

Drucker v Consolidated Edison, Inc.

2019 NY Slip Op 33252(U)

September 13, 2019

Supreme Court, Richmond County

Docket Number: 152277/17

Judge: Wayne M. Ozzi

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This opinion is uncorrected and not selected for official publication.

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

DCM Part 23

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MARK DRUCKER,

Present:

Hon. Wayne Ozzi

Plaintiff,

-against-

DECISION AND ORDER

CONSOLIDATED EDISON, INC., VERIZON
COMMUNICATIONS, INC., and CHARTER
COMMUNICATIONS, INC., d/b/a SPECTRUM,

Index No. 152277/17
Mot. Nos. 005
006

Defendants.

-----X
CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC. i/s/h/a CONSOLIDATED EDISON, INC.,

Third-Party Plaintiff,

-against-

RIGGS DISTLER & COMPANY, INC.,

Third-Party Defendant.

The following papers numbered 1 to 5 were marked submitted on the August 1, 2019:

Notice of Motion Pursuant to CPLR Sections 3211 and 214 in Lieu of an Answer By Defendant Charter Communications, Inc., s/h/a Charter Communications, Inc., d/b/a Spectrum with Supporting Papers and Exhibits (005) (dated June 20, 2019)	1
Notice of Cross-Motion Pursuant to CPLR 3211 to Dismiss the Complaint By Defendant Verizon New York, Inc., i/s/h/a Verizon Communications, Inc., with Supporting Papers and Exhibits (006) (dated July 1, 2019).....	2
Affirmation in Opposition to Notice of Motion in Lieu of Answer and in Opposition to Cross-Motion By Plaintiff (005)(006) (dated July 17, 2019).....	3
Reply Affirmation By Defendant Verizon New York, Inc., i/s/h/a Verizon Communications, Inc., (dated July 24, 2019).....	4

Reply Affirmation
 By Defendant Charter Communications, Inc., s/h/a Charter Communications, Inc.,
 d/b/a Spectrum
 (dated July 29, 2019)..... 5

Upon the foregoing papers, defendants’ motions are granted for the reasons set forth below:

Defendants Charter Communications, Inc., s/h/a Charter Communications, Inc., d/b/a Spectrum (Charter) and Verizon New York Inc., i/s/h/a Verizon Communications, Inc (Verizon) move for an Order pursuant to CPLR 3211 (a) and CPLR 214 to dismiss the plaintiff’s supplemental summons and amended complaint filed on June 14, 2019, alleging that the action is time barred because the three-year statute of limitations applicable to the underlying negligence claim has expired (see CPLR 214[5])¹.

Plaintiff’s accident is alleged to have occurred on May 12, 2016. On October 12, 2017, the plaintiff commenced the action by filing a summons and complaint which only named Consolidated Edison as a defendant.

On April 5, 2019, plaintiff filed a supplemental summons and amended complaint to add Verizon and Charter as defendants. Both defendants moved to dismiss the complaint in lieu of an answer because it was filed without Court permission as required by CPLR 1003. On May 10, 2019, plaintiff brought an order to show cause for permission to serve the supplemental summons and complaint and toll the statute of limitations that was about to run on May 12, 2019. By Decision and Order dated May 30, 2019, the Court dismissed the plaintiff’s improperly amended complaint but granted leave to serve a new supplemental summons and amended complaint on

¹ CPLR 214[5] reads: The following actions must be commenced within three years: [5] an action to recover damages for a personal injury...

both defendants, within 30 days of the Order. The statute was tolled pending the hearing and decision by the Court from May 10, 2019 until May 30, 2019 for a total of twenty days.

Plaintiff filed the amended complaint on June 14, 2019. Defendants Verizon and Charter argue that this second complaint should also be dismissed as the statute of limitations expired before it was filed, even if taking into account, the 20-day toll.

The plaintiff filed the order to show cause on May 10, 2019, two days before the statute was about to expire, in response to the defendants' motion to dismiss the first complaint. Where as here, when a motion for leave to file and serve a supplemental summons and complaint is made prior to the expiration of the statute of limitations and includes a copy of the proposed amended pleading, the statute of limitations is tolled (see, *Abreu v. Casey*, 157 AD3d 442 [2009]). However, the toll is only in effect for the period in which the motion is filed until the date the order granting the motion is entered, with the limitations period running again, "after entry of the order." (see, *Schlapa v Consol. Edison Co. of New York, Inc.*, 174 AD3d 934 [2d Dept 2019]; quoting *Perez v. Paramount Communications*, 92 NY2d 749, 756 [1999]).

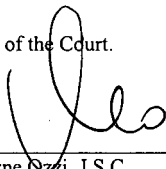
In the instant case, the order granting the filing of the new supplemental summons and complaint was signed on May 30, 2019 and entered in e-file on June 3, 2019. Plaintiff had two days remaining to bring the action against Verizon and Charter when he filed the order to show cause. The clock began running again when the order was entered on June 3, 2019, which means the action should have been filed no later than June 5, 2019. Plaintiff did not file the summons and complaint until June 14, 2019, 9 days past the statute of limitations.

Accordingly, it is

ORDERED that Defendant Verizon's motion to dismiss the Supplemental Summons and Amended Complaint is granted and it is further;

ORDERED that Defendant Charter's motion to dismiss the Supplemental Summons and Amended Complaint is also granted.

The foregoing constitutes the Decision and Order of the Court.



Wayne Ozzi, J.S.C.

Dated: September 12, 2019

HON. WAYNE M. OZZI
J.S.C.