

Rojas v City of New York

2023 NY Slip Op 33623(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 156432/2022

Judge: J. Machelie Sweeting

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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. J. MACHELLE SWEETING PART 62

Justice

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JUAN G CANAS ROJAS

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 156432/2022

MOTION DATE 04/28/2023

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

were read on this motion to/for DISMISS.

In the underlying action, plaintiff alleges that on or about August 5, 2019, at approximately 10:30 pm, he fell into a manhole located on the sidewalk in front of 83-22 37th Avenue, Jackson Heights, in the County of Queens, City and State of New York.

Now pending before the court is a motion where defendants THE CITY OF NEW YORK (the "City") seeks:

- (i) an order pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(5) dismissing plaintiff's complaint against the City with prejudice, on the grounds that plaintiff failed to commence this action within the one year and ninety-day statute of limitations ("SOL") as set forth in General Municipal Law ("GML") 50-i and CPLR 217-a; or
- (ii) in the alternative, an order pursuant to CPLR 504(3) and CPLR 510(1), changing the venue of this action from New York County to Queens County, and an order directing the clerk to transfer the file accordingly.

“On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties

Both the Notice of Claim and the Complaint allege that the subject incident occurred on August 5, 2019. The City argues that even taking into account the tolls imposed as a result of the Covid-19 pandemic, plaintiff had, at the very latest, until Monday June 21, 2021, to commence this action. Instead, this action was not commenced until August 2, 2022, more than one year and one month past the expiration of the SOL, and in contravention of CPLR 217-a and GML 50-i. The City argues that the law is well established that dismissal is not discretionary where actions are brought in contravention of the statutory mandate, and cites a plethora of caselaw to support this argument.

In opposition, plaintiff does not dispute that the action is untimely. Instead, plaintiff argues that dismissal would be prejudicial because due to the pandemic, plaintiff was out of the country to “seek treatment for his injuries which were a result of the incident which is the substance of this action.” Plaintiff also seems to suggest that due to the pandemic, the SOL may not have expired at the time that this action was filed. Specifically, plaintiff argues that “The Executive Orders which tolled accrual of time for Statue of Limitations purposes were and are still raising questionability and requiring judicial deference for actions filed post COVID-19 Pandemic.”

Conclusions of Law

With respect to the argument that plaintiff was out of the country, plaintiff does not specify the dates of his travel or how such dates relate to the SOL in this case, nor does plaintiff provide any legal basis for his implied argument that the SOL is tolled when a plaintiff travels abroad.

With respect to plaintiff's argument concerning tolling, New York State Executive Order 202.8 was issued on March 20, 2020 and tolled the SOLs and various other time limits under the procedural laws of the State of New York. This Executive Order was thereafter extended by additional subsequent executive orders, with the tolling period remaining in effect until November 3, 2020. In total, the tolling period ran from March 20, 2020 to November 3, 2020, and amounted to 228 days in total.

The incident date here is August 5, 2019, and absent any tolling, the SOL would have expired 1 year and 90 days later, on November 3, 2020. In this case, if we take the original SOL deadline of November 3, 2020 and add the full tolling period of 228 days to this date, the SOL would have expired on June 19, 2021. Here, the Complaint was not filed until August 2, 2022, and plaintiff sets forth no legal basis as to how the SOL may have still been running on that date.


Finally, as the City correctly argues, it is well settled that courts lack jurisdiction to extend statutes of limitations (*see Clemons v New York City Hous. Auth.*, 110 AD3d 500 (1st Dept 2013) (“The proceeding is time-barred [*see* CPLR 217 (1)] and this Court cannot extend the statute of limitations [*see* CPLR 201]”); *Walker v David*, 137 AD3d 459 (1st Dept 2016) (“this Court has no discretion to extend the statute of limitations”).

Conclusion

Accordingly, it is hereby:

ORDERED that this motion is **GRANTED**; and it is further

ORDERED that this Complaint is dismissed, with prejudice.

10/17/2023			
DATE			J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE