Dirden v City of New York
2020 NY Slip Op 33520(U)
October 26, 2020
Supreme Court, New York County
Docket Number: 162188/2018
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 162188/2018

CHELSEA DIRDEN,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK, DEPARTMENT OF HOMELESS SERVICES and WOMEN IN NEED, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 21, 22, 23, 24

were read on this motion to/for DISMISS.

In this action arising from an alleged assault at a homeless shelter, defendants move, pursuant to CPLR 3012 (b), to dismiss the complaint due to plaintiff's failure to timely serve the complaint and, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff's claims are barred by the statute of limitations. Plaintiff opposes the motion and cross-moves for an order compelling defendants to accept her complaint. After considering the parties' contentions and reviewing the relevant statutes and case law, the motion and cross motion are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On December 28, 2018, plaintiff Chelsea Dirden commenced this action against the City of New York (the City), the Department of Homeless Services (DHS) and Women in Need, Inc. a/k/a WIN, Inc. (WIN), by the electronic filing of a summons with notice (NYSCEF Doc. No.

1). The summons with notice describes the nature of the action as seeking "to recover on [p]laintiff's damages when on September 29, 2017 at approximately 7:00 pm at the Alexander Abraham Residence plaintiff was assaulted by personnel of [DHS] and personnel of [WIN]" (*id.*). It further alleges that during the incident, plaintiff was assaulted by DHS and New York City Police Officers (*id.*).

On April 25, 2019, plaintiff served the summons with notice upon DHS, WIN, and the City (NYSCEF Doc. Nos. 3-5). According to defendants, they thereafter "served a notice of appearance and demand for a complaint on May 3, 2019 and May 31, 2019" (NYSCEF Doc. No. 15, at ¶ 3). The only document of this nature uploaded to NYSCEF is a "Notice of Appearance" for WIN, which was filed by WIN's attorney Salvatore J. DeSantis of Molod Spitz & DeSantis, P.C. (DeSantis) on May 31, 2019 (NYSCEF Doc. Nos. 2). At that time, the City's Corporation Counsel was the attorney of record for DHS and the City. As best as can be discerned from defendants' papers, which are less than clear on this issue, defendants appear to maintain that Corporation Counsel served a separate notice of appearance and demand for DHS and the City on May 3, 2019 (NYSCEF Doc. No. 15, at ¶ 3; NYSCEF Doc. No. 23, at ¶ 7). However, no notice of appearance or demand for a complaint was uploaded to NYSCEF for DHS or the City.

Plaintiff thereafter filed her complaint on October 5, 2019 (NYCEF Doc. No. 6). On October 10, 2019, a "Consent to Change Attorney" was executed, substituting DeSantis as the attorney of record for DHS and the City, which DeSantis filed on October 21, 2019 (NYSCEF Doc. No. 9). In the interim, DeSantis filed a joint answer on behalf of all three defendants on October 15, 2019 (NYSCEF Doc. No. 7).

Defendants now move to dismiss the action on the ground that plaintiff failed to serve the complaint within the time frame set forth in CPLR 3012 (b). They also assert that the complaint

should be dismissed as time-barred pursuant to CPLR 3212 and CPLR 215 (3). Plaintiff cross-moves to compel defendants to accept her untimely complaint.

Failure to Timely Serve Complaint under CPLR 3012 (b)

CPLR 3012 (b) provides, in pertinent part, that:

> "If the complaint is not served with the summons, the defendant may serve a written demand for the complaint . . . . Service of the complaint shall be made within twenty days after service of the demand . . . . If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision."

Whether to dismiss an action pursuant to CPLR 3012 (b) is a matter of discretion for the court (*see Hernandez v Chaparro*, 95 AD3d 745 [1st Dept 2012]). In order to avoid dismissal, plaintiff is required to demonstrate a reasonable excuse for the delay and a meritorious claim (*see McKenzie v Jack D. Weiler Hosp.*, 171 AD3d 615, 615 [1st Dept 2019]).

Here, since there is no evidence that DHS and the City ever filed a demand or notice of appearance, defendants have not established that the 20-day period within which the complaint had to be served under CPLR 3012 (b) began to run with respect to DHS and the City (*see Howard B. Spivak Architect, P.C. v Zilberman*, 59 AD3d 343, 344 [1st Dept 2009]). Accordingly, dismissal of the action insofar as asserted against DHS and the City for failure to timely serve a complaint pursuant CPLR 3012 (b) is not warranted (*see Ryan v High Rock Dev., LLC*, 124 AD3d 751, 752 [2d Dept 2015]).

Additionally, since the City and DHS did not establish that they served a notice of appearance or demand for a complaint, the service of the complaint on them was not untimely and, thus, the branch of plaintiff's cross motion seeking to compel said defendants to accept an untimely complaint is denied.

However, under the circumstances of this case, the claims against WIN must be dismissed pursuant to CPLR 3012 (b). Initially, this Court notes that the failure of the other defendants to file a notice of appearance is not a reasonable excuse for the plaintiff's delay in serving the complaint upon WIN (*see V.D.R. Realty Corp. v New York Property Ins. Underwriting Assn.*, 186 AD2d 645, 646 [2d Dept 1992]). WIN filed a notice of appearance on May 31, 2019. Doc. 2. Therefore, plaintiff had until June 20, 2019 to serve it with the complaint. However, plaintiff did not file the complaint until October 5, 2019, more than 4 months after the deadline expired. Doc. 6.

Plaintiff fails to demonstrate a reasonable excuse for the delay. Plaintiff's counsel maintains that the delay was attributable, at least in part, to defendants' false suggestion that defendants were hoping to settle the case. In support of this contention, he relies on a communication he received from defendants' counsel stating "I will try to settle if you are willing to be reasonable" (NYSCEF Doc. No. 21, at ¶ 5). However, since this communication allegedly occurred on October 14, 2019 (*id.*), it does not explain why plaintiff did not file the complaint before the deadline expired more than 4 months earlier.

In explaining the delay, plaintiff's counsel also highlights that "defendant did not even file a Consent to Change Attorney until October 19, 2019" (*id.*) and that it is "disingenuous that Defendants expected plaintiff to serve a complaint when defendants had not even concluded who would be representing them in the litigation, when over five months had elapsed since commencement of the action" (*id.* at ¶ 6). This argument also does not adequately explain the delay. Since plaintiff has not demonstrated a reasonable excuse for failing to comply with CPLR 3012 (b) with respect to WIN, there is no need to address the merits of her claims insofar as asserted against that entity.

Thus, the action is dismissed pursuant to CPLR 3012 (b) insofar as asserted against WIN. Since the action is dismissed as against WIN, that branch of plaintiff's cross motion seeking to compel it to accept untimely service of the complaint is denied as moot.

Statute of Limitations

Defendants argue that plaintiff's claims are barred by the one-year statute of limitations applicable to intentional torts (*see* CPLR 215 [3]). In opposition, plaintiff contends that her claims against defendants sound in negligent hiring, retention, and supervision, and are therefore governed by a three-year statute of limitations (*see* CPLR 214 [5]). This Court notes, however, that negligence claims against the City and DHS, a City agency, must be commenced within one year and ninety days after the happening of the event upon which the claim is based (*see* General Municipal Law § 50-i [1][c]).[1] Nevertheless, plaintiff's claims against DHS and the City are not time-barred.

Plaintiff's verified complaint sets forth three causes of action. The first cause of action is asserted against the City, the second is asserted against DHS, and the third is asserted against WIN. Since the complaint is dismissed, pursuant to CPLR 3012 (b), insofar as asserted against WIN, only the first and second causes of action are at issue on this branch of defendants' motion. In both the first and second causes of action, which are not labeled as asserting any particular claim, plaintiff alleges that, on September 29, 2017, she was assaulted by DHS and New York City police officers and that she sustained personal injuries as a result of defendants' "negligent acts" (Complaint, NYSCEF Doc. No. 6, at ¶¶ 21, 23).

[1] Defendants do not deny plaintiff's assertion that, pursuant to section 50-e of the General Municipal Law, she served a notice of claim on the City within 90 days of when the claim arose (see Affirmation in Opposition, at ¶ 2, NYSCEF Doc. No. 21; Complaint at ¶ 14, NYSCEF Doc. No. 6).

"In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance" (*Faiella v Tysens Park Apts., LLC*, 110 AD3d 1028, 1028 [2d Dept 2013][internal quotation marks and citations omitted]). Here, viewed in the light most favorable to plaintiff, the first and second causes of action, although not specifically labeled as such, may be construed as alleging that the City and DHS negligently hired and retained the employees who allegedly assaulted plaintiff. While defendants emphasize that plaintiff's claims are premised on allegations of intentional conduct, "the negligence of an employer is not transformed into intentional conduct simply because the employee's wrongful conduct was intentional" (*McCarthy v Mario Enters., Inc.*, 163 AD3d 1135, 1137 [3d Dept 2018]; *see Jarvis v Nation of Islam*, 251 AD2d 116, 116-117 [1st Dept 1998]["Although plaintiffs' alleged injuries resulted from an assault, they are not thereby relegated only to a cause of action for assault and battery"][internal quotation marks and citations omitted]). While plaintiff's damages may have been immediately caused by the employees' alleged assault, liability against the City and DHS is not based upon allegations that they intentionally harmed plaintiff, but that the City and DHS negligently hired and retained the employees. Indeed, "[a] single act . . . causing a single injury may constitute a breach of different duties and may give rise to causes of action based upon different grounds of liability and subject to different statutory periods of limitations" (*Green v Emmanuel African M. E. Church*, 278 AD2d 132, 133 [1st Dept 2000] [internal quotations marks and citations omitted]).

As noted above, a claim for negligence brought against the City and DHS must be commenced within one year and ninety days from the happening of the event upon which the claim is based. This action accrued on September 29, 2018, when the incident occurred. Thus, in order

for the action against the City and DHS to be timely, it had to be commenced on or before December 28, 2019. Since plaintiff commenced this action on December 28, 2019, her claim of negligent hiring, retention, and supervision against the City and DHS is not time-barred.

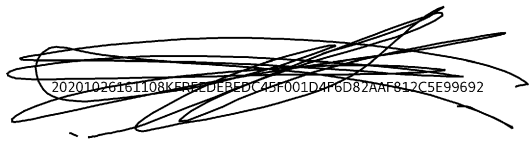
Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion is granted to the extent that the action is dismissed, pursuant to CPLR 3012 (b), insofar as asserted against defendant Women in Need, Inc. a/k/a WIN, Inc., and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion to compel defendants to accept service of the complaint is denied as moot as against defendant Women in Need, Inc. a/k/a WIN, Inc.; and it is further

ORDERED that plaintiff's cross motion to compel defendants to accept service of the complaint is denied as against defendants the City of New York and the Department of Homeless Services; and it is further

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



10/26/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE