

**Galan v Port Auth. of N.Y. & N.J.**

2019 NY Slip Op 35196(U)

June 21, 2019

Supreme Court, Queens County

Docket Number: Index No. 704353/18

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN
Justice

IA PART 27

WALKIRIA GALAN, as the Administratrix of the
Estate of RICHARD GALAN, deceased, and
WALKIRIA GALAN, Individually,

Index No. 704353/18

Motion
Date October 23, 2018

Plaintiff,

- against-

Motion
Cal. No. 14

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY

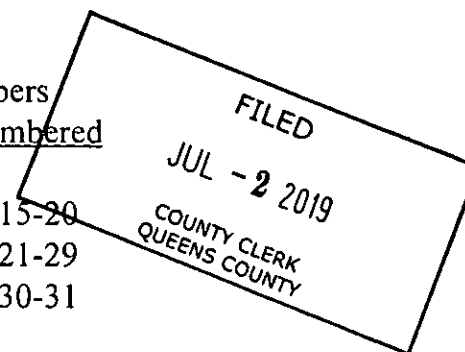
Motion
Seq. No. 2

Defendant.

The following numbered papers read on this motion by defendant to dismiss plaintiff's verified complaint in its entirety for lack of subject matter jurisdiction and the cross motion by plaintiff for leave to commence the instant action, pursuant to McKinney's Unconsolidated Laws of NY §§ 7107 and 7108, and to deem the action timely filed nunc pro tunc.

Notice of Motion - Affirmation - Exhibits..... EF15-20
Notice of Cross Motion - Affirmation - Exhibits..... EF21-29
Reply Affirmation..... EF30-31

Papers
Numbered



Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

Richard Galan (the decedent), in the course of his employment as an airplane mechanic, allegedly fell from an airplane at John F. Kennedy International Airport, on March 17, 2017, sustaining serious injuries, which resulted in his death on March 28, 2017. Defendant, Port Authority of New York and New Jersey (Port Authority), owns and operates John F. Kennedy International Airport. On May 8, 2017, Walkiria Galan (plaintiff), the decedent's wife, as the proposed administratrix of the decedent's estate, served a notice of claim upon defendant, Port Authority. Thereafter, plaintiff's counsel hired estate attorneys to file her application for letters of administration. On February 22, 2018, the Surrogate of Queens County signed limited letters of administration, naming plaintiff as administratrix of the decedent's estate. Plaintiff's counsel

affirms that they received notice thereof on March 6, 2018, and plaintiff served an amended notice of claim as the administratrix of the decedent's estate on defendant, Port Authority, on March 9, 2018. Plaintiff, as administratrix of the decedent's estate and in her individual capacity, thereafter commenced the instant wrongful death action against defendant, Port Authority, by filing a summons and verified complaint on April 17, 2018.

Defendant, Port Authority, moves to dismiss the complaint on the ground that the court does not have subject matter jurisdiction, and plaintiff cross-moves for leave to serve a late summons and complaint, and to deem the action timely commenced, *nunc pro tunc*.

"The Port Authority was created in 1921 by a bi-state compact between New York and New Jersey. As an agency of two sovereign states, it cannot be sued without a waiver of sovereign immunity. Such a waiver was enacted by both states' legislatures in 1950. The New York version of the legislation is found in sections 7101 through 7112 of McKinney's Unconsolidated Laws of NY" (*Matter of New York City Asbestos Litig.*, 24 NY3d 275, 278 [2014]). Uncons Laws § 7101 states that consent to suit against the Port Authority is given by New York "[u]pon the concurrence of the state of New Jersey," and sections 7106 and 7107 state conditions to the consent.

The condition at issue is found in section 7107, which provides: "The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least 60 days before such suit, action or proceeding is commenced" (Uncons Laws § 7107).

The timing requirements set forth in Uncons Laws § 7107 are jurisdictional, and a plaintiff's failure to satisfy these requirements will result in the withdrawal of the Port Authority's consent to be subject to suit, compelling the dismissal of the action for lack of subject matter jurisdiction (*see Lyons v Port Auth. of N.Y. & N.J.*, 228 AD2d 250 [1996]; *see also Patel v Port Auth.*, 184 AD2d 235 [1992]; *Lumbermens Mut. Cas. Co. v Port Auth. of N.Y. & N.J.*, 137 AD2d 796 [1988]).

Uncons Laws § 7108 provides a limited exception: "where a person entitled to make a claim dies and by reason of his [or her] death no notice of claim is filed or suit, action or proceeding commenced within the time specified in section seven hereof then any court in which such suit, action or proceeding may be brought may in its discretion grant leave to serve the notice of claim and to commence the suit, action or proceeding within a reasonable time but in any event within three years after the cause of action accrued. Application for such leave must be made upon an affidavit showing the particular facts which caused the delay" (Uncons Laws § 7108).

Here, it is undisputed that plaintiff's action was untimely commenced, more than one year after the subject accident. In her cross motion seeking leave to commence a late action and to deem the action timely filed pursuant to Uncons Laws § 7108, plaintiff did not submit her own affidavit and instead relies on the affirmation of her attorney. Plaintiff's attorney failed to proffer a satisfactory explanation for the delay in commencing the instant action. While plaintiff's counsel asserts that the action was not timely commenced due to the decedent's death and delays in obtaining letters of administration, plaintiff was granted limited letters of administration on February 22, 2018, well within the one-year period of limitations of Uncons Laws § 7107. Also, even if plaintiff's counsel did not receive notification of plaintiff's appointment as administratrix until March 6, 2018, as alleged, plaintiff still had 11 days from such date within which to timely commence the action, but did not do so until April 17, 2018.

Moreover, plaintiff was represented by counsel, who prepared and served legal documents, including an amended notice of claim on March 9, 2018, before the expiration of the one-year period of limitations. There is no reason proffered for why the summons and complaint could not similarly have been prepared and timely filed by plaintiff's attorneys. Plaintiff therefore has failed to demonstrate a reasonable excuse for the delay in commencing this action which would warrant an extension of time to commence the action pursuant to Uncons Laws § 7108.

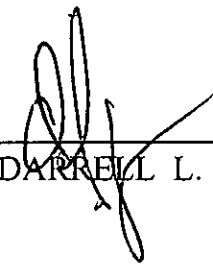
Plaintiff's alternative argument that her action should be deemed timely, pursuant to CPLR 217-a, is also without merit. CPLR 217-a, entitled "Actions to be commenced within one year and ninety days," is inapplicable to this bi-state entity, defendant, Port Authority. Moreover, the requirement for bringing an action against the Port Authority within one year set forth in Uncons Laws § 7107 is a condition precedent to suit and not a statute of limitations, and compliance with this condition, just as with the other condition precedent in Uncons Laws § 7107 of giving at least 60 days notice, is mandatory and jurisdictional (*see Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375 [1999]). As noted, the failure to comply with the conditions set forth in Uncons Laws § 7107 results in the withdrawal of defendant, Port Authority's consent to the lawsuit and compels dismissal of the action for lack of jurisdiction (*see DaCruz v Towmasters of N. J., Inc.*, 22 AD3d 629 [2005]; *see also Estate of Pearlberg v Port Auth. of N.Y. & N.J.*, 210 AD2d 199 [1994]).

Finally, contrary to plaintiff's assertion, the fact that defendant, Port Authority, may not have been prejudiced by plaintiff's failure to comply with the requirements of Uncons Laws § 7107 is immaterial since the requirements are jurisdictional and must be strictly construed.

Accordingly, plaintiff's cross motion for leave to commence a late action and to deem the action timely commenced, *nunc pro tunc*, is denied.

Defendant, Port Authority's motion to dismiss the action for lack of subject matter jurisdiction, pursuant to CPLR 3211 (a) (2), is granted, and the action is hereby dismissed.

Dated: June 21, 2019

  
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DARRELL L. GAVRIN, J.S.C.

FILED  
JUL -2 2019  
COUNTY CLERK  
QUEENS COUNTY