

Cortes v City of New York

2023 NY Slip Op 30587(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 153376/2022

Judge: J. Machelles Sweeting

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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. J. MACHELLE SWEETING PART 62

Justice

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EMILY CORTES,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY HOUSING
AUTHORITY

Defendants.

-----X

INDEX NO. 153376/2022

MOTION DATE 8/25/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

In the underlying action, plaintiff claims that on June 29, 2020, she slipped and fell down an interior staircase inside her apartment building, located at 240 Madison Street, New York, New York, and that her accident was caused by the subject staircase which was owned and operated by the defendants in a negligent manner.

Pending now before the court is a motion in which defendant New York City Housing Authority (“NYCHA”) seeks an order: (1) pursuant to Civil Practice Law and Rules (“CPLR”) 3211(a)(5), CPLR 217-A, and Public Housing Law 157(2), dismissing plaintiff’s Complaint in its entirety against defendant NYCHA on the basis that the Complaint was not commenced within the year and 90 days statute of limitations (“SOL”) period; and (2) pursuant to CPLR 306-b, dismissing plaintiff’s Summons and Complaint as not timely served within 120 days of the action’s commencement. Also pending under this motion sequence is a cross-motion in which plaintiff

seeks an order deeming the Summons and Complaint in this action to be timely served upon defendants *nunc pro tunc* under principles of equity, fairness and justice.

Statue of Limitations

The central issue here is a dispute over the effect of Executive Order 202.8, issued by then-New York State Governor Andrew Cuomo, in response to the Covid-19 pandemic. Executive Order 202.8 and the subsequent orders extending it are referred to herein, collectively, as the “Executive Order.”

Both parties agree that the Executive Order was issued on March 20, 2020; that the order tolled the statute of limitation and various other time limits under the procedural laws of the State of New York; and that the Executive Order was extended by additional subsequent executive orders, with the tolling period remaining in effect until November 3, 2020. There is also no dispute that the period of the toll, which ran from March 20, 2020 to November 3, 2020, is 228 days in total.

The accident alleged here, occurred on June 29, 2020, which was during the tolling period. There is no dispute that absent any tolling, the original SOL would have expired one year and 90 days later, on September 27, 2021. The Summons and Complaint were filed on April 20, 2022.

Plaintiff argues that the proper way to interpret the Executive Order is to add the total period of the toll, namely 228 days, to the original SOL. Under plaintiff’s calculation, the original SOL expired on September 27, 2021, and by adding 228 days to that, the new SOL expiration date was May 12, 2022. Therefore, plaintiff argues, the Complaint was timely filed on April 20, 2022.

NYCHA argues that pursuant to the Executive Order the SOL starts to run from the date after the tolling period ended. Under NYCHA's calculation, the SOL of one year and 90 days started to run on November 4, 2020, which is the day after the tolling period ended on November 3, 2020. The SOL, therefore, expired on February 1, 2022, which, NYCHA argues, makes the Complaint filed on April 20, 2022 untimely.

In support of their respective arguments, both parties rely on *Brash v Richards*, 195 AD3d 582 (2d Dept 2021), about which the Appellate Division First Department has held as follows:

In *Murphy v Harris*, 210 AD3d 410 (1st Dept 2022), decided on November 1, 2022, the Appellate Division 1st Department held in relevant part:

On March 20, 2020, Governor Cuomo signed Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) in response to the public health crisis occasioned by the COVID-19 pandemic. As relevant here, the Executive Order “tolled” any “specific time limit for the commencement, filing, or service of any legal action . . . until April 19, 2020” (9 NYCRR 8.202.8). That toll was extended through several subsequent executive orders, the last of which remained in effect until November 3, 2020.

The subject executive orders constituted a toll of the applicable statute of limitations (*see Brash*, 195 AD3d at 582; *Matter of Roach v Cornell Univ.*, 207 AD3d 931, 933 [3d Dept 2022]). As noted by the Second Department in *Brash*, the March 20, 2020 Executive Order expressly used the word “toll” and, “although the . . . executive orders issued after [Executive Order No. 202.8] did not use the word toll, those executive orders all . . . stated that the Governor hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive, made in the prior executive orders” (195 AD3d at 585 [internal quotation marks and citations omitted]). We agree with the Second Department that Executive Law § 29-a (2) (d) “indicates that the Governor is authorized to do more than just suspend statutes during a state disaster emergency; he or she may alter or modify the requirements of a statute, and a tolling of time limitations contained in such statute is within that authority” (*Brash*, 195 AD3d at 585 [internal quotation marks and brackets omitted]).

Plaintiffs' wrongful death claim accrued on September 30, 2018, and had a two-year statute of limitations (EPTL 5-4.1). Plaintiffs' wrongful death claim was tolled on March 20, 2020, and had a remaining limitations period of six months and 10 days, which started to run again after November 3, 2020 (*see Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020]; *Matter of Roach*, 207 AD3d at 933). Thus, plaintiffs' wrongful death claim was timely on February 12, 2021.

In *New York City Tr. Auth. v Am. Tr. Ins. Co.*, 211 AD3d 643 (1st Dept 2022), decided on December 29, 2022, the Appellate Division First Department held, in relevant part as follows:

On March 20, 2020, the Governor signed Executive Order No. 202.8 in response to the public health crisis occasioned by the COVID-19 pandemic. As relevant here, the Executive Order “tolled” any “specific time limit for the commencement, filing, or service of any legal action ... until April 19, 2020” (9 NYCRR 8.202.8). That toll was extended through several subsequent executive orders, the last of which remained in effect until November 3, 2020 (*see Gabin v. Greenwich House, Inc.*, 210 A.D.3d 497, 177 N.Y.S.3d 582, 2022 N.Y. Slip Op. 06428 [1st Dept. 2022]; *Murphy v. Harris*, 210 A.D.3d 410, 177 N.Y.S.3d 559, 2022 N.Y. Slip Op. 06086 [1st Dept. 2022]).

[...]

Upon such consideration, we find that petitioner's cause of action was timely. Specifically, the cause of action accrued on March 5, 2020 (see CPLR 7510), and was tolled on March 20, 2020, when the Governor's Executive Order tolling the statute of limitations went into effect, remaining so through November 3, 2020. After that date, the remainder of the 350-day statute of limitations period began to run again, expiring on October 20, 2021. Thus, the petition filed on October 19, 2021 was timely (*see Murphy v. Harris*, 210 A.D.3d 410, 177 N.Y.S.3d 559, 2022 N.Y. Slip Op. 06086 at 2).

Moreover, in *Port Auth. of N.Y. & N.J. v. Amigo Tr. LLC*, 2022 N.Y., 76 Misc.3d 1227, a case that is similar to the case at bar, it was held that “[w]here, as here, the event triggering the limitations period occurs while the toll is in effect, the limitations clock does not start running until the end of the tolled period; but it then runs as it otherwise normally would.”

Based on the above, this court grants that branch of NYCHA’s motion seeking to dismiss this action as untimely commenced.

Complaint Timely Served

With respect to plaintiff’s cross-motion and the issue of whether the Complaint was timely served within 120 days of being filed, plaintiff admits that service was untimely and, in any event, this claim is dismissed as moot, in light of the fact that the action itself was not timely commenced within the statute of limitations period. Further, it is well settled that courts lack jurisdiction to

extend statutes of limitations (*see Clemons v New York City Hous. Auth.*, 110 AD3d 500 (1st Dept 2013) (“The proceeding is time-barred [see CPLR 217 (1)] and this Court cannot extend the statute of limitations [see CPLR 201]”); *Walker v David*, 137 AD3d 459 (1st Dept 2016) (“this Court has no discretion to extend the statute of limitations”).


Conclusion

Accordingly, it is hereby:

ORDERED that NYCHA’s motion is **GRANTED** and the Complaint is dismissed against NYCHA with prejudice; and it is further

ORDERED that NYCHA shall be removed as a named defendant in this action and the caption amended accordingly; and it is further

ORDERED that plaintiff’s cross-motion against NYCHA is **DENIED**.

<u>2/27/2023</u> DATE	 J. MACHELLE SWEETING, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE