

Colton v Maison

2022 NY Slip Op 32359(U)

July 15, 2022

Supreme Court, Kings County

Docket Number: Index No. 515899/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of July 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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RASHAWN COLTON and MARIAH FRENCH
Plaintiff(s),

Index no: 515899/2021
ORDER

-against-

ANASIA MAISON,
Defendant(s),

-----X

Recitations, as required by CPLR § 2219(a), of the papers considered in the review of defendant's motion

Papers	NYSCEF Nos.
Notice of Motion/Affirmation/Affidavit/Exhibits.....	5-12
Opposition/Affirmation/Exhibits Annexed.....	13-15
Reply.....	17

In this matter, Anasia Maison ("Defendant") moves to dismiss Plaintiffs' Complaint with prejudice upon the ground that this action is time barred pursuant to the statute of limitations. Plaintiffs have opposed this motion asserting that the statute of limitations was tolled at the time this lawsuit was commenced pursuant to New York Executive Order 202.67 ("Executive Order"), enacted on March 20, 2020, which in pertinent part, suspended the statute of limitations "for any civil cases...until November 3, 2020."

This action arises out of a motor vehicle collision that occurred on November 13, 2017. Plaintiffs' commenced this action by the filing of the Summons and Complaint on June 29, 2021. Issue was joined by service of Defendant's Answer on October 20, 2021, Defendant's fifth affirmative defense asserts that Plaintiffs' action is untimely and thus their alleged causes of action are time barred.

Defendant's initial argument contends that Plaintiffs are not entitled to the toll created by the Executive Order because the statute of limitations did not expire until November 13, 2020, which was after November 3, 2020, the last effective date for the Executive Order and beyond the permitted commencement time pursuant to CPLR § 214(5) which states:

The following actions must be commenced within three years:

provided in sections 214-b, 214-c and 215.¹

In support of its motion, the Defendant cites *Brash v Richards*, 195 AD3d 582 [2021], arguing that the Court's holding only applies in instances where the statute of limitations expires during the tolling period. Moreover, Defendant argues that the intention of the Executive Order was to protect the parties' rights to file lawsuits that could not be filed during the period that it was in effect, but it was not intended to provide a blanket extension of time for all lawsuits that might be filed after their effective date as that would add time to other statute of limitation provisions such as CPLR §§ 2138 and 211(b).² In their Reply, Defendant asserts that the Executive Order should be interpreted as a suspension rather than a toll, which would make Plaintiffs' case untimely.

In opposition to Defendant's motion, Plaintiffs contend that the "effect" of the Executive Order was to create a tolling period that applied to the CPLR filing provision, after which the remaining time will run. Thus, this matter was not filed after the statute of limitations. Furthermore, Plaintiffs assert that the tolling period does not become inapplicable simply because the statute of limitation extends beyond the tolling period, such as instances under CPLR § 201 where Plaintiffs are provided with an 18 month toll for a personal injury action if the defendant dies after a case has accrued. In their Reply, Plaintiffs assert that the Executive Order and the *Brash* decision created a toll under which, Plaintiffs case is timely filed.

On a motion pursuant to CPLR § 3211(a)(5) to dismiss a cause of action on the ground that it is barred by the statute of limitations, the moving defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired (see *Avery v WJM Dev. Corp.*, 197 AD3d 1141 [2nd Dept. 2021]; *HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2nd Dept. 2019]; *Barry v Cadman Towers, Inc.*, 136 AD3d 951 [2nd Dept. 2016]). If that initial burden is satisfied, the plaintiff must then raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff commenced the action

¹ The exceptions in 214-b, 214-c and 215 are inapplicable as Plaintiffs seek to recover for injuries sustained in a motor vehicle accident.

² Defendant also notes that Plaintiffs filed a similar lawsuit for this subject accident, before this Court, on November 5, 2020, which was also after the effective date for the Executive Order but before the statute of limitations had run. In that matter, the Court dismissed Plaintiffs' Complaint with prejudice for failure to serve in accordance with the CPLR as Plaintiffs did not move to extend their time for service.

limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (*HSBC Bank USA, N.A.* at 1030; *Barry* at 952; *Coleman v Wells Fargo & Company, et al.*, 125 AD3d 716 [2nd Dept. 2015]).

A toll stops the running of the applicable period of limitations for a finite period of time, and the period of the toll is excluded from the calculation of the relevant limitations period (*see Brash v Richards*, 195 AD3d 582 [2021]; *Chavez v Occidental Chemical Corp.*, 35 NY3d 492 [2020]; *Baker v 40 Wall Street Holdings Corp.*, 74 Misc. 3d 381 [Sup Ct, Kings County 2022, J. Silber]). A suspension, unlike a toll, does not exclude its duration from the calculation of the relevant time period. Rather, it simply delays the expiration of the time period or filing deadline until the date of the suspension (*Brash* at 582; *see Chavez*).

In addressing the provisions of the Executive Order, the Court in *Brash* found that the subject Executive Orders constituted a toll of such filing deadlines (*Brash* at 582). The Court in *Brash* did not address or hold that the toll created by the Executive Order did not apply to cases where the statute of limitations expired after the tolling period. While several court decisions have interpreted the holding of *Brash* to constitute a suspension³ and others interpreted it to be a toll⁴ the Court clearly held that the Executive Order created a toll and not a suspension on the statute of limitations for civil cases.

The amount of time covered by the original Executive Order and all extensions is 228 days. Plaintiffs claim accrued on November 13, 2017. The effect of the Executive order was not to add a blanket 228 days to Plaintiffs' time to file, but rather any time that remained on the limitations period as of March 20, 2020 would be added back and start to run again once the limitations period resumed on November 4, 2020. Pursuant to CPLR § 214(5), Plaintiff had 3 years or 1095 days to commence this action, expiring on November 13, 2020. At the time the tolling provision went into effect on March 20, 2020, 858 days had run on Plaintiffs' case, leaving a remaining 237 days. Resuming on November 4, 2020, the statute of limitations would then be set to expire on June 29, 2021, which is the date Plaintiffs commenced this action. Thus, Plaintiffs' timely filed this action.

³ (*Baker v 40 Wall Street Holdings Corp., v Star-Delta Electric, LLC*, 74 Misc.3d 381 [Sup Ct, Kings County 2022, J. Silber]; *Cruz v Guaba*, 74 Misc.3d 1207(A) [Sup Ct, Queens County 2022, J. Caloras]; ⁴ (*Foy v State of New York*, 71 Misc.3d 605 [Ct Cl 2021]; *Vivar v BSREP UA River Crossing*, 2021 NY Slip Op. 32153 [Sup Ct, NY County 2021]; *Crandell v Amofa et al* Index # 524250/2020 [Sup Ct, Kings County 2021, J. Landicino]).

Accordingly, Defendant's motion to dismiss pursuant to CPLR § 3211(a)(5) is denied.
This constitutes the order and decision of the Court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**