

Pierre-Louis v City of New York
2015 NY Slip Op 32389(U)
November 20, 2015
Supreme Court, Queens County
Docket Number: 706332/14
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
Annanise Pierre-Louis a/k/a Annanise Index
Pierre-Louis a/k/a Annalise Pierre-Louis, Number: 706332/14

Plaintiff,
- against -

Motion
Date: 11/2/15

The City of New York, Metropolitan
Transportation Authority, Nassau Inter-
County Express, New York City Transit
Authority and John/Jane Doe,

Motion
Cal. Number: 102

Defendants.

Motion Seq. No.: 1

-----X

FILED
NOV 25 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 13 read on this motion by defendant, The City of New York, to dismiss; and cross-motion by plaintiff for leave to file a late notice of claim.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition-Exhibit.....	9-11
Reply.....	12-13

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the City to dismiss the complaint against it upon the ground that the complaint fails to state a cause of action against it in that plaintiff failed to serve a notice of claim upon the City pursuant to General Municipal Law §50-e(5) is granted. Cross-motion by plaintiff for leave to serve a late notice of claim upon the City is denied.

Plaintiff allegedly sustained injuries as a result of being struck by a bus while walking across the intersection of Springfield Boulevard and Hempstead Avenue in Queens County on February 12, 2014. Plaintiff did not file a notice of claim against the City, but commenced the present action against it on September

8, 2014.

A condition precedent to commencement of a tort action against the City is the service of a notice of claim upon it within 90 days after the claim arises, pursuant to General Municipal Law §50-e. Moreover, the statute of limitations for commencement of an action against the City is one year and 90 days from the date plaintiff's cause of action accrues (see General Municipal Law §50-i).

Since plaintiff's cause of action accrued on February 12, 2014, she was required to serve a notice of claim no later than May 13, 2014 and commence an action no later than May 13, 2015. Plaintiff commenced the present action on September 8, 2014 without having served a pre-requisite notice of claim upon the City. Therefore, the action, as against the City, was a nullity. Plaintiff's counsel's argument that the complaint does state a cause of action and, therefore, there is no ground for dismissal pursuant to CPLR 3211(a)(7) is without merit.

Although a motion to dismiss pursuant to CPLR 3211(a)(7) should not be granted if the complaint, within its four corners, articulates a cognizable cause of action when taking all facts alleged therein as true, and that evidentiary material should not be considered to show whether the plaintiff has a cause of action as opposed to whether the complaint states a cause of action, evidentiary material may form the basis of a motion to dismiss under CPLR 3211(a)(7) where it shows that "a material fact as claimed by the pleader to be one is not a fact at all and ... that no significant dispute exists regarding it" (Guggenheimer v Ginsburg, 43 NY 2d 268 [1977]; Sonne v Board of Trustees of Village of Suffern, 67 AD 3d 192 [2nd Dept 2009]).

Plaintiff alleges in the complaint, inter alia, "A Notice of Claim was filed with each of the Defendants in compliance with Plaintiff's obligation under Section 50-e of the General Municipal Law." In the first instance, this allegation is insufficient to establish that plaintiff satisfied the condition precedent and, therefore, that the complaint states a cause of action, since it is not alleged that a notice of claim was filed within 90 days of the accrual of plaintiff's cause of action.

However, even if, arguendo, plaintiff's allegation sufficiently pled compliance with the notice of claim requirement, the City has proffered evidence that plaintiff did not file a notice of claim against it. Indeed, plaintiff's counsel concedes that a notice of claim was not filed and cross-moves for leave to file a late notice of claim. Thus, since the allegation of the

complaint that a notice of claim in compliance with General Municipal Law §50-e was filed with all defendants is admittedly false, the complaint fails to state that the condition precedent to commencement of the action against the City was met and, therefore, the complaint must be dismissed pursuant to CPLR 3211(a)(7).

Since service of a timely notice of claim is a condition precedent, an action commenced absent a timely notice of claim is a nullity (see Davis v. City of New York, 250 AD 2d 368 [1st Dept 1998]). For this reason, if a timely notice of claim has not been served, an application for leave to serve a late notice of claim must be made, and must be granted, and a notice of claim must be served in order for the previously commenced action, even if timely commenced, to be viable. Moreover, although an application for leave to serve a late notice of claim may be made after plaintiff has commenced a timely action (see General Municipal Law §50-e[5]), an extension of time to serve a late notice of claim "shall not exceed the time limited for the commencement of an action by the claimant against the public corporation" (General Municipal Law §50-e[5]). Thus, even if an action is commenced within the statute of limitations period, it will fail to state a cause of action and must be dismissed if the condition precedent to it, a notice of claim, is not also served within the period of limitation.

In the present matter, although the action was commenced on September 8, 2014 and, thus, within the statute of limitations period which expired on May 13, 2015, plaintiff did not file a notice of claim within the period of limitation and is now precluded from doing so. Since plaintiff did not cross-move for leave to serve a late notice of claim until September 28, 2015, over four months after the statute of limitations had expired, this Court has no power to grant an extension of time to file a late notice of claim. Thus, plaintiff's failure to file a timely notice of claim or move within one year and 90 days after her cause of action accrued for leave to file a late notice of claim rendered the complaint legally insufficient and, thus, warrants dismissal for failure to state a cause of action (see Reaves v. City of New York, 177 AD 2d 437 [1st Dept 1991]).

Accordingly, the motion is granted, the cross-motion is denied and the complaint and all cross-claims are dismissed as against the City. The Court notes that co-defendants have not appeared to oppose this motion.

The caption of this action is hereby amended to read as follows:

-----X

Annanise Pierre-Louis a/k/a Annanise
Pierre-Louis a/k/a Annalise Pierre-Louis,

Index
Number: 706332/14

Plaintiff,

- against -

Metropolitan Transportation Authority,
Nassau Inter-County Express, New York City
Transit Authority and John/Jane Doe,

Defendants.

-----X

Dated: November 20, 2015



KEVIN J. KERRIGAN, J.S.C.

FILED
NOV 25 2015
COUNTY CLERK
QUEENS COUNTY