

Bennett v New York City Hous. Auth.

2023 NY Slip Op 32124(U)

June 26, 2023

Supreme Court, New York County

Docket Number: Index No. 150670/2020

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

-----X

COURTNEY BENNETT

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

INDEX NO. 150670/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries she alleges she sustained on November 17, 2018, when an elevator she was riding in a NYCHA building suddenly dropped from the ground floor to the basement.

Defendant now moves to dismiss the action because the Notice of Claim was filed late and plaintiff failed to seek leave to file a late notice of claim prior to the expiration of the statute of limitations.

For the reasons set forth below, the motion is granted, and the action is dismissed.

DISCUSSION

As the incident occurred on November 17, 2018, the 90-day deadline for serving the notice of claim was February 15, 2019. Plaintiff acknowledges that her notice of claim was served five days after the deadline.

The one year and ninety day statute of limitations for this case expired on February 18, 2020.

General Municipal Law §50-e, Public Housing Law §157 and CPLR §217-a all require that the plaintiff file a notice of claim within 90 days of the accrual of the claim. Pursuant to General Municipal Law §50-e(1)(a), the filing of a notice of claim is a condition precedent without the satisfaction of which an action against a municipal entity is barred. General Municipal Law §50-e(1)(a) states in relevant part:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation...the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises ...

See also Caselli v. City of New York, 105 A.D.2d 251 (1st Dept 1984).

Plaintiff has never attempted to seek leave to file a late notice of claim, and the statute of limitations has now long since expired, divesting the Court of discretion to grant leave now.

Frankel v. New York City Transit Authority, 134 A.D.3d 440 (1st Dept 2015).

With the expiration of the statute of limitations, the Court no longer has discretion and is deprived of jurisdiction to grant an extension of time to file a late notice of claim. *See Simons v. Sherburne-Earlville Cent. School Dist.*, 233 AD2d 592 (3rd Dept 1996); *Dua v. Suffolk County.*, 96 AD2d 1072 (2d Dept 1983); *Stoute v. City of New York.*, 91 AD2d 1043 (2d Dept 1983).

Plaintiff argues that the court should excuse the small delay because defendant has suffered no prejudice. Plaintiff's counsel alleges that in his affirmation in opposition that "... the Notice was prepared, signed and sent out for service on February 15, 2019, within the 90-day window of timeliness. Due to unforeseen and unanticipated circumstances, Plaintiff's process server delayed in serving the NOC and it was therefore served five days late." However, this claim appears to be belied by the record before the court, as Plaintiff's individual notarized

verification was signed and notarized on February 19, 2019, four days after the 90 day deadline expired (See NYSCEF Docs 10 & 22).

Additionally, such an application would be considered untimely on its face and the court would never reach adjudicating the standards that may have been at issue if the application was timely made. For example, in *Vandermast v. New York City Transit Authority*, 23 Misc.3d 1129(A) (Kings County Sup. Ct., 2000), the Court granted a motion to dismiss a complaint when a notice of claim was filed two days after the 90-day deadline but no application for leave to serve a late notice of claim was made until after the expiration of the statute of limitations. The Court determined the two day late notice of claim was a nullity and that it did not have jurisdiction to permit plaintiff to comply with the requirement for service of a notice of claim after the statute of limitations expired. *Id.* The Second Department affirmed the dismissal. *See Vandermast v. New York City Transit Authority*, 71 AD3d 1127.

In *McGarty v. City of New York*, 14 Misc.3d 1214(A) (Sup. Ct., New York, 2007), a plaintiff who fell on July 5, 2001, filed his notice of claim one day late, 91 days after the incident, on October 4, 2001. However, plaintiff did not seek leave to serve a late notice of claim until after the expiration of the statute of limitations. The Court dismissed the case, stating:

... where a plaintiff serves a late notice of claim without leave of court, then files and serves a summons and complaint, and after the statute of limitations has expired belatedly seeks an order declaring the late notice of claim to be timely served nunc pro tunc or for leave to serve a late notice of claim, the court has no authority to permit the service of the late notice of claim. In short, it matters not whether the plaintiff can satisfy the multi-factor test set forth in the Municipal Law and the case law regarding late notices of claim because the application is being made after expiration of the statute of limitations.

The Appellate Division affirmed, stating “Plaintiff’s service of a late notice of claim without court leave 91 days after accrual of his claim was a nullity (*Wollins v. New York City*

Board of Educ., 8 A.D.3d 30, 31 [2004]), and his failure to seek a court order excusing such lateness within one year and 90 days after accrual of his claim requires dismissal of the action (see id., citing, inter alia, Hochberg v. City of New York, 99 A.D.2d 1028 [1984], affd. 63 N.Y.2d 665 [1984]).”

WHEREFORE it is hereby:

ORDERED that the motion is granted, and the action is dismissed; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.

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SABRINA KRAUS, J.S.C.

6/26/2023
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: