

**Desouza v City of New York**

2023 NY Slip Op 31377(U)

April 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 504838/2017

Judge: Consuelo Mallafre Melendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 20 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of April 2023.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

ANWAR DESOUZA,

Plaintiff,

- against -

CITY OF NEW YORK, DETECTIVE NIURCA QUINONES (SHIELD NO. 3310) POLICE OFFICER JESSICA FUENTES (SHIELD NO. 17413) POLICE OFFICER JESSICA HERRERA (SHIELD NO. 14413), Individually and as Employees of The NEW YORK CITY POLICE DEPARTMENT, and “JOHN/JANE DOE CORRECTION OFFICERS 1-10” (fictitious names, The true names being unknown at this time), Individually and as Employees of the NEW YORK CITY CORRECTION DEPARTMENT,

Defendants.

**DECISION & ORDER**

Index No. 504838/2017  
Mot. Seq. 005

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:  
NYSCEF #s: 149 – 150, 151 – 160, 162 – 163, 164, 170

UPON a motion of Defendants seeking an Order

Pursuant to CPLR§ 3025(b) to amend their Answer to assert an affirmative defense based on the statute of limitations; and

Pursuant to CPLR § 2221(d) for an order modifying an order of this Court dated March 10, 2022, to state “without prejudice” as to the denial of Defendant’s motion to dismiss based on the applicable statute of limitations; and

Pursuant to CPLR § 2221(d) granting Defendants' motion to reargue the Court's March 10, 2022 Order as it relates to Defendants' motion for a protective order, claiming the Court overlooked

matters of fact and law.

And upon opposition submitted on behalf of the plaintiff, and upon oral argument of the matter, the court finds the following:

With regards to that portion of the motion seeking to amend the Answer to add an affirmative defense based on the Statute of Limitations 3211(a)(5), it is well established that a party may amend his or her pleading at any time by leave of court. (CPLR 3025 [b]). *Redd v. Village of Freeport*, 150 A.D.3d 780, 781 [2d Dept. 2017]; *Shields v. Darpo*, 207 A.D.3d 586 [2d Dept. 2022]. “Applications to amend pleadings are within the sound discretion of the court, and that of the Appellate Division.” *Coleman v. Worster*, 140 A.D.3d 1002, 1003 [2d Dept. 2016] quoting *Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 411 [2014]. “Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine”. *HSBC Bank v. Picarelli*, 110 A.D.3d 1031, 1032 [2013]; *BAC Home Loans Servicing, L.P. v Jackson*, 159 A.D.3d 861, 863 [2018]; *Ditech Fin., LLC v. Khan*, 189 A.D.3d 1360, 1362 [2d Dept. 2020]; *Park v. Home Depot U.S.A., Inc.*, 183 A.D.3d 645 [2d Dept. 2020]; *Shields*, 207 A.D.3d at 587.

The Second Department in *Park v. Home Depot U.S.A., Inc.* holds that “(p)rejudice is more than ‘the mere exposure of the [party] to greater liability’” (*Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 411 [2014], quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 [1981]). “Rather, ‘there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position’” (*Kimso Apts., LLC*, 24 N.Y.3d at 411, quoting *Loomis*, 54 N.Y.2d at 23).” *See Park*, 183 A.D.3d at 646-47. Indeed, “(t)he burden of proof in establishing prejudice or surprise, or that the proposed amendment lacks merit, falls to the party opposing the motion for leave to amend (*see Kimso Apts.*,

*LLC v. Gandhi*, 24 N.Y.3d 403, 411 [2014]; *Wells Fargo Bank, N.A. v. Spatafore*, 183 A.D.3d 853 [2020]; *Coleman v. Worster*, 140 A.D.3d 1002, 1003 [2016]), which is consistent with the general tenor of CPLR 3025 (b) that leave to amend otherwise be freely granted. Distilled to its essence, courts should be liberal in permitting the amendment of pleadings unless there is a reason grounded in prejudice to a party or the absence of merit to warrant a different result.” See *Lennon v. 56th and Park (NY) Owner, LLC*, 199 A.D.3d 64, 71 [2d Dept. 2021].

Further, the Second Department holds that "a waiver of the defenses listed in CPLR 3211(a)(1), (3), (4), (5), and (6) may generally be retracted through amendment to the answer pursuant to CPLR 3025 to include the waived defense." *GMAC Mtge., LLC v. Coombs*, 191 A.D.3d 37, 42 [2d Dept. 2020]. In *Coleman v. Worster*, 140 A.D.3d 1002, 1003 [2d Dept. 2016], an action in which, as in the instant case, the plaintiff sought to recover damages for false arrest and false imprisonment, the Second Department affirmed the lower court’s decision to grant the request to amend the Answer to add a statute of limitations affirmative defense. It held that “since the proposed amendment did not result in any prejudice or surprise to the plaintiff and was not palpably insufficient or patently devoid of merit, the Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was pursuant to CPLR 3025 (b).” *Coleman*, 140 A.D.3d at 1003-1004.

Contrary to plaintiff’s arguments, Defendants established that there is merit to an affirmative defense based on the statute of limitations. They argue that Plaintiff’s untimely state law claims are nearly two-and-a-half years late and that his untimely federal claims are over seven months late. While a motion based on the statute of limitations is not presently before the court and the court is not commenting or ruling on the timeliness issue, defendants clearly set forth that there is merit to their argument, the extent of which is not determined herein.

On the other hand, Plaintiff fails to meet the burden of establishing prejudice or surprise as a result of the proposed amendment, or as mentioned above, that the proposed amendment lacks merit. The dates of the claimed occurrences were known to the plaintiff, as are the relevant statute of limitations. Thus, a motion based on the untimeliness of the claims cannot come as a surprise. Although plaintiff's argument that Defendant has previously amended their answer but failed to include this defense is correct, those Amended Answers were to answer for subsequently served and individually named defendants.

The court further finds that the timing of this motion to amend the Answer has not resulted in prejudice to the plaintiff. The progress of this litigation is confined to the institution of the action and some motion practice. Plaintiff filed a Summons and Complaint on March 10, 2017. Issue was joined on April 3, 2017. On June 12, 2017, Defendants filed an Amended Answer on behalf of Jessica Herrera. On August 14, 2017, Defendants filed a second Amended Answer on behalf of Niurca Quinones and Lauren Silver. During the summer of 2020, the parties exchanged Discovery and Inspection demands. On September 22, 2020, Defendants filed the underlying motion. On October 18, 2021, Plaintiff filed opposition to Defendants' motion. On October 26, 2021, Defendants filed their Reply. Oral argument was heard by the undersigned on January 19, 2022. A Decision was signed on March 10, 2022, which was based upon NYSCEF filings: 53-66; 11-123; 138-141. It is noted that pursuant to this court's rules, sur-replies or papers beyond a reply neither were or are accepted and considered. In sum, despite the passage of time, the litigation of this case has not substantially progressed. Other than motion practice, no discovery or depositions have taken place. It is noted that the underlying motion was also subject to delays caused by the pandemic pause.

Plaintiff's opposition is misplaced in so far as they argue that the court previously denied

a motion to amend the complaint to add the statute of limitations affirmative defense. At no time did the court deny a request to amend defendant's answer. Indeed, that request was never raised in the notice of motion or the affirmation in support of the underlying motion (sequence #3). In its reply, defendant inappropriately urged the Court to deem Defendants to have raised the affirmative defense in its original Answer. This improper request, first asserted in a Reply, was disregarded. However, such request is now properly before the court for the first time.

Further, plaintiff argues that defendants must state a reasonable excuse for the delay in moving to add the affirmative defense to their Answer. However, in the cases cited in opposition, leave to amend was denied based on prejudice to the other side or because the amendment was devoid of merit. *Greater Bright Light Home Care Services, Inc. v. Jeffries-El*, 199 A.D.3d 777 [2d Dept. 2021] (The Second Department affirmed denial of the motion to amend finding that the amendment had no merit as it was filed after summary judgment was granted); *Ridgewood Sav. Bank v. Glickman*, 197 A.D.3d 1189 [2d Dept. 2021] (Leave to amend defendant's answer was denied as defendant had knowledge of the allegedly erroneous mortgage satisfaction since the commencement of the action, and the proposed affirmative defenses were patently devoid of merit); *Schelchere v. Halls*, 120 A.D.3d 788 [2d Dept. 2014] (Motion to amend to assert additional causes of action alleging negligent infliction of emotional distress and breach of contract was denied upon a finding of prejudice to the defendant that would result from the amendment.)

In accordance with the above, that portion of the motion seeking to amend the Answer to assert an affirmative defense of statute of limitations is GRANTED and "Proposed Third Amended Answer", NYSCEF #160 is deemed served.

Defendants also request an order modifying the Decision of March 10, 2022 to include the words "without prejudice" as it refers to the timeliness issue. The prior application to dismiss

based on statute of limitations was denied solely on the grounds that Defendants' Answer did not contain a statute of limitations affirmative defense. At the time the prior motion was heard, the court was, and is, aware of the amendment provisions of CPLR 3025, however an application to amend the Answer was not properly before the court. Thus, Defendants' instant motion to amend the answer came as no surprise. It was simply Chambers' staff inadvertence that resulted in the words "without prejudice" to be left out of the court's Decision regarding the statute of limitations application. Accordingly, the application is granted to the extent that permission is given to file a motion based upon a statute of limitations claim.

Lastly, defendants also move for reargument of the March 10, 2022 decision based upon the court's failure to rule on one of their enumerated prayers for relief. In their notice of motion and supporting papers, defendants sought a protective order regarding certain discovery demands which as defendant correctly argues the court overlooked and a ruling was not made.

The court agrees with defendant's position that this portion of the application was omitted from the Decision dated March 10, 2022. Based on the court's omission, the motion to reargue is Granted. Upon reargument, the court issues a protective order as to the following:

- Any and all information and records related to promotion of detectives in the NYPD, including, but not limited to the promotion of DT Niurca Quinones to detective and the identity of the individual who approved her promotion
- Any and all information and records regarding criteria used for promoting ADAs
- Copies of all reviews/evaluations/disciplinary action regarding ADA Lauren Silver
- Deposition of Eric Gonzalez

A protective order is denied as to the deposition of ADA, Lauren Silver, as a non-party witness as to claims of malicious prosecution against the District Attorney's Office.

A protective order is denied as to the personnel/disciplinary records of the unnamed DOC employees. However, the exchange of these shall be stayed for 30 days post a decision on a statute of limitations motion, if the court finds such claims timely.

Furthermore, discovery of disciplinary records is limited for the named officers to CCRB and IAB closing reports for substantiated similar allegations for 10 years prior to Plaintiff's arrest on 7/18/13.

A motion based on a statute of limitations defense, should defendants so proceed to file, and all further motions, shall be placed in Part 20. All other discovery issues shall be heard in CDMP.

This constitutes the decision and order of the court.

**ENTER.**



---

**Hon. Consuelo Mallafre Melendez  
J.S.C.**