

89 A.D.3d 436

Supreme Court, Appellate Division,
First Department, New York.

Cleofoster BAPTISTE, Plaintiff–Appellant,

v.

“John DOE”, et al., Defendants–Respondents.

Nov. 1, 2011.

Attorneys and Law Firms

H. Fitzmore Harris, P.C., New York, for appellant.

Lifflander & Reich, LLP, New York (Kent B. Dolan of counsel), for respondents.

Opinion

*436 Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 10, 2011, which granted defendants' motion to dismiss the complaint, and denied plaintiff's motion for an extension of time to serve the

summons and complaint and for a default judgment against defendants, unanimously affirmed, without costs.

Since plaintiff's filing of this action was untimely, it was a nullity, “and there was no service period to extend” **869 (*Gonzalez v. *437 New York City Health & Hosps. Corp.*, 29 A.D.3d 369, 370, 815 N.Y.S.2d 53 [2006]; *Croce v. City of New York*, 69 A.D.3d 488, 893 N.Y.S.2d 48 [2010]). In the absence of an action pending against them, defendants' own tardiness in moving to “dismiss” did not constitute a waiver of the statute of limitations defense (*see* CPLR 3211[e]).

We have considered plaintiff's remaining arguments and find them unavailing.

FRIEDMAN, J.P., CATTERSON, MOSKOWITZ,
FREEDMAN, ABDUS–SALAAM, JJ., concur.

All Citations

89 A.D.3d 436, 931 N.Y.S.2d 868 (Mem), 2011 N.Y. Slip Op. 07708

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18 N.Y.3d 806

Unpublished Disposition

(The decision of the Court of Appeals of New York is referenced in the New York Supplement and North Eastern Reporter as a decision without published opinion.)

Court of Appeals of New York.

Cleofoster BAPTISTE, Appellant,

v.

John DOE, et al., Respondents.

No. 2011-1344.

|

Feb. 14, 2012.

Opinion

*1 Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

All Citations

18 N.Y.3d 806, 963 N.E.2d 792, 940 N.Y.S.2d 215 (Table), 2012 WL 445950, 2012 N.Y. Slip Op. 63944

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CASE DISP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

CLEOFOSTER BAPTISTE,

Index No. 310317/09

Plaintiff,

DECISION/ORDER

-against-

Present:

"JOHN DOE" AND LIBERTY LINES TRANSIT, INC.,

HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff's motion for an Order pursuant to CPLR § 306-b granting an extension in which to serve his Summons and Complaint and for an Order pursuant to CPLR § 3215 granting a default judgment against Defendants, and Defendants' motion for an Order pursuant to CPLR §§ 3211 dismissing Plaintiff's Complaint are consolidated for Decision herein.

Plaintiff's motion is **denied** in its entirety.

Defendants' motion is **granted**.

Plaintiff is suing for personal injuries allegedly sustained while riding on Defendant's bus on October 15, 2007. He commenced this action on December 22, 2009, but failed to serve the pleading within the requisite 120-days. See CPLR § 306-b. He is now moving for an extension of time in which to serve his Summons and Complaint. And Defendants are moving to dismiss the Complaint on the grounds that Plaintiff failed to timely commence this action. Plaintiff counters that Defendants waived

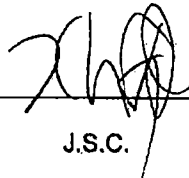
their right to dismiss the action on statute of limitations grounds since they did not timely move for such relief.

Plaintiff does not dispute that he was required to commence his action within a year and 90 days after its occurrence. See G.M.L. §§ 50-i and 50-b; see also Coleman v. Westchester Street Transp. Co., 57 N.Y.2d 734; Singer v. Liberty Lines, 183 A.D.2d 82. He simply argues that since Defendants did not move for this relief within the time allotted for interposing an Answer, that defense is waived. The Court disagrees with Plaintiff's analysis of the situation and applicable law.

Plaintiff's accident allegedly occurred on October 15, 2007. So he had until January 13, 2009 to commence an action. Consequently, his action was timed-barred when he commenced it on December 22, 2009. See CPLR § 304 (stating that "[a]n action is commenced by filing a summons and complaint or summons with notice"), thus, rendering his filing of the Summons and Complaint a nullity, see Gonzalez v. NYCHHC, 29 A.D.3d 369, 370. Therefore, there is no "service period" to extend nor jurisdiction to grant a default judgment. See Gonzalez, 29 A.D.3d at 370; Floyd v. Salomon Bros., 249 A.D.2d 139, 140 (stating that it did not have jurisdiction to enter a default judgment, "since there was no action pending in which defendant could have appeared").

The foregoing shall constitute the decision and order of this Court.

Dated: MAR 0 2 2011



J.S.C.

KENNETH L. THOMPSON, JR.