

<b>Garcia v City of New York</b>
2014 NY Slip Op 30364(U)
February 10, 2014
Supreme Court, New York County
Docket Number: 114295/2010
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT  
Justice

PART 5

Index Number : 114295/2010

GARCIA, VIRGINIA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

DISMISS

*CA 2: # 13*

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

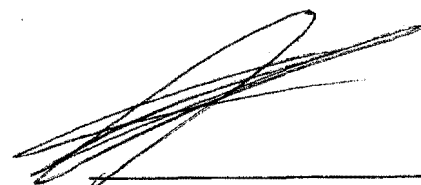
DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

FEB 11 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 2-10-14  
FEB 10 2014

 J.S.C.

HON. KATHRYN FREED

JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
VIRGINIA GARCIA,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 114295/2010

Seq. No.: 002

CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,  
and EN-TECH CORP.,

Defendants.

-----X  
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND EXHIBITS ANNEXED.....	.1 (Exs. A-F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.2(Exs. A-D)
REPLYING AFFIDAVITS.....	.....3.....
STIPULATIONS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant En-Tech Corp. ("En-Tech") seeks an order, pursuant to CPLR 214(5), dismissing the amended complaint insofar as asserted against it as time barred because plaintiff's negligence claim was not commenced within the applicable three-year statute of limitations. Plaintiff opposes En-Tech's motion, arguing that the supplemental summons and amended complaint were timely filed and served. After a review of the motion papers, the court file, and all relevant statutes and case law, the Court **grants** En-Tech's motion.

**FILED**

FEB 11 2014

[\* 3]

### **Factual and Procedural Background**

The instant matter arises from a trip and fall accident occurring on August 28, 2009, at the roadway directly in front of 540 West 49<sup>th</sup> Street in Manhattan. Plaintiff allegedly sustained physical injuries when she tripped over a metal plate that had been placed in the roadway.

Plaintiff commenced a timely action against The City of New York ("the City") and Consolidated Edison Company of New York ("Con Ed"). Issue was joined and bills of particulars were served. On July 6, 2012, the City produced a response to the Case Scheduling Order, which, inter alia, contained a document indicating that proposed defendant En-Tech obtained permits for, and performed, work at the subject location. The document specifically indicated that En-Tech had performed emergency sewer repairs at the site pursuant to a contract with the City. Based on this information, plaintiff moved on July 16, 2012, pursuant to CPLR 3025(b), to amend the caption and complaint to add En-Tech as a defendant. En-Tech failed to oppose the motion, which this Court granted by Order dated January 23, 2013 and entered the following day. In its decision, this Court held, inter alia, that:

"[it] acknowledges that the instant motion is dated July 16, 2012, well before the expiration of the statute of limitations on August 28, 2012. The Court notes that it inherited Part 5 and all outstanding motions in January 2013, obviously well after August 28, 2012. However, the Court also notes that counsel who submitted various notices, motions, etc., within the statutory time periods, will not be penalized, by this administrative delay."

Although this Court further held that the amended complaint "shall be deemed served upon service of a copy of [the] order with notice of entry thereof", there is no indication in the court file

that plaintiff served En-Tech with the Order dated January 23, 2013.

On or about February 8, 2013, plaintiff served En-Tech with a supplemental summons and amended complaint, dated July 17, 2012, by service on the Secretary of State's office. On or about May 29, 2013, En-Tech served its answer to the amended complaint, raising as an affirmative defense, inter alia, the statute of limitations. En-Tech annexes as Exhibit C to its motion copies of its discovery demands, dated May 29, 2013, including a demand that plaintiff provide proof that the supplemental summons and amended complaint were filed with this Court prior to service of those documents and that plaintiff filed proof with this Court that En-Tech was served within 120 days after the said filing. There is no indication, either from the motion papers or the court file, that plaintiff ever responded to this demand.

Although the proposed supplemental summons annexed as part of plaintiff's motion to amend the complaint contained the name and address of En-Tech, and indicated that En-Tech was sent a copy of, and therefore was apprised of, the motion to amend and the supplemental summons and amended complaint, plaintiff failed to append an affidavit of service establishing that En-Tech actually received notice of the motion to amend along with these documents. In fact, the July 23, 2012 affidavit of service annexed to the motion to amend the complaint indicates that the said application was only served on the City and on Con Ed. Additionally, neither the parties' motion papers nor the court file reflect that En-Tech was served either with the supplemental summons or with the amended complaint at any time prior to February 8, 2013.

#### **Positions of the Parties**

En-Tech argues that plaintiff failed to serve the supplemental summons and amended

complaint in a timely fashion pursuant to the CPLR, as those papers were not served until February 28, 2013.<sup>1</sup> En-Tech additionally notes that the said supplemental summons and amended complaint was not filed with the Court as of August 5, 2013, the date it brought this motion and thus this action for personal injuries based in negligence, which had to be commenced within three years after the alleged incident, is untimely. Finally, urges En-Tech, CPLR 306-b provides that, following the filing of a complaint, the plaintiff has 120 days in which to serve a party and that, since the amended complaint was not filed with the court, it must be dismissed.

Plaintiff argues that the supplemental summons and amended complaint were timely filed with the County Clerk's office. She asserts that the supplemental summons and amended complaint were annexed to her motion for leave to amend dated July 16, 2012, and must be deemed filed as of that date. Plaintiff additionally argues that such a filing meets the requirements set forth in CPLR 304. Further, plaintiff notes that En-Tech fails to cite any authority that would support its position that the supplemental summons and amended complaint herein should not be deemed filed as of July 16, 2012.

In addition, plaintiff argues that filing pursuant to CPLR 304(c) is defined as "the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the county in which the action or special proceeding is brought..." (Plaintiff's Aff. in Opp, at par. 9). She also asserts that CPLR 2001 specifically addresses any defects or omissions in the filing process that are not "jurisdictional, as long as any additional fees are paid." Plaintiff notes that there are no additional fees associated with filing the instant supplemental summons and amended complaint.

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<sup>1</sup>This is evidently a typographical error, as the affidavit of service reflects that the supplemental summons and amended complaint were served on En-Tech via the Secretary of State on February 8, 2013.

Therefore, plaintiff urges “that the completely inadvertent failure to file an additional copy of the supplemental summons and complaint should be disregarded in light of CPLR 2001, which was amended specifically to address filing errors and defects.” (Plaintiff’s Aff. in Opp., at par. 16).

En-Tech responds to plaintiff’s arguments first by noting that plaintiff has failed to cite any authority to support her position that filing a motion for leave to amend which contains the supplemental summons and complaint is akin to actually filing said summons and complaint with the clerk of the court. It also argues that it is clear from plaintiff’s papers that she has never actually filed or delivered a copy of the supplemental summons and complaint to the clerk of the court as required by CPLR 304(c).

### **Conclusions of Law**

En-Tech’s motion to dismiss the amended complaint based on the statute of limitations must be granted.

Once the period in which to amend a pleading without leave expires, a party can still amend the pleading to add an additional party at any time by leave of court or by stipulation of the parties. *See* CPLR 1003; CPLR 3025(b). In order to prevent the statute of limitations from running against a potential defendant, the Court of Appeals has held that, in commencement by filing courts, such as the Supreme Court, the filing of a motion for leave to amend the complaint to add a defendant to a pending case, which motion includes a copy of the proposed supplemental summons and amended complaint, tolls the statute of limitations from the date on which the motion is filed until the date on which the order deciding the motion is entered. *See Perez v Paramount Communications*, 92 NY2d

749, 754-756 (1999).

Here, plaintiff's motion to amend the complaint to add En-Tech as a defendant did not toll the statute of limitations against that entity. The statute of limitations is tolled only from the time the plaintiff files a motion for leave to amend until the time the motion is decided, "provided that a copy of the proposed supplemental summons and amended complaint are annexed to the motion." *Long v Sowande*, 27 AD3d 247 (1<sup>st</sup> Dept 2006), citing *Perez v Paramount Communications*, *supra*. Although the supplemental summons annexed to plaintiff's July 16, 2012 motion to amend the complaint bore the name and address of En-Tech, thus indicating that En-Tech was sent a copy of, and therefore was apprised of, the said supplemental summons and proposed amended complaint, neither the motion papers nor the court file contains an affidavit of service establishing that En-Tech actually received notice of the motion. Indeed, the July 23, 2012 affidavit of service annexed to the motion to amend the complaint indicates that the said application was only served on the City and on Con Ed. That the supplemental summons and proposed amended complaint were annexed to the motion is meaningless given plaintiff's failure to serve En-Tech with the application. Since plaintiff failed to provide that proposed additional defendant, against which the statute of limitations was to be tolled, "notice of the substance of [the proposed amendment]" (*Perez v Paramount Communications*, *supra* at 755 [*citation omitted*]), the statute was never tolled against En-Tech.

Even assuming, *arguendo*, that plaintiff's claim was tolled by her motion to amend the complaint, she failed to properly commence her claim against En-Tech. "The joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior judicial permission, and noncompliance renders the pleadings



jurisdictionally defective.” *Perez v Paramount Communications, supra* at 753. The filing of a supplemental summons and amended complaint are thus necessary to commence an action against an additional defendant. *See* CPLR 305(a); *Perez v Paramount Communications, supra* at 756; *Benn v Losquadro Ice Co.*, 65 AD3d 655, 656 (2d Dept 2009); *Long v Sowande, supra* at 248. Here, the motion papers and court file are devoid of any indication that the amended complaint was filed with the court. Since the statute of limitations was not tolled and there was no filing of the supplemental summons and amended complaint by the time the statute of limitations expired on August 29, 2012, plaintiff’s claim against En-Tech is untimely and must be dismissed.

In addition, as noted above, plaintiff failed to comply with this Court’s Order, in that plaintiff never served En-Tech with Notice of Entry of its Order dated January 23, 2013 granting leave to amend and name En-Tech as a defendant. There is thus no indication in the motion papers or the court file establishing, or even suggesting, that En-Tech was on notice of this claim until February 8, 2013, when it was served the supplemental summons and amended complaint via the Secretary of State. Since the statute of limitations was not tolled against En-Tech, plaintiff’s negligence claim, which accrued on August 28, 2009, was untimely by the date the supplemental summons and amended complaint were served.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant En-Tech Corp. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further,

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

ORDERED that the caption be amended to reflect the dismissal against defendant En-Tech Corp. and that all future papers filed with the court bear the amended caption deleting the name of the said defendant; and it is further,

ORDERED that counsel for defendant En-Tech Corp. shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: February 10, 2014  
FEB 10 2014

ENTER,



Hon. Kathryn E. Freed  
J.S.C.

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

**FILED**

FEB 11 2014

COUNTY CLERK'S OFFICE  
NEW YORK