

Gibson v City of New York

2011 NY Slip Op 34239(U)

September 29, 2011

Supreme Court, Bronx County

Docket Number: 260089/08

Judge: Robert E. Torres

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PART

29

3

- Case Disposed
- Settle Order
- Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:-----X

GIBSON, DANA

Index No. 0260089/2008

-against-

Hon. ROBERT E. TORRES

CITY OF NEW YORK-----X

JUDGE

Justice.

The following papers numbered 1 to 3 Read on this motion, **VACATE ORDER/JUDGMENT**

Noticed on **September 09 2010** and duly submitted as No. on the Motion Calendar of 11/18/2011

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided pursuant to CPLR 9002, and in accordance with the attached decision.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 9 29 2011

Hon.

ROBERT E. TORRES
JUDGE

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 29

-----X
DANA GIBSON,

Plaintiff.

-against-

THE CITY OF NEW YORK.

Defendant.

-----X
HON. ROBERT E. TORRES:

DECISION AND ORDER

Index No.: 260089/08

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in three separate alleged false arrest/malicious prosecution incidents. Plaintiff commenced this action by filing his complaint on February 13, 2008, claiming a false arrest on September 22, 2003 and malicious prosecution concluding March 22, 2004; a false arrest on October 16, 2004 and malicious prosecution concluding February 24, 2005; and a false arrest on February 16, 2005 and malicious prosecution concluding July 7, 2005.

In May 2007 plaintiff commenced a proceeding seeking leave to serve a late notice of claim regarding the incidents of false arrest and malicious prosecution of which he complains in this action and to toll the statute of limitations during the period of his mental disability ending April 16, 2007. In an order, dated June 4, 2007, the court (Paul Victor, J.S.C.) granted plaintiff's application to file a late notice of claim but did not extend or toll the statute of limitations based on plaintiff's un rebutted allegations that he was under a mental disability that would toll the limitations period. Defendant then moved in June 2008 to dismiss plaintiff's action due to plaintiff's noncompliance with the General Municipal Law § 50-i, which requires actions against the City of New York to be commenced within one year and 90 days after the occurrence on which the action is based. In

opposition, plaintiff relied on CPLR § 208 to toll the statute of limitations so as to render his action timely. On June 17, 2008, plaintiff cross-moved to join as defendants the Bronx County District Attorney Robert T. Johnson and six individual employees of the City of New York and to amend his complaint to allege their responsibility for the three false arrests and three malicious prosecutions. The court (Lucy Billings, J.S.C.) granted defendant's motion to dismiss plaintiff's claims to a limited extent and granted plaintiff's cross-motion to join three additional parties and amend the complaint to include federal constitutional claims against the added defendants.

Defendant City of New York ("the City") now moves for an order pursuant to CPLR § 5015(a)(3) vacating Justice Paul Victor's prior order, dated June 4, 2007, and upon vacating said order, denying plaintiff's petition for leave to serve a late notice of claim; or for an order pursuant to CPLR 2221 granting renewal/reargument of plaintiff's motion for leave to file a late notice of claim; and upon granting renewal, for an order denying plaintiff's petition for leave to serve a late notice of claim; and upon an order denying plaintiff's petition for leave to file a late notice of claim, for an order vacating the order issued by Justice Lucy Billings, dated October 2, 2009 pursuant to CPLR § 5015(a)(5) or in the interests of justice; and for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint for failure to comply with the notice of claim rules.

Plaintiff moves for an order entering a default judgment against defendants City of New York, Robert T. Johnson, James Fleming, Shawique Simpson, Robert Serrano and Joseph Depaolo.

Plaintiff also moves pursuant to CPLR § 3124 for an order compelling defendant to comply with plaintiff's discovery demands, including NYPD records, criminal court files, medical records and District Attorney's records.

The motions are consolidated for disposition and decided as follows: defendant's motion is

denied and this court adheres to the determinations of the original motions; plaintiff's motion for a default judgment is denied with leave to renew, and plaintiff's motion to compel is granted to the following extent:

Defendant is essentially asking this court to vacate two prior orders, grant reargument or renewal, and to dismiss plaintiff's complaint on the ground that plaintiff misrepresented his mental capacity to the court and that he is not entitled to any toll under CPLR § 208, thus, warranting dismissal of plaintiff's action as the notice of claim and summons and complaint were untimely.

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. CPLR 2221(d)(2). A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. CPLR 2221(e)(2).

Movant has failed to establish that the court misapprehended the facts or misapplied the controlling principles of law. Noticeably absent from defendant's motion papers is any medical evidence that would convince this court that plaintiff should be denied the inference from his affidavit that he was disabled by his mental condition and treatment, thus warranting the CPLR § 208 toll. Defendant's arguments that plaintiff should not be availed of the toll include that plaintiff commenced other actions, filed other notices of claim and amended pleadings and responded to discovery demands during the claimed period of disability. Defendant also set forth that plaintiff testified at his deposition on October 16, 2006 that he was essentially not suffering from any medical conditions, and thus, he should not be given the benefit of the toll.

If defendant considered that the court exceeded its authority in the prior orders, defendant's

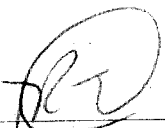
remedy was to appeal the orders. Additionally, defendant failed to show reasonable justification for failing to present such facts on the prior motions in accordance with CPLR 2221(e)(3). Accordingly, leave to renew is granted, and upon renewal, the court adheres to its prior decisions. Likewise, defendant's application to vacate the prior orders and to dismiss plaintiff's complaint is denied.

Defendant is directed to serve this order with notice of entry on the plaintiff and to provide authorizations to be signed by plaintiff within 30 days of the date of entry of this order. Plaintiff is directed to return the signed authorizations within 30 days of receipt of same and defendant is directed to provide plaintiff with copies of the records to the extent possible within 45 days of receipt of the authorizations, upon the payment of appropriate fees, if any.

Plaintiff's motion for an order entering a default judgment against the above-mentioned individual defendants is denied with leave to renew. Although plaintiff provides evidence that defendants were served with the summons and complaint, plaintiff has not submitted "proof of the facts constituting [his] claim," as required by CPLR 3215(f). Plaintiff's affidavit does not describe in any fashion the manner in which the alleged torts occurred or the injuries he sustained as a result thereof. *See Feffer v. Malpeso*, 210 AD2d 60 (1994). Moreover, plaintiff failed to provide confirmation of the facts underlying his claim. Finally, plaintiff's affidavit of service of the motion showed that not all defendants were served. Accordingly, it is hereby ordered that plaintiff's motion for a default judgment is denied without prejudice to renew upon the submission of proper papers.

This constitutes the decision and order of the Court.

Dated: September 27, 2011
Bronx, New York


Robert E. Torres, J.S.C.