

**Wright v Harrigan**

2017 NY Slip Op 31325(U)

May 15, 2017

Supreme Court, Bronx County

Docket Number: 18619/2005

Judge: Larry S. Schachner

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decision stated that it was without prejudice to any defenses which may be raised by the added defendants.

Defendants NYC Transport, Inc. and Harry Hernandez Jr. now move to dismiss plaintiff's action against them; vacate the note of issue; and vacate NYC Transport Inc.'s default in responding to plaintiff's Supplemental Summons and Amended Verified Complaint and/or Second Supplemental Summons and Second Amended Verified Complaint. Plaintiff opposes the motion claiming a toll of the statute of limitations under CPLR 208 and cross-moves to convert the motion to dismiss to a motion for summary judgment; extend plaintiff's time to serve added defendant Harry Hernandez, Jr. and allow substituted service upon him; and for related relief. The motion and cross motion are consolidated for disposition and decided as follows.

The accident at issue occurred on September 9, 2009 and it is undisputed that plaintiff failed to commence a lawsuit concerning such accident until well after the 3 year statute of limitations had expired. The moving defendants have made a prima facie showing that the claims asserted against them in this matter are time barred. Therefore, the burden shifts to the plaintiff to present admissible evidence to show that the cause of action falls within an exception to the statute of limitations. *See Santo B. v Roman Catholic Archdiocese of New York*, 51 AD3d 956 (2d Dept 2008).

"CPLR 208 provides, in pertinent part, that where a person is under a disability of 'insanity' at the time his cause of action accrues, the limitations period in a personal injury action will be extended to three years after the disability ceases." *McCarthy v Volkswagen of America, Inc.*, 55 NY2d 543, 546 (1982). In addition, the legislative history of the statute indicates that the toll for insanity is to be narrowly construed, e.g. the phrase "mental illness" may not be

substituted for “insanity,” so as not to result in unwarranted extensions of time to commence an action. *id.* at 548.

Plaintiff’s counsel claims that the applicable statute of limitations was tolled since September 2009 pursuant to CPLR 208 on the grounds that plaintiff’s injuries from the accident at issue “magnified her thinking difficulties and caused deterioration in her mental functioning to the point where Ms. Augustine was unable to function in society, to manage her own business affairs, or to comprehend and protect her own legal rights.” Plaintiff submits the affidavit, dated May 15, 2015, of Rimma Danov, Ph.D, a psychologist specializing in Neuropsychology who examined and tested plaintiff on April 29 and June 3 of 2014. In her report annexed to her affidavit, Dr. Danov does not diagnose plaintiff with insanity, but rather, Dr. Danov’s diagnosis of plaintiff is: “S/P TBI with post-traumatic seizures; Major Neurocognitive and Mood Disorder with personality change, secondary to TBI.” Dr. Danov acknowledges that plaintiff suffered from a traumatic brain injury in 2005 (from a prior motor vehicle accident) and avers in her affidavit that plaintiff “suffers from an overall inability to function in society, an inability to comprehend and protect her own legal rights.” However, Dr. Danov examined plaintiff more than 4 ½ years after the accident at issue and has no basis to opine on the plaintiff’s condition at or about the time of the accident.

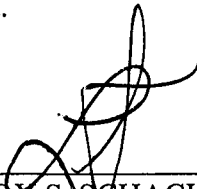
In opposition to plaintiff’s cross motion, defendants contend that, in the instant matter, plaintiff has retained an attorney, signed numerous documents for this litigation including a “stop work” letter and consent to change attorney which was acknowledged before a notary public, HIPAA authorizations signed before a notary public which allow for the release of her medical records to opposing counsel, as well as engaged in other documented financial transactions well

after the subject accident and thus during the time in which plaintiff is claiming the “insanity” toll.

Therefore, based on the record before the court, including the medical records of plaintiff’s examining neuropsychologist, plaintiff has failed to show that she was under a disability of “insanity” at the time her cause of action accrued as required for an “insanity” toll under CPLR 208 as set forth in *McCarthy v Volkswagen of America, Inc.*, 55 NY2d 543 (1982).

Accordingly, the court is constrained to deny plaintiff’s cross motion in its entirety and to grant defendants’ motion to dismiss plaintiff’s action against them.

This constitutes the decision and order of the court.



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LARRY S. SCHACHNER, J.S.C.

Dated: May 15, 2017