

Diaz v 611 W. 158th St. Corp.
2015 NY Slip Op 32861(U)
December 24, 2015
Supreme Court, New York County
Docket Number: 111926/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN Justice **FILED 11**

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SANDRA DIAZ,

Plaintiff,

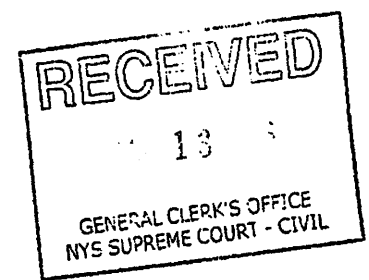
COUNTY CLERK'S OFFICE
NEW YORK
INDEX NO. : 111926/11
MOTION DATE: 12/3/15

- v -

MOTION SEQ. NO.: 003

**611 WEST 158TH STREET CORP. and
VER-TECH ELEVATOR, RESIDENTIAL
MANAGEMENT, INC. and RESIDENTIAL
MANAGEMENT (NY) INC.,**

Defendants.



The following papers, numbered 1 to _____ were read on this motion amend.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____	<u>PAPERS NUMBERED</u>
Answering Affidavits — Exhibits _____	_____	
Replying Affidavits _____	_____	

Cross-Motion: [x] Yes [] No

Defendants 611 West 158th Street Corp ("611 West") and Residential Management (NY) Inc. move for an order declaring the second supplemental summons and amended complaint a nullity, or, alternatively, dismissing the amended complaint on the grounds that the action was commenced after the expiration of the statute of limitations. Plaintiff opposes the motion and cross moves to extend the time to file proof of service or, in the alternative, deeming Residential Management, Inc, and Residential Management (NY), NY served *nunc pro tunc*.

This is an action seeking to recover damages for personal injuries plaintiff allegedly sustained on August 3, 2011, as the result of a trip and fall incident involving an elevator located

at 611 West 158th Street, New York, NY (the Building”). The Building is owned by 611 West and the elevator at issue is serviced by defendant Ver-Tech Elevator (“Ver-Tech”). After Ver-Tech was added as a defendant in March 2014, plaintiff discovered that Residential Management, Inc. was the party that contracted with Ver-Tech to service the elevator at issue. When plaintiff was unable to obtain an agreement from the other parties to permit it to add Residential Management, Inc., plaintiff moved by order to show cause to amend the complaint to add Residential Management Inc. as a defendant. Plaintiff filed an order to show cause to amend on July 21, 2014,¹ which is fourteen days prior to the expiration of the three year statute of limitations on August 4, 2014.² A proposed supplemental summons and amended complaint naming Residential Management Inc. as a defendant was attached to plaintiff’s motion.

By decision and order dated January 20, 2015, this court granted plaintiff’s motion and directed that plaintiff serve the amended complaint within 15 days of the decision and order during which time the statute of limitations shall be “stayed,” and that the decision and order not be entered. The court’s decision was based on the Court of Appeals decision in Perez v. Paramount Communications, Inc., 92 NY2d 749 (1999), which holds the filing of a motion for leave to amend the complaint to add a defendant tolls the statute of limitations until entry of the order deciding the motion, where the motion papers included the proposed supplemental summons and amended pleading. In addition, while evidence submitted in opposition to the motion indicated that the proposed defendant’s correct name was Residential Management (NY) Inc. and not Residential Management Inc., the court noted that, at best, such evidence supports the adding not only Residential Management Inc. but also Residential Management (NY), Inc. as a defendant and that, in any event, to the extent the proposed pleading contained a misnomer it

¹The court signed the order to show cause on July 30, 2014.

²Since August 3, 2014 is a Sunday, the statute did not expire until the following day.

could be corrected.

After the plaintiff notified the court by letter dated March 3, 2015, that it did not receive the January 20, 2015 decision and order until after the 15-day period for service had expired, the court issued an order dated March 4, 2015, amending its January 20, 2015 decision and order to permit plaintiff to serve the supplemental summons and amended complaint within 15 days of the order, “extending” the statute of limitations until March 20, 2015, and directing that the order not be entered prior to that date.³

It is undisputed that plaintiff filed a second supplemental summons and amended complaint dated March 9, 2015, on April 13, 2015; that Residential Management (NY) Inc. was served on April 13, 2015; and that Residential Management, Inc. was served via the Secretary of State on April 28, 2015. The affidavits of service were filed on May 4, 2015.

Plaintiff, however, argues that its failure to timely serve the supplemental summons and amended complaint within time permitted by the March 4, 2015 order should be excused as it exercised due diligence to do so, and seeks an extension of the time to serve defendants or that the court deem service timely *nunc pro tunc*. Plaintiff’s position is without merit.

In general, the filing of the supplemental summons marks the interposition of the claim against the newly joined defendant(s) for statute of limitations purposes. Long v. Sowande, 27 AD3d 247 (1st Dept 2006); Trioche v. Warner Amex Satellite Entertainment Co., 48 AD3d 671, 672 (2d Dept 2008). However, as indicated above when, as here, judicial permission is needed to join a new defendant, “the statute of limitations is tolled as to the new defendant from the time plaintiff files the motion ...until the court decides the motion.” Long v. Sowande, 27 AD3d at 248. The toll, however, is not indefinite but ends upon entry of an order granting permission to join

³This instruction was not followed by the Clerk’s office which entered the order on March 9, 2015.

the new defendant, and the supplemental summons and amended complaint must then be filed within the time remaining on the statute of limitations after it begins to run. *Perez v. Paramount Communications Inc.*, 92 NY2d at 756 .

Here, based on the court's decision dated March 4, 2015, the statute of limitations was tolled until March 20, 2015. At best, it could be argued that since the order to show cause was filed on July 21, 2015, and the statute of limitations did not run until August 4, 2015, plaintiff had an additional fourteen days, or until April 3, 2015, to file the supplemental summons and amended complaint. However, the supplemental summons and complaint was not filed until April 13, 2015, which is after the statute of limitations expired.

Moreover, contrary to plaintiff's argument, even assuming *arguendo* that plaintiff has shown "due diligence" in attempting to timely effectuate service (*Leader v. Maroney, Ponzini & Spencer v. Olympia York Estates Co.*, 97 NY2d 95 [2001]), the time to file the supplemental summons and amended complaint for statute of limitations purposes cannot be extended. In this connection, while plaintiff is correct that the 120-day period provided for service after filing may be extended "for good cause shown or in the interest of justice" (*see* CPLR 306-b), here, the filing of the action against the proposed defendants was not accomplished prior to the end of the tolling period and the expiration of the statute of limitations. Therefore, the court is without authority to extend the limitations period. See CPLR 201 (providing that "[n]o court shall extend the time limited by law for the commencement of an action").

Finally, plaintiff's reliance on CPLR 2004, which permits the court grant extensions of time except otherwise prescribed by law is unavailing since the provision "may not be invoked to extend the statute of limitations" *Lennox v. Rhodes*, 39 AD2d 801, 802 (3d Dept 1972); 3A Carmody-Wait 2d §21:4 (2015)(while a court may extend the time fixed by various statutes for performing certain procedural requirements, it has no power to extend statutes of limitation

creating substantive rights).

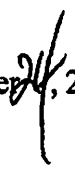
Accordingly, it is


ORDERED that the motion is granted and the amended complaint is dismissed; and it is further

ORDERED that the cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remaining parties shall appear for a status conference on January 21, 201⁶~~4~~ at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: December , 2015



J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

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