

Franton v Allboro Water & Sewer Corp.

2022 NY Slip Op 33763(U)

November 4, 2022

Supreme Court, New York County

Docket Number: Index No. 154036/2021

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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JOSEPH FRANTON, ROBERT FARBER, THE BOARD OF MANAGERS OF CONDOMINIUM ATARAXIA

Plaintiff,

- v -

ALLBORO WATER & SEWER CORP., DJC CORP., MOMENTAS, INC.,

Defendant.

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INDEX NO. 154036/2021
MOTION DATE 02/28/2022, 03/10/2022
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 15, 16, 17, 18, 19, 20, 21, 24

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 22, 23, 25

were read on this motion to/for DISMISS.

In this action seeking to recover for alleged property damage, Defendant Momentas, Inc. ("Momentas") moves in Motion Sequence #001 to dismiss as against it pursuant to CPLR 3211(a)(8) for failure to timely serve it with the Summons and Complaint. The other two Defendants, Allboro Water & Sewer Corp. ("Allboro") and DJC Corp. ("DJC Corp.") move in Motion Sequence #002 for dismissal pursuant to CPLR 3211(a)(5), arguing the action is time barred, and for failure to timely serve them with the Summons and Complaint.

Plaintiffs cross-moved in Motion Sequence #001 for an extension of time to serve all three Defendants or, in the alternative, for an order deeming service complete nunc pro tunc pursuant to CPLR § 306-b. Plaintiffs further oppose Allboro and DJC Corp.'s motion to dismiss the action as time barred. Momentas opposes the cross-motion in Motion Sequence #001 and

Allboro and DJC Corp. oppose the cross-motion by filing reply papers to Motion Sequence #002. The motions are consolidated for disposition.

Plaintiffs are owners of a residential building located at 163 East 71st Street. They allege that on April 25, 2018 Defendants were performing water main and supply line work in connection with a construction project at 152 East 71st Street and in doing so caused damage to their property. Plaintiffs filed a Summons and Complaint on April 26, 2021, the last day permitted under the three-year statute of limitations. However, Plaintiffs did not serve Defendants until October 15, 2021, 172 days later. Defendants filed their motions to dismiss on February 28, 2022 and March 10, 2022. Only then did Plaintiffs cross-move for an extension of time to serve in the interest of justice.

Service of a Summons and Complaint shall be made within 120 days of their filing (CPLR § 306-b). If service is not timely made, upon a defendant's motion, the court "shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (*id.*; *see also* CPLR 3211[a][8]). A determination as to whether to grant a request for an extension of time to serve in the interest of justice "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interest of the parties" (*Leader v Maroney*, 97 NY2d 95, 105 [2001]). The Court may consider "diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*id.* at 105-106). "No one factor is determinative — the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served" (*id.* at 106).

Defendants seek to dismiss on the grounds that the Summons and Complaint were not served upon them within the requisite 120 days, nor was any extension granted or even sought. In support of the cross-motion for an extension, Plaintiffs' attorney affirmation states only that service was late "[d]ue to an in-office procedural oversight" without any specific details or further information. It does not explain why Plaintiffs did not seek an extension of time to serve upon realizing that service had not been effectuated, or at time prior to Defendants' motions to dismiss. Plaintiffs argue service should nevertheless be permitted in the interest of justice because the statute of limitations has now tolled, and they would therefore be unable to commence a new action. They further argue that Defendants have notice of the occurrence because of several other actions filed by other property owners stemming from the same incident, and contend their action has merit, pointing to a Fire Department incident report and certain statements made by Momentas in a third-party complaint filed in one of the other actions. Defendants dispute that the claims have merit and argue that the fact that the statute of limitations expired in April 2021 weighs in favor of Defendants, not Plaintiffs.

The Court finds that Plaintiffs are not entitled to an extension in the interest of justice. Plaintiffs' time to serve the Summons and Complaint expired on August 24, 2021, more than 14 months ago. Plaintiffs served Defendants 52 days late on October 15, 2021. They did not seek an extension of time to serve until nearly seven months after their time to serve Defendants had expired, and they only did so in response to Defendants' motions to dismiss. They fail to adequately explain the circumstances surrounding their lack of diligence in timely serving the Summons and Complaint, and do not address their failure to promptly seek an extension of time to serve.

“It is well settled that statutes of limitations are designed to promote justice by preventing the revival of stale claims” and “to ensure fairness to a defendant” (*Lyles v State*, 3 NY3d 396, 400 [2004], citing *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 773 [1997]; *Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427, 429 [1969]). Plaintiffs commenced the action on the last day allowable under the statute of limitations, and it has now been expired for more than eighteen months. While Defendants had notice of claims being made by other nearby properties, their only notice of the claims asserted by these Plaintiffs was a Summons and Complaint served 172 days after the statute of limitations had expired and 52 days late.

The parties dispute whether Plaintiffs’ claims have merit, but even assuming the claims are meritorious, that factor does not outweigh the lack of diligence in effectuating timely service; the seven-month delay in seeking an extension of time to serve, prompted only by the instant motions to dismiss; and the fact that the statute of limitations expired eighteen months ago. Accordingly, Defendants’ motions to dismiss are granted.

Were it necessary for the Court to address Allboro and DJC Corp.’s motion to dismiss the action as time-barred, that motion would be denied. It is undisputed that the incident leading to the purported damaged occurred on April 25, 2018, and that the statute of limitations for property damage is three years. As Plaintiffs note, the statute of limitations tolled on a weekend, and therefore, in accordance with General Construction Law § 25-a(1), the Plaintiffs had until Monday April 26, 2021 to commence the action, which they did on that date. Therefore, the action was not time barred.

Accordingly, for the reasons set forth herein Defendants’ motions to dismiss are granted and it is hereby:

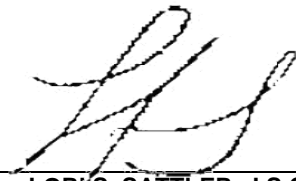
ORDERED that the motion of defendant Momentas, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendants Allboro Water & Sewer Corp. and DJC Corp. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that all other relief sought is denied.

This constitutes the Decision and Order of the Court.

11/4/2022
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: