

Harrell v New York City

2023 NY Slip Op 32935(U)

August 22, 2023

Supreme Court, New York County

Docket Number: Index No. 151194/2021

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X

RHONDA HARRELL

Plaintiff

- v -

NEW YORK CITY
NEW YORK CITY TRANSIT AUTHORITY

Defendants

-----X

INDEX NO. 151194/2021
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

JUDGMENT – DEFAULT

For the reasons that follow, Plaintiff’s motion for a default judgment is denied.

In this personal injury matter, Plaintiff alleges that on September 7, 2019¹ and or on November 7, 2019, while a passenger on a New York City Transit Authority bus, she fell and was injured as a result of an alleged collision.

Background

On January 8, 2020, Plaintiff served Notice of Claims upon Defendants, City of New York (City) and Transit for a November 7, 2019 accident (NYSCEF Doc. No. 11 [Exhibit A, Notice of Claim]). However, it appears that Plaintiff has not complied with Defendants’ mandatory requests to appear for General Municipal Law § 50-h hearings (NYSCEF Doc. 23).

¹ The notice of claim alleges that the accident took place on November 7, 2019 (NYSCEF Doc. No. 11 [Exhibit A, Notice of Claim]); and, the verified complaint alleges it occurred on September 7, 2019 in paragraphs six and eight but then alleges November 7, 2019 in paragraph fifteen (NYSCEF Doc. No. 1 [Summons and Complaint]).

On February 3, 2021, Plaintiff filed the instant negligence action and served Defendants on May 27, 2021 (NYSCEF Doc. 7). Transit e-filed and served its Answer with discovery demands on July 12, 2021 and the City e-filed and served its Answer with cross claims and combined demands on July 14, 2021 (NYSCEF Doc. 2 and 3).

Plaintiff now moves for a default judgment pursuant to CPLR 3215 alleging that Defendants failed to timely answer by June 16, 2021. The City opposes the motion and cross-moves pursuant to CPLR 3012(d), 2004 and 2005 for an order accepting its Answer *nunc pro tunc*. Transit also opposes the motion and cross-moves pursuant to CPLR 3211(a)(7) and 3212, General Municipal Law § 50(e) and Public Authorities Law §§ 1212 (1) and (4) for an order dismissing the complaint and all causes of action; or alternatively, for an order accepting its Answer *nunc pro tunc*. Plaintiff does not submit a reply nor oppose the cross-motions.

Discussion

While the CPLR requires that an answer is served within 20 days after service of the summons and complaint, in the interest of justice, late pleadings may be accepted upon a showing of a reasonable excuse for the delay (CPLR 3012(a) (d)). Further, while a generalized reference to the Covid-19 pandemic is not a sufficiently reasonable excuse, when a party explains with specificity the connection between the pandemic and the delay, then the excuse may be reasonable (see e.g. *Buckley v Nicklous*, 210 AD3d 575 [1st Dept 2022]). In addition, short delays for law office failures that do not prejudice a plaintiff, may also be considered reasonable delays (CPLR 2005; *Hirsch v NYC Dept. of Educ.*, 105 AD3d 522 [1st Dept 2013]).

Here, the City filed its answer on July 14, 2021, approximately 1 month after the deadline of June 16, 2021 and 8 months prior to Plaintiff filing this default motion (see NYSCEF Doc.

10). The City explains with specific numbers that due to staffing and hiring shortage based on law office failure because of the Covid-19 pandemic, it was not able to respond timely.

Thus, in light of deciding matters on the merits, the relatively short delay in time for filing and serving the answer, the City's explanation for the delay, the City's alleged viable affirmative defenses and counterclaims, and Plaintiff's failure to show any prejudice, the City's Answer shall be accepted *nunc pro tunc* (see CPLR § 3012 (d); *Rector v BDG Gotham Residential, LLC*, 209 AD3d 509 [1st Dept 2022]; *Velasquez v New York City Tr. Auth./MTA*, 198 AD3d 555 [1st Dept 2021]; *Nason v Fisher*, 309 AD2d 526, 526 [1st Dept 2003]).

As to Transit, similar to the City, it also alleges a reasonable excuse for the short delay in answering on July 12, 2021, less than one month after the required June 16, 2021 deadline. Transit specifically alleges a backlog of work and a hiring freeze in May 2021 due to Covid-19 and further alleges that its office was closed.

Accordingly, and like the reasoning above, Transit's Answer is also accepted *nunc pro tunc*, as Transit has shown a reasonable excuse for the short delay, its answer was filed more than 8 months before this default motion, Transit may have a viable late notice of claim argument, and Plaintiff has not shown any prejudice (see CPLR § 3012 (d); *Rector*, 209 AD3d 509; *Velasquez*, 198 AD3d 555; *Nason*, 309 AD2d 526).

As to the part of Transit's motion seeking dismissal of the complaint, that is denied without prejudice and with leave to refile. Transit properly argues that Plaintiff did not file the required notice of claim for a September 7, 2019 alleged incident. However, Plaintiff timely served a Notice of Claim for a November 7, 2019 alleged incident on January 8, 2020.

This Court recognizes the importance of a proper and timely notice of claim since it provides public entities with fairness and an opportunity to adequately investigate the

circumstances surrounding the alleged claim while the matter is still fresh. Yet at this time, although Plaintiff does not reply to this argument, this Court does not have sufficient information supported by caselaw and evidence to determine whether the Notice of Claim is defective as it fails to properly describe the correct date of the accident or it is untimely as it was served after 90 days from the alleged claim (see General Municipal Law § 50-e; see e.g. *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]; see also *Bennett v New York City Tr. Auth.*, 4 AD3d 265 [1st Dept 2004; *Brown v New York City Tr. Auth.*, 172 AD2d 178 [1st Dept 1991]).

Accordingly, it is

ORDERED that Plaintiff's default motion is denied in its entirety; it is further

ORDERED that the City's cross-motion to compel Plaintiff to accept its Answer *nunc pro tunc* is granted; it is further

ORDERED that the part of Transit's cross-motion seeking to compel Plaintiff to accept its Answer *nunc pro tunc* is granted; it is further

ORDERED that the part of Transit's motion seeking dismissal of the complaint is denied without prejudice and with leave to re-file; it is further

ORDERED that Plaintiff is to file and serve upon all parties and the Clerk of the Court a notice of entry within 20 days; and it is further

ORDERED that in compliance with Part 21 Rules, the parties are to submit a proposed Preliminary Conference Order by September 28, 2023.

8/22/2023
DATE



DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER
 REFERENCE