

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-01644

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

PATRICK HARDEN AND KATHERINE HARDEN,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

DAVID N. WEINRAUB, BROWN AND WEINRAUB,
PLLC, LINDSAY ROBINSON AND JODI LYNN MCKAY,
DEFENDANTS-RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (SHARON STERN GERSTMAN OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PILLINGER MILLER TARALLO, LLP, BUFFALO (KENNETH A. KRAJEWSKI OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS DAVID N. WEINRAUB AND BROWN AND
WEINRAUB, PLLC.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF
COUNSEL), FOR DEFENDANT-RESPONDENT LINDSAY ROBINSON.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR
DEFENDANT-RESPONDENT JODI LYNN MCKAY.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered August 31, 2022. The order granted the motion and cross-motions of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants David N. Weinraub and Brown and Weinraub, PLLC and the cross-motion of defendant Lindsay Robinson are denied, the complaint is reinstated against those defendants and against defendant Jodi Lynn McKay, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this action seeking to recover damages for injuries plaintiff Patrick Harden allegedly sustained in a motor vehicle accident. Defendants David N. Weinraub and Brown and Weinraub, PLLC (collectively, Weinraub defendants) moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint against them as time-barred. Defendant Jodi Lynn McKay cross-moved to dismiss the complaint against her as time-barred or, in the alternative, for failure to state a cause of action. Defendant Lindsay Robinson cross-moved to dismiss the complaint against her as time-barred. Supreme Court determined that the complaint was time-barred, and plaintiffs now appeal from an order that granted the motion and cross-motions.

We reverse.

"On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). Once a defendant meets that initial burden, the burden shifts "to plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*id.* at 1562 [internal quotation marks omitted]).

Here, defendants met their respective burdens of establishing that the limitations period had expired. Pursuant to CPLR 214 (5), a three-year statute of limitations applies to an action to recover damages for personal injury. Plaintiffs' cause of action accrued on December 4, 2018, the date of the accident (*see Torres v Greyhound Bus Lines, Inc.*, 48 AD3d 1264, 1264-1265 [4th Dept 2008]; *Peace v Yumin Zhang*, 15 AD3d 956, 957 [4th Dept 2005]; *Marino v Proch*, 258 AD2d 628, 628 [2d Dept 1999]), and plaintiffs did not commence this action until May 18, 2022. However, in response, plaintiffs established that the statute of limitations was tolled. On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" (9 NYCRR 8.202.8). Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 (*see* Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28], 202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]). "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020], *rearg denied* 36 NY3d 962 [2021]). "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (*id.*).

Here, 472 days of the 1,095-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020, the remaining 623 days of the limitation period began to run again, expiring on July 20, 2022 (*see Matter of New York City Tr. Auth. v American Tr. Ins. Co.*, 211 AD3d 643, 643 [2d Dept 2022]). Thus, the action was timely commenced on May 18, 2022 (*see Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022]; *Matter of Roach v Cornell Univ.*, 207 AD3d 931, 932-933 [3d Dept 2022]; *Brash v Richards*, 195 AD3d 582, 582 [2d Dept 2021]).

Defendants contend that the toll is inapplicable here because plaintiffs could have timely commenced the action at any point between December 4, 2018, and March 20, 2020, or between November 3, 2020, and

December 4, 2021. We reject that contention. “[A] toll operates to compensate a claimant for the shortening of the statutory period in which it must commence . . . an action, irrespective of whether the stay has actually deprived the claimant of any opportunity to do so” (*Lubonty v U.S. Bank, N.A.*, 34 NY3d 250, 256 [2019], *rearg denied* 34 NY3d 1149 [2020]; see *Matter of Hickman [Motor Veh. Acc. Indem. Corp.]*, 75 NY2d 975, 977 [1990]). Thus, plaintiffs were entitled to the benefit of tolling for the entire 228-day duration of the COVID-19 Executive Orders.

We therefore reverse the order, deny the Weinraub defendants’ motion and Robinson’s cross-motion, and reinstate the complaint. Inasmuch as the court did not address the alternative ground for dismissal raised in McKay’s cross-motion, we remit the matter to Supreme Court to consider that ground and determine McKay’s cross-motion anew (see *Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]; see also *Julius v County of Erie*, 196 AD3d 1058, 1059 [4th Dept 2021]).