

Garcia v City of New York

2021 NY Slip Op 33126(U)

November 17, 2021

Supreme Court, Queens County

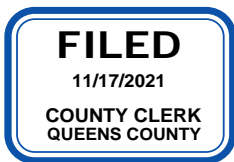
Docket Number: Index No. 713463/20

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Elisandro Garcia,

Plaintiff,

- against -

Index
Number: 713463/20

Motion
Date: 10/25/21

City of New York, the New York City
Department of Education and The New York
City School Construction Authority,

Motion Seq. No.: 1

Defendants.

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The following papers numbered E6-E23, E25-E29 & E31-32 read on this motion by defendant, The New York City School Construction Authority, for an order to dismiss; and cross-motion by defendants, The City of New York and The New York City Department of Education, for an order converting the cross-claim into a third-party action and directing a joint trial.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E6-20
Affirmation in Opposition-Exhibits.....	E21-23
Notice of Cross-Motion-Affirmation-Exhibits.....	E25-28
Reply.....	E29
Reply.....	E31-32

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendant The New York City School Construction Authority ("NYCSCA") for an order of the Court dismissing plaintiff's action as barred by the statute of limitations pursuant to CPLR 3211 (a) (5) is granted, and further the cross-motion by defendant City of New York ("City") for an order converting the cross-claims filed against NYCSCA into a third-party action and directing a joint trial is denied.

This action for personal injuries arises out of an accident that occurred on August 28, 2019, when, while working for MSM Empire Construction Corp. ("MSM") at the P.S. 184 playground located at 327 Cherry Street, New York, New York, plaintiff was caused to fall from a height sustaining injuries.

In support of its motion NYCSCA submits, *inter alia*, the affirmation of its attorney, the affidavit dated April 23, 2021, of Susan Vera Moran, the Senior Director of Human Resources for NYCSCA and the affidavit dated April 26, 2020, of Jessica Reyes, the Corporate Secretary and FOIL Officer for NYCSCA.

In opposition to the motion and in support of the cross-motion, City submits, *inter alia*, the affirmation of its attorney.

Movant avers that the Court lacks personal jurisdiction over NYCSCA due to plaintiff's defective service of the complaint and further that this action must be dismissed as against NYCSCA because plaintiff's 120-day period under CPLR 306-b to effectuate proper service has expired and that plaintiff's action against NYCSCA is now time-barred pursuant to the one-year statute of limitations provided in §1774 of the Public Authorities Law. The Court agrees.

On October 21, 2019, plaintiff filed a notice of claim naming the City of New York ("City"), New York City Department of Education ("DOE") (collectively "City Defendants") and NYCSCA as respondents. Pursuant to the notice of claim, plaintiff alleged that on August 28, 2019, while working for MSM Empire Construction Corp. ("MSM") at the P.S. 184 playground located at 327 Cherry Street, New York, New York, plaintiff was "caused to fall from a height" resulting in "severe injuries."

On December 3, 2019, plaintiff appeared for a 50-h hearing conducted by the City and DOE respondents. The parties agreed to adjourn NYCSCA's 50-h hearing pending review of claimant/plaintiff's testimony transcript.

On June 30, 2020, plaintiff appeared for a 50-h hearing conducted by NYCSCA.

On August 19, 2020, plaintiff commenced this action by serving a summons and complaint, naming NYCSCA as a defendant.

On September 4, 2020, plaintiff filed affidavits of service which aver that on August 27, 2020, plaintiff had served the complaint on the City Defendants.

On October 13, 2020, plaintiff filed an affidavit of service which avers that on October 8, 2020, plaintiff had served the complaint on NYCSCA, which affidavit of service states that on October 8, 2020, process server Schadrac Laguerre delivered "a true copy of each to Briana Garcia personally. Deponent knew said corporation/partnership/trust/LLC so served to be the corporation/partnership/trust/LLC described in the aforementioned document as said defendant and knew said individual to be Authorized to Accept thereof"

Pursuant to the affidavit of NYCSCA Senior Director of Human Resources Susan Vera Moran, NYCSCA did not employ a person named Brianna Garcia in October 2020 nor was this individual designated to accept service of the complaint on behalf of the NYCSCA. Ms. Moran also states that the NYCSCA Corporate Secretary Jessica Reyes was the individual authorized to accept service on behalf of NYCSCA in October 2020.

Pursuant to the affidavit of Ms. Jessica Reyes, she was NYCSCA's Corporate Secretary and FOIL Officer, and in her capacity as Corporate Secretary, she is the only person authorized to accept service on behalf of NYCSCA. Ms. Reyes also states that in October 2020, NYCSCA did not accept in-person service due to the COVID-19 pandemic and that as a substitute for in-person service, NYCSCA provided instructions for service via registered or certified mail, and also accepted service of process via e-mail. Ms. Reyes states that she was the only person authorized to accept, stamp, and log all legal documents received via registered or certified mail, and in addition, she was the only person who had access to the NYCSCA's service e-mail address for receipt of legal documents. Further, Ms. Reyes also states that she was present and working at the NYCSCA office on October 8, 2020, from approximately 7:53 a.m. until 4:30p.m., and at no point during that time on October 8, 2020, did Ms. Reyes receive notification of process server Laguerre's appearance at NYCSCA to serve a copy of plaintiff's summons and complaint.

On February 4, 2021, plaintiff sent NYCSCA "good faith" correspondence regarding service of the complaint and NYCSCA's alleged failure to appear or answer, wherein NYCSCA informed plaintiff that this correspondence was the first notification that NYCSCA had regarding plaintiff's action and requesting an extension of time from plaintiff for NYCSCA to answer and NYCSCA would waive personal jurisdictional defenses. A proposed draft stipulation was drawn, but was never fully executed, nor filed in counter parts with the Court. Further, NYCSCA's proposed stipulation was to extend the time to answer the summons and complaint, based on a good faith assumption that said summons and complaint had been served on NYCSCA, and an answer thereto was not made by NYCSCA. Nevertheless, no stipulation was ever signed and entered.

On this record there is nothing presented to refute NYCSCA's evidence that service was neither timely nor properly made on NYCSCA and accordingly the Court finds that it lacks personal jurisdiction over NYCSCA in this matter.

The Court notes that pursuant to CPLR §306-b, the last date by which plaintiff could have effectuated timely service on NYCSCA was December 17, 2020, and although plaintiff filed his complaint on August 19, 2020, the defect in service is not cured by the defendant's subsequent receipt of actual notice of the commencement of the action. (See Feinstein v. Bergner, 48 N.Y.2d 234 [1979]).

Public Authorities Law § 1744(1), which is found under Title 6 of the New York City School Construction Authority Act, states that "Except in an action for wrongful death, no action or proceeding shall be prosecuted or maintained against the authority, or any member, officer, agent, or employee thereof, for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of the authority or of any such member, officer, agent or employee thereof, or for any other alleged tort of the authority or of such member, officer, agency or employee thereof, unless ... the action or proceeding shall be commenced within one year after the happening of the event upon which the claim is based." Accordingly, any action against the School Construction Authority must be commenced within one year of the accrual of any cause of action against it (D & L Associates, Inc. v. New York City School Const. Authority, 69 AD3d 435, 435 1st Dept [2010]; Ramirez v. New York City School Const. Auth., 229 AD2d 313, 313 1st Dept [1996]). A cause of action for personal injuries generally accrues on the date an injury is sustained (Fleishman v. Eli Lilly and Co., 96 A.D.2d 825, 825 2d Dept [1983] ["In general, it can be said that a cause of action for personal injuries, whether sounding in negligence, malpractice, or products liability, accrues at the time of injury."]) (Wikiera v. City of New York, 44 Misc. 3d 1203(A), 997 N.Y.S.2d 102 Sup. Ct. [2014]).

Plaintiff is also time-barred from commencing a new lawsuit against the NYCSCA.

In the instant matter, plaintiff's accident is alleged to have occurred on August 28, 2019, and as such, an action based on that occurrence must have been commenced against NYCSCA no later than August 28, 2020.

Plaintiff failed to effectuate timely service on NYCSCA pursuant to the complaint dated August 19, 2020, and he is now time-barred from commencing any new action against NYCSCA arising from the August 28, 2019, occurrence.

Accordingly, the motion by NYCSCA dismissing plaintiff's action as barred by the statute of limitations is granted, and further the cross-motion by defendant City for an order converting the cross-claims filed against NYCSCA into a third-party action and directing a joint trial is denied as moot.

Dated: November 17, 2021



 KEVIN J. KERRIGAN, J.S.C.

