

Briscoe v New York City Hous. Auth.

2018 NY Slip Op 31989(U)

August 16, 2018

Supreme Court, New York County

Docket Number: 153188/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 153188/2017

OLIVER BRISCOE,

MOTION DATE 08/16/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE NEW YORK CITY HOUSING AUTHORITY and THE CITY OF
NEW YORK,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 36, 37

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ORDERED that the instant motion by Defendant New York City Housing Authority for summary judgment, pursuant to CPLR 3212, is granted without opposition for the reasons stated herein:

BACKGROUND

In the instant action, Plaintiff alleges that, on August 11, 2016, he slipped and fell while using stairs on premises owned and maintained by Defendant New York City Housing Authority ("NYCHA").¹ Plaintiff further alleges in the complaint that a notice of claim was served on NYCHA on September 12, 2016. (Affirm in Supp., Ex. A [Complaint] ¶ 30.)

Notwithstanding Plaintiff's allegation that a notice of claim was served on NYCHA, NYCHA asserted, as a sixth affirmative defense in its answer dated April 28, 2017, that "Plaintiff has failed to comply with the conditions precedent to bringing this lawsuit pursuant to General Municipal Law § 50-h in that plaintiff failed to serve a notice of claim." (Affirm in Supp., Ex. B [Complaint] ¶ 20.)

In addition, on February 1, 2018, NYCHA filed the instant motion for summary judgment on the ground that it was never timely served with a notice of

¹ The Court notes that Defendant City of New York was dismissed from this action pursuant to an order dated March 14, 2018. (NYSCEF Document No. 31.)

claim in accordance with Public Housing Law § 157 and General Municipal Law § 50-e.

As part of the instant motion papers, NYCHA has submitted an affidavit from an individual named Mercedes Arazoza, who stated that she has been employed by NYCHA for 36 years and that she currently works in NYCHA's law department in the title of Principal Administrative Associate III. Ms. Arazoza stated that she is "responsible for processing and handling notices of claim that are served on NYCHA and so [she is] familiar with NYCHA's procedures for documenting receipt of a notice of claim." (Id. ¶ 1.) Ms. Arazoza further discussed the procedures for data entry and record keeping in regard to notices of claim. Ms. Arazoza stated that after the complaint in the instant action was served on NYCHA, on or about April 13, 2017, the Claims Legal Management System ("CLMS") was searched for Plaintiff's name and the alleged date of loss "to determine whether a notice of claim had ever been served by or on behalf of plaintiff Oliver Paul Briscoe and, more specifically, a notice of claim relating to an accident that allegedly occurred on August 11, 2016." (Aff. in Supp. ¶ 5.) Ms. Arazoza states that "[t]hat search revealed that no notice of claim by or on behalf of Oliver Paul Briscoe was ever served on NYCHA." (Id. ¶ 6.)

Following the filing of the instant motion papers, Plaintiff's counsel moved for (Seq. 003) and was granted leave to withdraw from representation. (See NYSCEF Document Nos. 32-35.) In Plaintiff's counsel's affirmation in support of his motion to withdraw, Plaintiff's counsel noted the instant motion for summary judgment (Seq. 002) and stated that "the process server mistakenly served New York City Corporation counsel" rather than NYCHA as required. (Affirm in Supp. of Mtn to Withdraw [NYSCEF Document No. 34] ¶ 6.) Plaintiff's counsel further stated that he had "informed the plaintiff of the situation" and that Plaintiff "has indicated that he will retain new counsel to bring a claim against me arising from my representation of him in this case." (Id. ¶ 7.) As such, Plaintiff's counsel argued that "there exists a conflict of interest in my continuing to represent him." (Id. ¶ 8; see also Seq. 003 Oral Arg. Tr. at 2:25-3:05 [Plaintiff's former counsel stating, "I failed to properly serve the Housing Authority and therefore, my client may well bring a claim against me. So I think that's an actual conflict of interest.")

By decision and order, dated May 9, 2018, the Court granted Plaintiff's counsel's motion to withdraw, contingent upon counsel's compliance with the provisions enumerated in the order, and the Court ordered that no further proceedings could be taken against Plaintiff for a period of sixty (60) days. (See NYSCEF Document No. 39.) The Court further stated, in the order granting leave

to withdraw, that oral argument on the instant motion for summary judgment (Seq. 002) was adjourned to July 24, 2018. Pursuant to the order permitting his withdrawal, Plaintiff's counsel served his client with a copy of the order with notice of entry on May 15, 2018, and filed an affidavit of service on NYSCEF on May 16, 2018. (NYSCEF Document No. 41.)² Oral argument on this motion was subsequently adjourned from July 24, 2018 to August 16, 2018.

DISCUSSION

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Id.*) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

“A tort action against a municipality cannot be maintained unless a timely notice of claim is served, and the action is commenced within one year and 90 days after the ‘happening of the event upon which the claim is based.’” (*Turner v City of New York*, 94 AD3d 635, 636 [1st Dept 2012], quoting General Municipal Law § 50–I [1]; *see also Pierson v City of New York*, 56 NY2d 950, 954 [1982].) “The court is without power to consider an application to file a late notice of claim after expiration of that limitations period.” (*Turner*, 94 AD3d at 636.)

² Notwithstanding this Court's order granting Plaintiff's counsel leave to withdraw, it does not appear that Plaintiff has retained a new attorney or notified the Clerk of this Part in writing that he intends to proceed pro se. (See NYSCEF Document No. 39.)

Here, the alleged injuries occurred on August 11, 2016, and Plaintiff's one year and ninety days to seek leave to file a late notice of claim expired on November 9, 2017. Plaintiff's former counsel has admitted that a notice of claim was never served on NYCHA, and Plaintiff has never sought leave to file a late notice of claim. That NYCHA was served with a complaint and thereafter participated in this litigation does not bring the instant action within the statute of limitations. (*Wollins v New York City Bd. of Educ.*, 8 AD3d 30, 31 [1st Dept 2004].) Indeed, even if Plaintiff were to so move now, this Court would "lack[] discretion to grant plaintiff leave to file a late notice of claim, as he failed to move for said relief before the one year and 90-day statute of limitations expired." (*Lozano v New York City Hous. Auth.*, 153 AD3d 1173, 1174 [1st Dept 2017].)

As such, the Court finds that the instant motion must be granted.³

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and its further

ORDERED that Defendant New York City Housing Authority shall serve a copy of this order with notice of entry upon Plaintiff at his last known address by certified mail, return receipt requested.

This constitutes the decision and order of the Court.

8/16/2018
DATE

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.

³ The Court, however, will disallow NYCHA's entitlement to costs, as it finds that it would be inequitable to impose costs on Plaintiff for his attorney's admitted failure to timely serve a notice of claim.