

Torres v City of New York
2022 NY Slip Op 33125(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 154247/2019
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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YOHANA TORRES,

Plaintiff,

- v -

THE CITY OF NEW YORK, MANCHESTER WEST 36
LLC, TAV WEST 36, LLC, 251 WEST 36TH STREET
MANAGER CORP.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27

were read on this motion to

DISMISS

Plaintiff brings this negligence action against the City of New York (the “City”) as well as Manchester West 36 LLC, TAV West 36, LLC, and 251 West 36th Street Manager Corp. (collectively, the “Corporate Defendants”) arising from injuries allegedly sustained on January 21, 2019 as a result of a slip and fall on the “sidewalk and/or parking area” abutting the property located at 255 West 36th Street, New York, New York (NYSCEF Doc. No. 1 [Complaint at ¶59]). On June 24, 2019, the City interposed an Answer asserting cross-claims against the Corporate Defendants for contribution and indemnification (NYSCEF Doc. No. 15 [City’s Answer at ¶12]).

On August 28, 2019, the Corporate Defendants interposed an Answer asserting cross-claims against the City for common-law indemnification, contribution, contractual indemnification, and breach of contract for failure to procure insurance (NYSCEF Doc. No. 2 [Corporate Defendants’ Answer at ¶¶25-27]).

The City now moves, pursuant to CPLR §3211(a)(7), to dismiss the complaint and all cross-claims against it based on plaintiff's failure to file a notice of claim. While plaintiff does not oppose the City's motion, the Corporate Defendants oppose the dismissal of their cross-claims, arguing that, as discovery is ongoing, summary judgment is premature. More specifically, the Corporate Defendants note that "[s]everal of the photographs exchanged by the plaintiff show construction ongoing in the street at the accident location" and contend that triable questions of fact exist as to whether the City had a role in this construction and whether this construction was a cause of plaintiff's accident (NYSCEF Doc. No. 22 [Suleymanov Affirm. at ¶6]). In reply, the City argues that the road construction referenced by the Corporate Defendants does not create a triable issue of fact because the complaint alleges that plaintiff's accident was caused by snow and ice on the ground and does not mention construction work.

The City further argues, in reply, that the Corporate Defendants' cross-claims must be dismissed because no contract exists between the Corporate Defendants and the City. In support of this argument, the City submits an email dated May 5, 2022, from Corporate Defendants' counsel, Jessica Suleymanov, Esq. to the City representing that the Corporate Defendants had authorized her "to discontinue [the Corporate Defendants'] cross-claims as to contractual indemnification and failure to insure only" (NYSCEF Doc. No. 27). The City also contends that the Corporate Defendants' failure to attach a contract as an exhibit to their opposition establishes that no such contract exists.

DISCUSSION

That branch of the City's motion seeking to dismiss the complaint as against it is granted. An individual "seeking to recover in tort against a municipality [is] required, as a precondition to suit, to serve a Notice of Claim," in order to allow "authorities to investigate, collect evidence and

evaluate the merit of a claim” (Brown v City of New York, 95 NY2d 389, 392 [2000] [internal citations omitted]). General Municipal Law (“GML”) §50-e[1][a] requires that the notice of claim be served on the municipality within ninety days after the claim arises (See e.g., Mazzocchi v City of New York, 2018 NY Slip Op 31191[U], *2 [Sup Ct, NY County 2018]). A plaintiff who misses this deadline may nevertheless move for leave to serve a late notice of claim until the expiration of the statute of limitations of one year and ninety days (See GML §50-e[5]; CPLR §217-a). “Service of a notice of claim ... is a condition precedent to a lawsuit against a municipal corporation” (Davidson v Bronx Mun. Hosp., 64 NY2d 59, 61 [1984]).

Here, it is undisputed that plaintiff failed to serve a notice of claim by April 21, 2019 (i.e., ninety days after the instant action occurred on January 21, 2019). Plaintiff also failed to move for leave to file a late notice of claim before November 4, 2020 (i.e., within one year and ninety days of her claim accruing, after accounting for the period tolled by Executive Order §202.72). Accordingly, plaintiff’s complaint must be dismissed as against the City (See e.g., Williams v City of New York, 74 AD3d 548, 549 [1st Dept 2010]).

The Court declines, however, to grant that branch of the City’s motion seeking the dismissal of the Corporate Defendants’ cross-claims. “[C]ourts view such cross claims independently of a plaintiff’s complaint against the City” (Zic v City of New York, 2014 NY Slip Op 33185[U], *4 [Sup Ct, NY County 2014] quoting DeLeonibus v Scognamillo, 183 AD2d 697, 698 [2nd Dept 1992]) and where, as here, the complaint is dismissed on “procedural rather than substantive [grounds], a codefendant’s cross claim is still viable” (Id.).

The City’s argument for dismissal—that no contract exists with the Corporate Defendants—is impermissibly raised for the first time in its reply papers (See e.g., Miller v Icon Group LLC, 107 AD3d 585 [1st Dept 2013]). Even ignoring this infirmity, the City has failed to

establish that no such contract exists. The sole evidence submitted in support of this argument—the May 5, 2022 email from the Corporate Defendants’ counsel indicating that she was authorized to discontinue the Corporate Defendants’ contractual indemnification and failure to insure cross-claims—does not constitute “documentary evidence” for purposes of a CPLR §3211 motion (See VXi Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189, 193 [1st Dept 2019] [“A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are “essentially undeniable”]). Moreover, the Corporate Defendants’ failure to attach their contract with the City in opposition is of no moment. As discussed, supra, the City bears the initial burden to establish that no such contract exists, and its failure to do so relieves the Corporate Defendants of any obligation, in opposition, to establish the contract’s existence.

In light of the foregoing, that branch of the City’s motion to dismiss the Corporate Defendants’ cross-claims is denied and the Corporate Defendants’ cross-claims are hereby converted into a third-party action¹ (See Franklin-Hood v 80th St., LLC, 138 AD3d 609, 609 [1st Dept 2016]; Eddine v Federated Dept. Stores, Inc., 72 AD3d 487, 487 [1st Dept 2010]).

Accordingly, it is

ORDERED that the City of New York’s motion to dismiss this action and all cross-claims, pursuant to CPLR §3211(a)(7), is granted to the limited extent that the plaintiff’s complaint is hereby dismissed as against the defendant City of New York and is otherwise denied; and it is further

¹ Although the Corporate Defendants did not formally move for conversion of their cross-claims, the Court exercises its “discretion to consider informally requested relief set forth in opposition papers if there is no prejudice to the initial movant, and the request for relief is clearly stated therein” (Murphy v New York & Presbyt. Hosp., 2021 NY Slip Op 31902[U], *3 [Sup Ct, New York County 2021] citing Fried v Jacob Holding, Inc., 110 AD3d 56, 65-66 [2nd Dept 2013]; see also Wimbledon Fin. Master Fund, Ltd. v Laslop, 169 AD3d 550, 551 [1st Dept 2019]).

ORDERED that the Corporate Defendants' cross-claims against the City are converted into a third-party action; and it is further

ORDERED that the caption of the action is hereby amended as follows:

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

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YOHANA TORRES,

Plaintiff,

Index No. 154247/2019

- v -

MANCHESTER WEST 36 LLC, TAV WEST 36, LLC,
251 WEST 36TH STREET MANAGER CORP.,

Defendants.

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MANCHESTER WEST 36 LLC, TAV WEST 36, LLC,
251 WEST 36TH STREET MANAGER CORP.,

Third-Party Plaintiffs,

- v -

THE CITY OF NEW YORK

Third-Party Defendant.

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and it is further

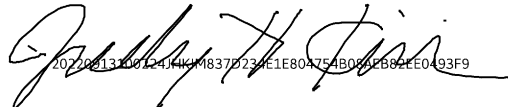
ORDERED that the City of New York is directed to serve a copy of this decision and order, with notice of entry, on plaintiff and the Corporate Defendants within ten days of the date of this decision and order; and it is further

ORDERED that the City of New York shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint as against defendant the City of New York and to mark the Court's records to reflect that the cross-claims by defendants Manchester West 36 LLC, Tav West 36, LLC, 251 West 36th Street Manager Corp. against the City of New York are converted to a third-party action.

This constitutes the decision and order of the Court.

<u>9/13/2022</u>			
DATE		HON. JUDY H. KIM, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☒ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE