

Melgarejo v City of New York

2023 NY Slip Op 33463(U)

October 6, 2023

Supreme Court, New York County

Docket Number: Index No. 153534/2021

Judge: Adam Silvera

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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. ADAM SILVERA PART 40

Justice

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INDEX NO. 153534/2021

PAEZ MELGAREJO,

MOTION DATE 03/16/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, NYC TRANSIT AUTHORITY,
JOHN DOE 1-10, ABC CORP 123

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ordered that plaintiff Paez Melgarejo’s (“Mr. Melgarejo”) instant motion for renewal and reargument, pursuant to CPLR § 2221(e) and CPLR § 2221(d) respectively, is granted for the reasons set forth below.

This personal injury action arises out of Mr. Melgarejo’s slip and fall accident in a New York City subway platform, resulting in a fall onto the train tracks and a train running over his hand. The accident occurred on February 12, 2020, following which Mr. Melgarejo required extended medical treatment, including surgeries, and was hospitalized for 57 days. On September 10, 2020, plaintiff served a Notice of Tort Claim to defendant City of New York (“City”). Plaintiff was informed in January 2021, upon a 50-h hearing with defendant City, that the correct entity to be served in the instant matter was co-defendant New York City Transit Authority (“Transit”). Plaintiff served Transit with a Notice of Claim on January 25, 2021. Following the filing of plaintiff’s Complaint in April 2021, and defendants’ delayed joint answer

in September 2021 (pursuant to a stipulation between counsel to extend defendants' time to answer), plaintiff moved to strike defendants' answer or compel discovery in September 2022. Defendants City and Transit cross-moved to dismiss plaintiff's claims on the basis that the Notice of Claim was untimely. This Court granted defendants' cross-motion and dismissed plaintiff's complaint in a Decision/Order dated January 24, 2023.

Plaintiff now moves for renewal on the basis that his extended medical hospitalization beginning in February 2020, immediately following the accident at issue herein, should have constituted a physical incapacity justifying the failure to file a timely notice of claim. *See* Brief in support of Plaintiff Motion for Leave to Renew and Reargue this Court's Decision on Plaintiff's Prior Motion to Strike and Defendant's Prior Cross Motion to Dismiss, p. 3. Plaintiff additionally makes arguments regarding the first Notice of Claim served to defendant City, the defendants' actions in litigation, and the stipulation between counsel regarding defendants' delayed answer. Defendants City and Transit highlight that plaintiff's counsel was aware of Mr. Melgarejo's hospitalization at the time of the prior motion, and that plaintiff failed to seek leave to file a late Notice of Claim within the 1 year and 90-day statutorily limited period. *See* Affirmation in Opposition to Plaintiff's Motion to Renew and Reargue, p. 4-5.

CPLR §2221(e) permits a party to move for leave to renew a decision to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". CPLR §2221(e). Relatedly, CPLR §2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or

the law or for some reason mistakenly arrived at its earlier decision.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep’t 1992), *appeal denied in part, dismissed in part*, 80 NY2d 1005 (1992) (internal quotations omitted).

Plaintiff primarily argues that his prolonged medical hospitalization and unavailability for litigation lasted until the beginning of the Covid tolling period and constitutes a new fact sufficient to justify renewal/reargument. While defendants’ argument is true that this information was available to plaintiff at the time the prior motion was made, the Appellate Division, First Department has clearly stated “[t]hat the additional evidence was available at the time of the original motion is not dispositive.” *Joseph v Board of Education of the City of New York*, 91 AD3d 528, 529 (1st Dep’t 2012). Furthermore, the Appellate Division, First Department has explicitly held that the requirement upon renewal of a motion to present a “new” fact that was “unknown to the movant” during the original motion “is a flexible one”. *Tishman Construction Corporation v City of New York*, 280 AD3d 374, 376 (1st Dep’t 2001). Moreover, “the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant” during the original motion “so as not to defeat substantive fairness”. *Id.* at 376-377 (internal quotations omitted).

Of note, is the longstanding and well settled proposition that New York courts favor resolution of actions on their merits. *See Picnic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1st Dep’t 1986). Given the nature of plaintiff’s injury and that plaintiff’s hospitalization of 57 days would have run from February 12, 2020 into the Covid tolling period beginning March 20, 2020, the period of plaintiff’s hospitalization is an adequate justification for failing to file the Notice of Claim during that hospitalization period. Here, plaintiff has proffered sufficient medical evidence to establish his physical incapacitation which prevented him from filing the Notice of Claim for

57 days immediately following the accident. *Cf Matter of Casale v City of New York*, 95 AD3d 744, 744 (1st Dep't 2012) (holding that "petitioners failed to submit any medical evidence supporting their assertion that the injured petitioner's physical condition prevented them from timely serving a notice of claim".) Thus, plaintiff's 90-day period to file a Notice of Claim on the correct party, defendant Transit, began on November 3, 2020, such that the January 25, 2021 Notice of Claim to defendant Transit is hereby deemed timely.

Accordingly, it is

ORDERED that plaintiff Melgarejo's motion for renewal and reargument is granted; and it is further

ORDERED that upon renewal, the Court vacates its prior Decision/Order dated January 24, 2023, and defendants' cross-motion in motion sequence number 001 is hereby denied; and it is further

ORDERED plaintiff's Complaint dated April 12, 2021 is hereby reinstated; and it is further

ORDERED that defendants' Answer dated September 10, 2021 is reinstated; and it is further

ORDERED that all counsel shall appear in room 422 of 60 Centre Street, New York, NY on November 16, 2023 at 10:00am for a compliance conference to discuss all outstanding discovery; and it is further

ORDERED that counsel for the plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the Decision/Order of the Court.

10/06/2023

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE