

Muhammad v City of New York
2021 NY Slip Op 31157(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 160637/2017
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

OMAR MUHAMMAD,

Plaintiff,

- v -

CITY OF NEW YORK, TRIBORO BRIDGE AND TUNNEL
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY, AND DEFOE CORP.

Defendant.

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INDEX NO. 160637/2017

MOTION DATE 12/22/2020

MOTION SEQ. NO. 005

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, the motion is granted.

Plaintiff Omar Muhammed moves for an order pursuant to CPLR § 2221 granting plaintiff leave to vacate the Court's order of dismissal under NYCRR § 202.27 and restore his case to the calendar. For the reasons described herein, the motion is granted.

On or about December 1, 2017, plaintiff filed a Summons and Complaint against the defendants. On or about December 20, 2017, defendants Triborough Bridge and Tunnel Authority ("TBTA") and Metropolitan Transportation Authority ("MTA") filed their verified answer and combined discovery demands [NYSCEF Doc. No. 2, 6]. On or about January 5, 2018, defendant Defoe Corp. filed its verified answer and combined demands [NYSCEF Doc. No. 15].

On or about May 5, 2018, defendants TBTA and MTA moved to dismiss on procedural grounds and that plaintiff failed to respond to their discovery demands [NYSCEF Doc. No. 18, 11]. On or about May 15, 2018, defendant Defoe Corp. cross-moved to dismiss plaintiff's complaint for failing to respond to its discovery demands [NYSCEF Doc. No. 29]. On or about June 13, 2018, defendant City sent plaintiff a letter requesting a more specific location of the incident, as well as responses to defendant's discovery demands, including a bill of particulars.

On or about June 20, 2018, plaintiff's counsel at the time filed an order to show cause requesting the Court's permission to withdraw as plaintiff's counsel, which was granted on or about August 15, 2018. In this order, the Court directed that the action be stayed for sixty days for plaintiff to retain new counsel [NYSCEF Doc. No. 54]. In the interim, the motion and cross-motion to dismiss were adjourned for oral argument [NYSCEF Doc. No. 57].

On November 14, 2018, the Court issued an order transferring the case to a non-City Part noting "Corp. Counsel no longer represents" [NYSCEF Doc. No. 70]. On November 20, 2018, the Court granted the moving defendants' motion to dismiss on grounds that plaintiff failed to comply with the prior orders of the Court and retain new counsel [NYSCEF Doc. No. 71]. On March 11, 2019, the Court denied as moot defendants' prior motion to dismiss based on plaintiff's failure to respond to discovery demands as the moving defendants were no longer parties in the matter [NYSCEF Doc. No. 73]. Although the City did not move to dismiss, this matter was marked disposed, perhaps erroneously, per the Supreme Court Records On-Line library ("SCROLL").

On or about July 26, 2019, plaintiff pro se filed an order to show cause to restore this matter to the calendar [NYSCEF Doc. No. 74], which the Court declined to sign on August 1, 2019, thereby denying plaintiff's requested relief to restore the matter to the calendar. In declining to sign the order to show cause, the Court noted that although plaintiff may have provided reasons for his delays, he nonetheless failed to demonstrate a meritorious claim as well as a lack of prejudice to defendant City. On September 12, 2019, plaintiff pro se filed another order to show cause asking the Court to restore the action. On July 31, 2020, the Court again declined to sign the order to show cause stating that "plaintiff's OSC provides no additional facts and evidence to support his application. As before, even if plaintiff were to meet his burden to demonstrate a reasonable excuse for the default, plaintiff does not offer any evidence that a meritorious cause of action exists, nor does plaintiff demonstrate a lack of prejudice to the defendant City." [NYSCEF Doc. No. 96]. On November 4, 2020, plaintiff, having secured counsel, filed the instant motion to vacate and restore [NYSCEF Doc. No. 99]. The Court finds that plaintiff has now sufficiently demonstrated excusable delay, meritorious claims, and lack of prejudice, so as to vacate the dismissal and restore the action to the calendar in the interests of justice.

Based on plaintiff's submissions, plaintiff alleges that on September 20, 2016, he sustained serious personal injuries when he fell eight feet down an open manhole located at the intersection of Harlem River and the RFK Bridge Underpass in the County, City and State of New York. Plaintiff's theories of liability include negligence per se and res ipsa loquitor, asserting that but for the allegedly uncovered manhole exclusively under the control and ownership of the defendants, plaintiff would not have been caused to fall down it and sustain serious injury.

In support of these asserted claims, plaintiff submits to the Court photographs allegedly depicting the construction site and alleged dangerous condition where the open manhole was located, which plaintiff's counsel attests were not previously included in the transfer file from prior counsel and, as a result, were not received from plaintiff's prior counsel until December 16, 2020. Additionally, plaintiff submits copies of hospital records to evidence his serious injuries, allegedly caused by plaintiff falling through the subject manhole. Although defendants argue in opposition to the instant motion that these medical records do not conclusively demonstrate proximate cause between the alleged accident and the injuries for which he was being transported to, and treated in, the hospital at that time, such merits arguments can be made at a later time, but need not be decided in relation to plaintiff's current motion to vacate the prior dismissal (which was based on a failure to cooperate with discovery and appearance orders).

Thus, based on what appears to the Court to be potentially meritorious claims, supported by photographs of the site and manhole where plaintiff allegedly fell and was injured, along with hospital and ambulance records purportedly demonstrating injuries allegedly caused by the alleged accident, as well as what appears to be justifiable excuse for delay, including his involuntary detainment by I.C.E., his prior counsel moving to be relieved, and his difficulties in retaining new counsel, which was further delayed by COVID-19, the Court finds that in the interest of justice, the prior order of dismissal should be vacated and the action restored to the calendar.

Further, the Court finds that plaintiff has now sufficiently demonstrated that defendants, having had notice of plaintiff's claim within 90 days of the occurrence, will not be unfairly prejudiced by the restoration of plaintiff's claims, while plaintiff would be severely prejudiced if he were not permitted to have his claims adjudicated on its merits. That said, this decision is issued without prejudice to any defenses that defendants might have, including without


limitation, any arguments regarding the sufficiency or timeliness of the notice of claim or of the complaint.

ORDERED that the Court’s prior order dismissing the action (NYSCEF Doc. No. 71) is hereby vacated: and it is further

ORDERED that the Clerk shall restore the action to the calendar; and it is further

ORDERED that on June 14, 2021 at 1:30pm., there shall be a telephone conference with the Court regarding discovery and whether the matter should be referred to the City Part;

This is the decision and order of the Court.

<u>4/9/2021</u> DATE	 JAMES EDWARD D'AUGUSTE, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	OTHER