

<b>Rios v City of New York</b>
2012 NY Slip Op 33481(U)
May 9, 2012
Sup Ct, Bronx County
Docket Number: 260482/11
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

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ANA RIOS,

X

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

X

**DECISION/ORDER**

Index No.: 260482/11

The following papers numbered 1 to read on the below motions noticed on December 27, 2011 and duly submitted on the Part IA15 Motion calendar of **January 27, 2012**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs' Affirmation in support of motion, Exhibits	1,2
Pl.'s Affirmation in opposition, Exhibits	3,5
Defs' Affirmation in Opposition/ Reply	5

Upon the foregoing papers, defendant City of New York (hereinafter "Defendant") seeks (1) an order dismissing the complaint of the plaintiff Ana Rios (hereinafter "Plaintiff") for (1) failure to comply with CPLR 305 and CPLR 306 and (2) an order dismissing the complaint pursuant to CPLR 3211(a)(7), and General Municipal Law § 50-(i).

The instant action seeks damages for personal injuries Plaintiff allegedly sustained on July 3, 2010 at the intersection of 170th Street and Jerome Avenue, Bronx, New York. Plaintiff alleges that while waiting at a bus stop at the intersection of 170th Street and Jerome Avenue, she was forced off the sidewalk and fell in a hole in the ground and sustained personal injuries.

I. Background

Plaintiff served on Defendant a Notice of Claim on or about August 18, 2010. In the Notice, Plaintiff alleged the that nature of the claim arose from Defendant's negligence "in the maintenance of the sidewalk/crosswalk located at the intersection of 170th street and Jerome Avenue, Bronx, New York." On October 29, 2010, pursuant to General Municipal Law § 50-h,

Plaintiff submitted to a hearing. After the hearing, by notice dated January 3, 2011 the City of New York Office of the Comptroller (hereinafter "Comptroller's office") informed Plaintiff's counsel that the claim was disallowed pursuant to § 7-210 of the New York City Administrative Code. Thereafter, according to Plaintiff's opposition papers, her attorney's office contacted the Comptroller's office and explained that the sidewalk defect was not private landowner property but rather was a piece of sidewalk located within the bus stop, which is City of New York maintained property. Subsequently, according to plaintiff's opposition papers her counsel's office was instructed by the Comptroller's office to file an amended notice of claim. Thus, on February 7, 2011 Plaintiff served Defendant an amended Notice of Claim in which she alleges that the nature of the claim arose from Defendant's negligence "in the maintenance of the street annexed to the bus [s]top at the intersection of 170th street and Jerome Avenue, Bronx, New York." Nevertheless, by notice dated February 10, 2011 the Comptroller's office informed the plaintiff that her amended notice of claim was disallowed because it "was not filed within (90) days from the date of the occurrence as required by General Municipal Law Section 50-e."

Subsequently, Plaintiff filed a motion on June 9, 2011 pursuant to CPLR § 3025(c) and General Municipal Law § 50-e (5) for leave to file an amended notice of claim, so it can clarify that "the sidewalk defect was not private landowner property but rather was a piece of sidewalk located within the bus stop which is City of New York maintained property." By Order dated July 21, 2011 the Honorable Larry S. Schachner granted Plaintiff's motion on default and instructed Plaintiff to "serve the amended notice of claim within thirty (30) days of entry of this order by the clerk." Contrary to Defendant's allegation that "there is no record of plaintiff ever filing an original summons and complaint", a review of the Court records indicates that the Plaintiff filed the original summons and complaint and the amended notice of claim with the county clerk on August 3, 2011 under the index number 260482/11, the same index number the motion to amend the notice of claim was made under. Moreover, the Court records indicate that Plaintiff filed the affidavit of service regarding the summons and complaint on August 3, 2011. It should be noted that the aforementioned affidavit of service states that on August 2, 2011 Plaintiff served on Defendant the summons and complaint by first class mail.

Thereafter, according to Plaintiff's opposition papers, "[a]s time went by and no entry of appearance was received, Plaintiff was reticent to file a motion for default judgment" her counsel personally went to Defendant's Law Department, who verified that the complaint had been received but had not been assigned. According to Plaintiff's opposition papers, her counsel was instructed to contact the Defendant's Law Department in Bronx County and, "[a]fter many phone calls we...[spoke] directly to attorney Bradely Brout, Assistant Corporation Counsel. He admitted that the Summons and Complaint was in his computer system, but had not been assigned to an attorney." Subsequently, Plaintiff "noted that Plaintiff's first name was spelled incorrectly. Since an answer had not been received from Defendant nor a request to extend the time to [answer], Plaintiff filed an Amended Summons and Complaint" on November 15, 2011 to reflect plaintiff's first name correctly. Defendant's served an answer to the amended summons and complaint on November 28, 2011.

Defendant's answer asserted fifteen affirmative defenses, however those germane to the instant motion are the following: (1) "The defendant(s) are not subject to the jurisdiction of this court, in that the summons does not bear the date it was filed with the clerk of the court; (2) "The action has not been commenced in compliance with CPLR section(s) 304, 306-a and/or section 400 of the CCA; (3) The action on behalf of the plaintiff(s) is barred by reason of the fact that it was not commenced within the time provided by the Statute of limitations; (4) This court lacks jurisdiction over the defendant(s)...in that said defendant(s) were not personally served with the summons; (5) "Plaintiff fails to comply with section 3017 of the CPLR."

On December 27, 2011 the instant motion was made, using the same index number as Plaintiff on her motion to amend the Notice of Claim. Defendant argues that Plaintiff did not establish personal jurisdiction by failing to comply with: (1) the CPLR 305 requirement that the summons bear the index number assigned and the date of filing with the clerk of the court and (2) the CPLR 306-a requirement that upon filing the summons and complaint an index number shall be assigned and a fee required to be paid. In addition, Defendant contends that, pursuant to General Municipal Law § 50-i, Plaintiff's statutory period to commence her action was October 3, 2011 and since she filed her amended summons and complaint on November 15, 2011 her action was commenced beyond the statute of limitations.

II. Applicable Law and Analysis

CPLR 304(a) states in pertinent part that “[a]n action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter.” In the case at bar, there is no question that Plaintiff filed the original summons and complaint on August 3, 2011. General Municipal Law § 50-i.(1) (c) states in pertinent part that

No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, ....unless...(c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based...

CPLR 305(a) states in pertinent part that “[a] summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff’s address, and also shall bear the index number assigned and the date of filing with the clerk of the court.”

CPLR 306-a states in pertinent part that “[u]pon filing the summons and complaint, summons with notice or petition in an action or proceeding commenced in supreme or county court with the clerk of the county, an index number shall be assigned and the fee required by subdivision (a) of section eight thousand eighteen of this chapter shall be paid.”

In the case at bar, Plaintiff served her initial summons and complaint on August 2nd, 2011 with the index number assigned to her motion to amend the Notice of Claim. She thereafter filed the pleadings on August 3rd, 2011. Plaintiff did not purchase a new index number for her summons and complaint prior to serving Defendant, as she should have. See, *Goldenberg v Westchester County Health Care Corp.*, 16 N.Y.3d 323 (2011) citing CPLR 304, 305, 306-a, 306-b.

The question before the Court is whether CPLR 2001 vests the Court with discretion to forgive the mistake that plaintiff made, namely filing the original summons and complaint without a new index number. This Court believes it does.

CPLR 2001 was amended by the legislature in 2007 (L. 2007 ch 529 #1. effective August 15, 2007. amending L. 1962. ch 308) and provides:

2001. Mistakes, omissions, defects and irregularities

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

See also *Matter of United Servs. Auto. Assn. v Kungel*, 72 A.D.3d 517, 518 (1<sup>st</sup> Dept. 2010). Here, Plaintiff filed the original summons and complaint on August 3<sup>rd</sup>, 2011, therefore the action was timely commenced. In addition, Plaintiff's counsel affirms that he contacted Defendant's Law Department in Bronx County who confirmed receipt of the pleadings, but stated that the matter was not yet assigned to an attorney. In its reply, Defendant does not deny this fact. Defendant also does not present evidence of any prejudice.

In light of the foregoing, Defendant's motion is denied.

III. Conclusion


Accordingly, it is hereby

ORDERED, that Defendant's motion is denied, and it is further,

ORDERED, that Plaintiff is directed to purchase a new index number, and to file and serve its amended summons and complaint in accordance with the CPLR within thirty (30) following entry of this Decision and Order by the Bronx County Clerk's Office.

This constitutes the Decision and Order of this Court.

Dated: May 9, 2012

  
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Hon. Mary Ann Brigantti-Hughes, J.S.C.