

Walker v Triborough Bridge & Tunnel Auth.

2023 NY Slip Op 30643(U)

March 3, 2023

Supreme Court, New York County

Docket Number: Index No. 160839/2021

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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KELLIE WALKER, INDEX NO. 160839/2021
MOTION DATE 08/29/2022
MOTION SEQ. NO. 002
Plaintiff,

- v -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, D/B/A
METROPOLITAN TRANSPORTATION AUTHORITY
BRIDGES AND TUNNELS, VICTOR MUALLEM, SHARON
GALLO-KOTCHER

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 40, 41, 42

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, and after oral argument, which took place on December 20, 2023, where Jeanne M. Christensen, Esq. appeared for the Plaintiff Kellie Walker (“Plaintiff”) and Ira J. Lipton, Esq. appeared for Defendants Triborough Bridge and Tunnel Authority, D/B/A/ Metropolitan Transportation Authority Bridge and Tunnels (“MTA”), Victor Muallem (“Muallem”) and Sharon Gallo-Kotcher (“Gallo-Kotcher”) (collectively “Defendants”), Plaintiff’s motion seeking leave to serve a late notice of claim is denied.

I. Factual and Procedural Background

This action arises out of Plaintiff’s employment at the MTA and her relationship with her supervisors, Muallem and Gallo-Kotcher (NYSCEF Doc. 1). At issue in this motion is whether or not this Court has the power to grant Plaintiff leave to file a late notice of claim. Plaintiff alleged assault, battery, and negligent supervision claims against Defendants in her Complaint (*id.* at ¶¶ 159-178). Defendants moved to dismiss Plaintiff’s Complaint on various grounds, including

Plaintiff's failure to properly serve a notice of claim, a condition precedent to bringing her tort causes of action against the Defendants (NYSCEF Docs. 6-7). In an Order issued by this Court dated August 9, 2022, Plaintiff's tort claims were dismissed, without prejudice, for failure to serve a notice of claim (NYSCEF Doc. 23). Shortly thereafter, on August 24, 2022, Plaintiff filed the instant motion seeking leave to file a late notice of claim (NYSCEF Doc. 27). Plaintiff asserts she only seeks to pursue assault and battery claims against Muallem, and abandons her claims for assault, battery, and negligent supervision against Muallem's employer, the MTA (NYSCEF Doc. 27 at ¶ 8 n. 1).

II. Discussion

The alleged assault and battery for which Plaintiff seeks leave to serve a late notice of claim occurred on February 3, 2020 (NYSCEF Doc. 27 at ¶ 12). The instant motion was made on August 24, 2022 (NYSCEF Doc. 26). Defendants oppose Plaintiff's motion on the basis that a court may not extend a plaintiff's time to serve a late notice of claim beyond the one year and ninety-day statute of limitations for asserting tort claims (*see* General Municipal Law ["GML"] § 50-e[5]; *see also* Public Authorities Law § 569-a[2]). Indeed, the only exception which would allow this Court to grant Plaintiff an extension of time to serve a late notice of claim beyond the one year and ninety-day statute of limitations is if the statute has been tolled (*Pierson v City of New York*, 56 NY2d 950, 954 [1982]).

Over two years and six months lapsed between the alleged incident on February 3, 2020 and the instant motion on August 24, 2022. Therefore, unless there is an applicable toll, this Court is powerless to grant an extension of time to serve a late notice of claim (*see Troy-McKoy v New York Parks & Recreation Dept.*, 170 AD3d 537 [1st Dept 2019]; *Turner v City of New York*, 94 AD3d 635, 636 [1st Dept 2012]).

Plaintiff argues that the statute was tolled due to her initiation of a prior federal lawsuit and the instant lawsuit (NYSCEF Doc. 27 at ¶ 38). Plaintiff cites to *Cohen v Pearl River Union Free School District*, 51 NY2d 256, 259-264 [1980] and *Hoops v Director, Bellevue Hosp. Ctr.*, 28 Misc. 3d 61 [1st Dept 2010] in support of her argument that the statute was tolled due to her prior lawsuits. However, the statute in those cases was tolled due to the plaintiffs' disabilities pursuant to CPLR § 208(a). In *Hoops*, the plaintiff allegedly suffered from insanity, an enumerated disability in CPLR §208(a), while in *Cohen*, the Plaintiff was an infant, the only other enumerated disability in CPLR § 208(a). Nowhere in CPLR § 208(a) does it state that filing a lawsuit creates a legal disability which tolls the time to move for leave to serve a late notice of claim. Persuasive precedent has rejected Plaintiff's argument that participation in a lawsuit somehow tolls the one year and 90-day deadline (*Townsend v City of New York*, 173 AD3d 809, 810 [2d Dept 2019]; *Cassidy v Riverhead Cent. School Dist.*, 128 AD3d 996 [2d Dept 2015]; *Feliciano v New York City Housing Authority*, 123 AD3d 876, 877 [2d Dept 2014]). Nothing in the record indicates there was any impediment prohibiting Plaintiff from seeking leave to serve a late notice of claim in either the federal lawsuit or this lawsuit.

Although Plaintiff also argues that the statute was either tolled or extended pursuant to CPLR § 205[a] when her prior federal action was dismissed on November 18, 2021, the Court finds this argument to be without merit. As Defendants argue, even if CPLR § 205(a) extended the one year and 90-day deadline to seek leave to file a notice of claim by an additional six months, the six-month extension would have lapsed on May 18, 2022. The instant motion was not made until August 24, 2022. Failure to abide by applicable statutes of limitation makes this Court powerless to deem a notice of claim served *nunc pro tunc* (*Pierson v City of New York*, 56 NY2d

950 [1982]; *Bobko v City of New York*, 100 AD3d 439, 440 [1st Dept 2012]). Therefore, this Court must deny Plaintiff's motion.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion seeking leave to serve a late notice of claim is denied; and it is further

ORDERED that the parties are directed to submit a proposed preliminary conference order to the Court on or before March 22, 2023 via e-mail to SFC-Part33-Clerk@nycourts.gov. In the event the parties are unable to agree to a proposed preliminary conference order, the parties are directed to appear for an in-person preliminary conference with the Court on April 5, 2023 at 9:30 a.m. in 60 Centre Street, Room 442, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order with notice of entry on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

3/3/2023 DATE					<i>Mary V Rosado</i> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	SUBMIT ORDER
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE
				<input checked="" type="checkbox"/>	OTHER