

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33184
H/kmb

_____AD3d_____

Argued - November 17, 2011

MARK C. DILLON, J.P.
RANDALL T. ENG
L. PRISCILLA HALL
LEONARD B. AUSTIN, JJ.

2011-00370

DECISION & ORDER

Michael David Yang, respondent, v Oceanside Union
Free School District, et al., appellants.

(Index No. 15086/10)

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale,
N.Y. (Gregory A. Cascino of counsel), for appellants.

Frank X. Kilgannon, Mineola, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Diamond, J.), dated November 19, 2010, as denied that branch of their motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint as barred by the statute of limitations.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendants' motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint as barred by the statute of limitations is granted.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see Christodoulou v Christodoulou*, _____AD3d_____, 2011 NY Slip Op 08109 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051, 1052).

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Here, the defendants established, prima facie, that the complaint was filed more than 1 year and 90 days after the plaintiff's cause of action accrued and, thus, was untimely (*see* Education Law § 3813[2]; General Municipal Law § 50-i[1]). The defendants demonstrated that the 1 year and 90-day statute of limitations began to run on March 30, 2009, the date of the plaintiff's 18th birthday, when the infancy toll had terminated (*see* CPLR 208; *Henry v City of New York*, 94 NY2d 275). However, the complaint was not filed until August 9, 2010.

The plaintiff failed to meet his burden of raising an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable (*see Babu v Consolidated Edison Co. of N.Y., Inc.*, 72 AD3d 852). In particular, the plaintiff's affidavit was insufficient to demonstrate that any alleged negligent acts were committed by the defendants after March 30, 2009.

Accordingly, that branch of the defendants' motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint as barred by the statute of limitations should have been granted.

DILLON, J.P., ENG, HALL and AUSTIN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court