

**Calma v City of New York**

2023 NY Slip Op 32082(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 451707/2022

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52

Justice

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INDEX NO. 451707/2022

MICHAEL CALMA,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, JENNY CORA

DECISION + ORDER ON MOTION

Defendant.

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Upon the foregoing documents, after oral argument, it is

The defendants move, pursuant to CPLR § 3211(a)(5), to dismiss the complaint on the grounds that the action was not timely filed pursuant to GML § 50-i and CPLR § 217-a. The plaintiff cross-moves to deem the Summons and Complaint timely filed nunc pro tunc. For the reasons set forth herein, the defendants' motion is granted and the plaintiff's cross- motion is denied.

This action arises from an accident that allegedly occurred on July 25, 2018, when a car driven by defendant Jenny Cora ("Cora") and owned or controlled by the defendants New York City Police Department ("NYPD")/City of New York ("City"), struck the plaintiff, a pedestrian at the time. Pursuant to GML § 50-i and CPLR § 217-a, a personal injury action against a city or officer, agent or employee thereof must be commenced within one year and ninety days after the happening of the event upon which the claim is based. The plaintiff does not dispute that the summons and complaint, filed March 4, 2020, were not filed within one year and ninety days after the happening of the event upon which the claim is based. However, the plaintiff contends

that, under the rather unusual circumstances surrounding the instant matter, the late filing of the summons and complaint should be deemed a mistake or irregularity amenable to correction or disregard pursuant to CPLR § 2001.

Plaintiff contends that the instant action was commenced late due to the malfeasance of a former paralegal at plaintiff's counsel's law firm. The former paralegal's employment was terminated in December of 2020, when plaintiff's counsel learned of several allegedly illegal acts performed by the paralegal, including theft, altering of files, and attempts to hide files. Plaintiff's counsel conducted an investigation which discovered that the paralegal had allegedly hacked into computer accounts and committed computer fraud, which was reported to the police. After being contacted by counsel for the defendants in the instant matter, plaintiff's counsel learned that the summons and complaint were filed late. Plaintiff's counsel's investigation determined that, in this case, the date of the incident and the statute of limitations were deleted from the firm's case management software. Plaintiff's counsel believes this was intentionally done by the paralegal. Plaintiff contends that this is the reason the action was not timely filed, and that the late filing should be excused.

CPLR § 2001 provides: "At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid."

Changes to CPLR § 2001, which went into effect in 2007, “were not meant to excuse a complete failure to file within the statute of limitations. Moreover, in order to properly commence an action, a plaintiff or petitioner would still have to *actually file a summons and complaint or a petition. A bare summons, for example, would not constitute a filing.* The purpose of this measure is to clarify that a mistake in the method of filing, AS OPPOSED TO A MISTAKE IN WHAT IS FILED, is a mistake subject to correction in the court’s discretion” (*Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 328 [2011] [citations omitted, emphasis in original]). CPLR § 2001 does not allow a trial judge to disregard a complete failure to file within the statute of limitations (*Id.*). “A Statute of Limitations is not open to discretionary change” (*Arnold v Mayal Realty Co.*, 299 NY 57, 60 [1949]). Even where papers are timely filed, where the papers are insufficient to commence a proceeding, this “constitutes a nonwaivable, jurisdictional defect” (*Ennis v Annucci*, 160 AD3d 1321, 1322 [3d Dept 2018]).

The sole case cited to in the plaintiff’s papers in opposition to the defendants’ motion and in support of the cross-motion is inapplicable to the case at bar. That case, *Brooklyn Hous. and Family Services, Inc. v Lynch* (191 Misc 2d 341, 350 [Sup Ct Kings County 2002]), dealt with the failure to properly serve the defendant, not the failure to timely commence the case within the time period required by the statute of limitation. CPLR § 306-b, the statute at issue in *Brooklyn Hous.*, *supra*, specifically provides for service after the expiration of the statute of limitations in certain circumstances and provides for the extension of time for service upon good cause shown or in the interest of justice (*see* CPLR § 306-b). Notably, the action still needs to be commenced by filing within the statute of limitations.

In the instant matter, the plaintiff failed to file *anything* with the court within the time permitted by the statute of limitations. This differentiates the instant matter from cases where the case was filed but the required index number was not purchased (*Horvath v Progressive Cas. Ins. Co.*, 24 Misc 3d 194, 202 [NY Dist Ct Nassau County 2009]). In fact, the legislative history of CPLR § 2001 specifically states that “It is important to emphasize that this measure would not excuse a complete failure to file within the statute of limitations” (New York Bill Jacket, 2007 S.B. 3563, Ch. 529).

Accordingly, CPLR § 2001 does not give the court discretion to allow for the late commencement of the instant action. Therefore, for the reasons stated hereinabove, it is hereby

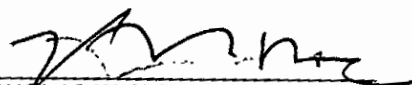
ORDERED that the plaintiff’s cross-motion is DENIED; and it is further

ORDERED that defendants’ motion for summary judgment is GRANTED and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

6/16/2023

DATE



NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE