

Erwing v Aerco Intl., Inc.
2021 NY Slip Op 31877(U)
June 3, 2021
Supreme Court, New York County
Docket Number: 190362/2017
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA**PART****IAS MOTION 13***Justice*

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INDEX NO. 190362/2017

MARIA ERWING, MARIA ERWING,

MOTION DATE 10/19/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

AERCO INTERNATIONAL, INC., BMCE INC., CARRIER
CORPORATION, CBS CORPORATION, F/K/A VIACOM
INC., CONSOLIDATED EDISON COMPANY, CRANE CO.,
FMC CORPORATION, FOSTER WHEELER, L.L.C.,
GENERAL ELECTRIC COMPANY, GOULDS PUMPS
LLC, IMO INDUSTRIES, INC., ITT LLC., WARREN PUMPS,
LLC, PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70

were read on this motion to/for

DISMISS

After oral argument and upon the foregoing documents, it is ORDERED that defendant The Port Authority of New York and New Jersey's ("Port Authority") motion to dismiss plaintiff Paul E. Erwig's ("Decedent") Complaint pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction is denied. Defendant argues that the Court lacks subject matter jurisdiction over the Port Authority due to Plaintiff's failure to comply with the statutory condition precedent to commencing suit against Port Authority. Plaintiff opposes the motion and cross-moves for an Order deeming the plaintiff's August 20, 2018 Summons and Complaint naming Port Authority as properly and timely filed.

Pursuant to N.Y. Unconsolidated Laws 7107, any suit against Port Authority shall be commenced within one-year after the cause of action and a party must serve the Port Authority with a Notice of Claim at least sixty days before a party files suit against the Port Authority. In

Yonkers Contracting Company, Inc. v. Port Authority Trans-Hudson Corporation, 93 N.Y.2d 375, 712 N.E.2d 678, 690 N.Y.S.2d 512 (1999), the Court of Appeals held that New York Unconsolidated Laws § 7107's requirement that actions be commenced against the Port Authority within one-year of accrual was not a statute of limitations but rather a condition precedent to suit, which could not be tolled by CPLR 205(a).

Defendant alleges that plaintiff failed to file a Complaint against the Port Authority within one-year of the accrual of Decedent's cause of action. As a result, defendant argues that the Complaint against Port Authority must be dismissed as a matter of law because the Court lacks subject matter jurisdiction. Defendant notes that plaintiff served Notice of Claim on Port Authority on November 17, 2017 which clearly and unequivocally states that plaintiff's claim arose in "2017 [when plaintiff] was diagnosed with asbestos-related lung cancer" as a result of alleged exposure to asbestos (Mot, Exh A). On November 20, 2017, plaintiff commenced this action against multiple defendants, but not the Port Authority (Mot, Exh C). Plaintiff filed a Second Amended Complaint alleging claims against the Port Authority on August 20, 2018 (Mot, Exh D). Port Authority acknowledged receipt of the Second Amended Complaint and filed its Standard Answer asserting Affirmative Defenses, including an affirmative defense of lack of subject matter jurisdiction (Mot, Exh F).

Defendant argues that prior to the enactment of N.Y. Unconsolidated Laws 7107, Port Authority, as a direct governmental agency of the States of New York and New Jersey, was absolutely immune from suit (*Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 249 N.Y.S.2d 409 [1964]). Port Authority's waiver of its absolute immunity from suit has been strictly construed (*Id.*). The Court of Appeals held that in view of this, Port Authority was immune from suit as to any claim occurring outside the one-year period set forth in New York

Unconsolidated Laws § 7107 (*id.* at 123-124, 410-411). Thus, defendant argues that the very existence of a right to bring suit against the Port Authority is conditioned on precisely following N.Y. Unconsolidated Laws 7107, which plaintiff has failed to do.

In opposition, plaintiff notes that the Port Authority fails to apprise this Court that the plaintiff died on January 1, 2018 and that an Estate Representative was not appointed by the Queens County Surrogate Court until July 9, 2018, a period slightly in excess of six months, during which the Estate was entitled to a statutory tolling pursuant to Unconsolidated Law section 7108. Plaintiff concedes that it failed to obtain this Court's permission for a late filing and cross-moves to ask the Court to deem plaintiff's August 20, 2018 Supplemental Summons and Second Amended Complaint which added the Port Authority as defendant to the instant matter as properly and timely filed. Plaintiff notes that August 20, 2018 was about forty-one days after Letters of Administration were issued but within seventy-eight days that the plaintiff had remaining on the one-year statute of limitations.

Pursuant to Unconsolidated Law section 7109, "[w]here a person entitled to make a claim dies and by reason of his death no notice of claim is filed or suit, action or proceeding commenced within the time specified in section seven hereof, then any court ... may in its discretion grant leave to ... commence the suit ... within a reasonable time but in any event within three years after the cause of action has accrued." The Court of Appeals has held that where statute requires anyone who brings suit against Port Authority to service a notice stating the nature of the claim, "notice of a claim for personal injuries is a sufficient notice of claim for wrongful death, where the person injured dies of his injuries between the service of the notice of the claim and the beginning of the lawsuit" (*In re New York City Asbestos Litigation*, 24 NY3d 275, 278 [2014]). The purpose of the notice of claim requirement is to allow the State to

investigate the claim and to estimate its potential liability. Here, plaintiff served Notice of Claim on Port Authority on November 17, 2017 and Port Authority actively participated in discovery from the inception of the lawsuit to present allowing it to estimate its potential liability.

The Court finds that plaintiff's August 20, 2018 filing against the Port Authority, would have been a timely filing of the action, had leave of court had been obtained at the time. The Court notes that plaintiff has proffered an excuse for the failure to timely file and concludes that defendant will not be prejudiced should the Court grant plaintiff permission for the late filing. Defendant has fully participated in discovery in the instant matter. Port Authority appeared at Decedent's deposition and had the opportunity to orally examine Decedent. Given the circumstances of Decedent's death, the delay of an Estate Representative being appointed, and defendant's full participation in discovery in this matter, the Court grants plaintiff's cross-motion seeking leave to deem the August 20, 2018 Amended Complaint as filed timely and denies Port Authority's motion to dismiss the Complaint.

Accordingly, it is

ORDERED that defendant's motion to dismiss plaintiff's complaint is denied; and it is further

ORDERED that plaintiff's cross-motion for an order deeming the plaintiff's August 20, 2018 Summons and Complaint naming The Port Authority of NY and NJ as properly and timely filed is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This Constitutes the Decision/Order of the Court.

6/3/2021

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

☐

GRANTED IN PART

☒

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE