

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

D33641
G/prt

_____AD3d_____

Argued - December 20, 2011

REINALDO E. RIVERA, J.P.
SHERI S. ROMAN
SANDRA L. SGROI
JEFFREY A. COHEN, JJ.

2011-04167

DECISION & ORDER

Bogdan Zaborowski, respondent, v Local 74, Service Employees International Union, AFL-CIO, also known as United Service Workers Union Local 74, appellant, et al., defendants.

(Index No. 34484/10)

O'Dwyer & Bernstein, LLP, New York, N.Y. (Joy K. Mele of counsel), for appellant.

Dandeneau & Lott, Melville, N.Y. (Dawn A. Lott of counsel), for respondent.

In an action, inter alia, to recover damages for breach of the duty of fair representation, the defendant Local 74, Service Employees International Union, AFL-CIO, also known as United Service Workers Union Local 74, appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Asher, J.), dated March 29, 2011, as denied its motion pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the appellant's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred is granted, and that branch of the motion which was pursuant to CPLR 3211(a)(7) is denied as academic.

In April 2010, the plaintiff commenced an action in federal district court against, among others, the appellant, alleging, inter alia, breach of the duty of fair representation. Thereafter, the federal action was voluntarily discontinued pursuant to a stipulation of discontinuance. In

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AFL-CIO, also known as UNITED SERVICE WORKERS UNION LOCAL 74

September 2010, the plaintiff commenced this action, similarly alleging that the appellant had breach its duty of fair representation. The Supreme Court denied the appellant's motion pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint insofar as asserted against it as time-barred and for failure to state a cause of action, respectively.

“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” (*Baptiste v Harding-Marin*, 88 AD3d 752, 753; *see Rakusin v Miano*, 84 AD3d 1051, 1052).

Here, in opposition to the appellant's prima facie showing that the time in which to commence this action has expired, the plaintiff failed to raise an issue of fact as to whether the statute of limitations was tolled pursuant to CPLR 205(a). CPLR 205(a) is not applicable to the instant case, since the plaintiff's similar and timely commenced federal action was terminated by means of a voluntary discontinuance pursuant to a stipulation which contains no express statement of intent to preserve the right to commence a new action (*see Naval v Lehman Coll.*, 303 AD2d 662; *Kourkoumelis v Arnel*, 238 AD2d 313; *cf. George v Mt. Sinai Hosp.*, 47 NY2d 170, 180).

Accordingly, the Supreme Court should have granted that branch of the appellant's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred.

RIVERA, J.P., ROMAN, SGROI and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court