

Auslander v City of New York

2025 NY Slip Op 32364(U)

July 3, 2025

Supreme Court, New York County

Docket Number: Index No. 155825/2021

Judge: Carol Sharpe

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.

LP, Ryback Development Construction Corp., D'Onofrio General Contractor's Corp., and Consolidated Edison, Inc., ("Con Edison"). Thereafter, Spectrum commenced a third-party action against Star Com Fiber LLC. Plaintiff filed the affidavits of service of the summons and complaint on all defendants on April 12, 2023, and April 25, 2023, except Con Edison, which affirmation of service was filed on August 29, 2024.

Plaintiff later moved to consolidate the two actions as they arose out of the same accident and concern the same questions of fact and law. By Order dated June 12, 2024, the two actions were consolidated under Index Number 155825/2021 (NYSCEF Doc. #12). In the same Order, all claims and counterclaims interposed against DOT and DEP were dismissed, and the motions to dismiss made by JR CRUZ, Corp., Delaney Associates, LP, and Star Com Fiber LLC were denied. The third-party action against Star Com Fiber LLC was discontinued without prejudice per stipulation dated April 2, 2025 (NYSCEF Doc. #34).

On August 15, 2024, Con Edison filed the instant motion for an order dismissing the action against it as time barred pursuant CPLR §3211(a)(5) and CPLR §214(5). In support of its motion, Con Edison submitted the summons and complaint as an exhibit (NYSCEF Doc. #16). Con Edison contends that while plaintiff's summons and complaint was filed on April 10, 2023, Con Edison was not served until July 26, 2024, more than the 120 days permitted by CPLR § 306-b and after the expiration of the three-year statute of limitations. No opposition to the motion was filed.

Plaintiff's counsel, in good faith, did not file written objection to the motion, but requested that it be granted without prejudice, as he was still investigating whether service was properly completed on Con Edison in 2023. As of the date of this order, plaintiff's counsel has not submitted proof that Con Edison was timely served.

CPLR §214(5) provides that the statute of limitations for an action to recover damages for personal injury must be commenced within three years. Additionally, CPLR §306-b provides, in pertinent part, that:

“Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days

after the commencement of the action or proceeding...[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.”

Pleadings which are the subject of a CPLR §3211 motion to dismiss are liberally construed, the court is to accept the facts as alleged in the complaint to be true, accord plaintiff “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 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). CPLR §3211(a)(5) provides for dismissal of an action if it is time barred. The initial burden is on the defendant to establish when the cause of action accrued. *Swift v. N.Y. Med. Coll*, 25 A.D.3d 686, 687, 808 N.Y.S.2d 731 (2nd Dept. 2006). “Once this showing has been made, the burden shifts to the plaintiff to “aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely...” (*Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611, 872 NYS2d 144 [2009]; see *Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844, 989 NYS2d 365 [2014]). “The plaintiff has the burden of establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies [internal citation omitted].” *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 669-670, 64 N.Y.S.3d 228 (2nd Dept. 2017).

Gary Auslander’s accident occurred on June 30, 2020, and the action was commenced on April 10, 2023. The filings show that plaintiff properly commenced the action within the three-year limit and, pursuant to CPLR §306-b, properly served the summons and complaint on all of the defendants within 120 days from commencing the action except Con Edison. Con Edison was not served for more than one year after the other defendants (NYSCEF Doc. #19), and after the statute of limitations expired.

Con Edison provided sufficient documentary evidence that they were not properly served by plaintiff within the statute of limitations, pursuant to CPLR §3211(a)(5), nor within the 120-day requirement of CPLR §306-b. Plaintiff, however, has not provided any evidence that the action with

respect to Con Edison was timely or should be deemed timely, nor did it provide any evidence of good cause or judicial interest to justify such a determination. It is hereby

ORDERED, that defendant Consolidated Edison, Inc.’s motion to dismiss plaintiff’s action against it is granted; it is further

ORDERED, that Consolidated Edison, Inc., be removed as a party to this action; it is further

ORDERED, that the action is severed and continued against the remaining defendants; it is further

ORDERED, that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; it is further

ORDERED, that the caption is amended to read as follows:

-----X

JACOB AUSLANDER, as Administrator of the Estate of
GARY AUSLANDER,
Plaintiff,

- v -

THE CITY OF NEW YORK, JR CRUZ CORP., JLJ IV
ENTERPRISES, INC., TRIBORO WATER MAIN AND
SEWER CORP., DELANEY ASSOCIATES, LP., RYBACK
DEVELOPMENT AND CONSTRUCTION CORP.,
SPECTRUM NEW YORK METRO, L.L.C., and D'ONOFRIO
GENERAL CONTRACTORS CORP.

Defendants.

-----X

; it is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court within twenty (20) days of the date of this Order, and shall file proof of said service, and the Clerk of the Court is directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED, that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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).

This constitutes the Decision and Order of the Court.

ENTER:

July 3, 2025
DATE


HON. CAROL SHARPE, J.S.C.

HON. CAROL SHARPE
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE