioned action, in which plaintiff, The City of New York (City), seeks to recover response costs for damage allegedly caused by defendants during a project at the Cannonsville Dam and Reservoir in Delaware County, New York. Defendants contend that they were not served until 145 days after the filing of the Summons and as a result of this service failure now move to dismiss the instant action. City cross-moves to deem its late served summons with notice timely served *nunc pro tunc*.

Legal Standard

CPLR 306-b, provides in relevant part, that a plaintiff must serve its summons with notice on the defendants “within one hundred twenty days after the commencement of the action.” If service is not made within 120 days of commencement, the court, upon motion, shall dismiss the action, unless the plaintiff shows that the time for service should be extended upon “good cause” or “in the interest of justice.” *Id.*

Under the interest of justice prong of CPLR 306-b, the Court of Appeals has instructed that a court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor . . . , 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" (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] citing *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106).

Discussion

The timeline in this case is not in dispute. City commenced this action by filing a Summons with Notice on July 6, 2018. It is undisputed that the City did not serve the summons on defendants until 145 days after its filing and thus 22 days after the expiration of the 120-day statutory period.¹

However, prior to the commencement of the instant action, on December 30, 2015, more than 2 years before the filing of the summons with notice in this action, the City notified defendants that it would seek to recover damages arising out of defendants' negligence on the Cannonsville Dam Project. The parties began efforts to resolve the dispute short of litigation.

¹ The time period is considered 22 days past the 120-day period because the 120-day statutory period in question ended on a weekend.

Those efforts consisted of face-to-face meetings, a full-day mediation conference and discovery exchanges. On September 18, 2018, within the 120-day period, the plaintiff contacted the defendants, who agreed to accept service of the summons with notice via e-mail and asked for a stipulation extending their time to respond to the summons with notice. In addition, there was communication between the parties and the mediator on October 5, 2018, during the 120-day period for service, with counsel for the City asking to keep the file open as he was awaiting information from the New York City Comptroller's Office.

The Court finds that the interest of justice standard is satisfied here because it is undisputed that the parties to the instant action have been in ongoing settlement negotiations for over three years, therefore eliminating any surprise or prejudice by defendants of plaintiff's causes of action. In addition, there was contact with the defendants during the 120-day period, notifying them that an action had been commenced. Moreover, defendants have not asserted that a 22-day delay in service of the summons prejudiced them. The City however, would be prejudiced by dismissal because the statute of limitations in this matter has likely run, and the City likely has meritorious causes of actions demonstrated by the fact that serious settlement discussions have been held.

Accordingly, it is hereby

ORDERED that defendants' motions to dismiss are both denied in their entirety; and it is further

ORDERED that the City's cross motion is granted and the summons with notice by the City in this matter is deemed timely served *nunc pro tunc*.

This constitutes the Decision and Order of the Court.

8/1/2019
DATE


LYLE E. FRANK, J.S.C.

**HON. LYLE E. FRANK
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