Manno v 1023 38th Street Realty LLC
2016 NY Slip Op 31126(U)
February 2, 2016
Supreme Court, Kings County
Docket Number: 506560/15
Judge: Edgar G. Walker
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE KINGS

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SALVATORE A MANNO and PATRICIA A MANNO

Plaintiff,

-against-

1023 38TH STREET REALTY LLC; ALNOUR ASSOCIATE, CONSULTING ENGINEERING P.C.; SILVERCUP SCAFFOLDING 1 LLC; and US DEMCO OF BROOKLYN INC.,

Defendant.

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Hon. Edgar G. Walker
Part 90

Index No. 506560/15

The motions of defendants 1023 38TH STREET REALTY LLC and SILVERCUP SCAFFOLDING 1 LLP are granted. The plaintiffs' cross motion is denied.

In this case, plaintiffs allege property damage to their residence located at 1021 38th Street, Brooklyn, NY, resulting from defendants' construction/renovation activities occurring on defendants' adjacent property located at 1023 38th Street, Brooklyn, NY.

In support of their motions, the defendants collectively argue that "the statute of limitations has lapsed" and, as such, the complaint should be dismissed. Specifically, the defendants argue that the action is governed by a three year statute of limitations, which expired on June 3, 2013, more than two years prior to the date that the plaintiff commenced this action.

In opposition to the defendants' motions, the plaintiffs cross move this Court, initially arguing that the statute of limitations issue is moot because they amended the complaint as of right to indicate that the property damages cause of action accrued on June 3, 2012 rather than on June 3, 2010 as the original complaint asserted. In their cross motion, the plaintiffs move for leave to amend the complaint to reflect the date change from June 3, 2010 to June 3, 2012, despite their

claim that they previously so amended the complaint as of right. Although in their motion papers plaintiffs allege that they commenced the action by e-filing the summons and complaint on May 26, 2015, they concede in their reply papers that the submission did not include a summons. It is their contention that "subsequently" they re-submitted the original complaint with a summons, which was accepted by the Court's e-filing system, and that said system contains a log entry indicating that the error was corrected. As such, the plaintiffs contend that they have "followed the procedures in commencing an action . . . and obtaining jurisdiction."

In opposition and reply to the plaintiffs' cross motion, the defendants contend that the plaintiffs' initial filing was "defective as a matter of law" because "on May 26, 2015, plaintiff only filed a verified complaint without any summons." The defendants additionally argue that "plaintiffs have yet to commence these proceedings" properly, and that the amended summons and complaint that the plaintiffs filed on September 16, 2015 should be disregarded by the Court because it is defective due to the fact that the plaintiffs' time to amend their pleading without leave of the Court had expired and the "[p]laintiff did not have this Court's permission to file an amended summons and complaint."

In reply to the defendants' opposition and reply papers, the plaintiffs initially argue that the defendants are incorrect in their assertion that the action was not commenced properly and that, as a result, the statute of limitations has expired. The plaintiffs contend that the action was commenced properly because "plaintiff did file a summons and complaint and defendant was served with a summons and complaint according to the CPLR." Plaintiffs further state that they have "no explanation as to why the complaint only appears in the e-filing system" without the summons, but argue that the problem "can be rectified pursuant to CPLR §2001." The plaintiffs

also argue that their summons and amended complaint was properly and timely filed "as of right pursuant to CPLR §3025(a), since some of the defendants had not yet responded."

Finally, the plaintiffs argue that the defendants' claim that they would be prejudiced by the plaintiffs changing the date of discovery of the complained of condition in the amended complaint from June of 2010 to June of 2012, should be disregarded by the Court because the defendants fail to state how they would be prejudiced by the change. Specifically, the plaintiffs contend that the defendants' claim of prejudice or surprise is a feigned claim "given that the case was just commenced."

The original complaint, which was filed on May 26, 2015 without a summons, alleges that the defendants construction/renovation activities on or about June 3, 2010 caused severe damage to plaintiffs' property. On September 16, 2015, the plaintiffs filed additional papers which they labeled as an "amended" summons and an "amended"complaint alleging that the damage to their property which was caused by the defendants' construction/renovation activities occurred on June 3, 2012, rather than on June 3, 2010.

A review of the Court's records reflects only a single filing on May 26, 2015, which does not include a summons. The next filing was of the amended summons and complaint on September 16, 2015. While plaintiffs allege that they "subsequently submitted the complaint with a summons," conspicuously absent is any allegation as to when, if ever, they did so prior to September 16, 2015. Significantly, if in September, 2015 the plaintiffs had only wanted to amend their complaint to reflect changes to certain dates in their complaint, as they claim, there was no need to file an amended summons. Indeed, the "amended summons" is identical to the alleged original summons and is not amended at all. The Court finds that the filing of the superfluous

"amended summons" is indicative of plaintiffs' realization that they never actually filed any summons previously.

CPLR §214 provides that an action to recover damages for an injury to property must be commenced within three years. A cause of action for injury to property accrues when damage is apparent. Russell v. Dunbar, 40 A.D.3d 952. CPLR §304 provides that an action is commenced by filing a summons and complaint or summons with notice. According to the Court's records, the first filing of any summons in this case was on September 16, 2015. The initial filing on May 26, 2015, without a summons, was insufficient to commence the action.

Although in appropriate situations CPLR §2001 may allow for correction of non-jurisdictional errors in the filing process, the failure to file a summons as part of the commencement process is not the type of filing mistake that may be disregarded or corrected. Goldenberg v. Westchester Cty. Health Care Corp., 16 N.Y.3d 323.

In this case, the Court finds that the three year statute of limitations in which to commence an action for injury to property has lapsed regardless of whether it accrued on June 3, 2010 or June 3, 2012. An action is not commenced until a summons is filed with the Court, and in this case, there is no record that was done prior to September 16, 2015.

As such, the defendants motions to dismiss the complaint are both granted in their entirety. The plaintiff's cross motion is denied.

This constitutes the Decision and Order of the Court.

Dated : 2-2-16

Hon. Edgar G. Walker, J.S.C.