

**Brown v Coder**

2007 NY Slip Op 32205(U)

July 10, 2007

Supreme Court, Suffolk County

Docket Number: 0025169/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:**

**Hon. Paul J. Baisley, Jr.**

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ANDY BROWN and MARCUS BROWN,

Plaintiffs,

-against-

KENNETH R. CODER, LAURA FIELDS and  
 J.L.W. DAVENDER, JR.,

Defendants,

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**ORIG. RETURN DATE:** April 25, 2007

**MTN. SEQ. #:** 001-MotD, 002-MG

**PLTF'S ATTORNEY:**

Keegan, Keegan, Ross & Rosner, Esqs.  
 147 North Ocean Avenue  
 Patchogue, New York 11772

**ATTORNEYS FOR KENNETH R. CODER:**

Scalzi & Nofi, Esqs.  
 150 Broad Hollow Road, Suite 320  
 Melville, New York 11747

**ATTORNEYS FOR LAURA FIELDS**

**and J.L.W. DAVENDER, JR.:**

Steven J. Smetana, Esq.  
 201 North Service Road  
 Melville, New York 11747

Upon the following papers numbered 1 to 17 read on this motion and cross motion to dismiss: Notice of Motion and supporting papers 1 - 5; Affirmation in Opposition and supporting papers 6 - 8; Notice of Cross motion and supporting papers 9 - 13; Affirmation in Opposition and supporting papers 14 - 15; Reply affirmation 16 - 17; it is,

**ORDERED** that this motion (001) by the defendant Kenneth R. Coder to dismiss the complaint and cross-claims pursuant to CPLR 3211 is decided to the extent that that part of this application seeking dismissal on the basis of the statute of limitations is denied; and, that part of this application seeking dismissal on the basis of there being no personal jurisdiction as against the moving defendant shall be treated as a motion for summary judgment pursuant to CPLR 3212 and this moving defendant and the plaintiffs shall be given the opportunity to make further submissions to the court as follows: the submission date with regard to summary judgment shall be August 21, 2007; the moving defendant's papers in support of this application shall be served on or before July 24, 2007; the plaintiffs' responsive papers shall be served on or before August 7, 2007; and the movant's reply papers, if any, shall be served on or before August 14, 2007; and it is further

**ORDERED** that this cross motion (002) by the defendants Laura Fields and J.L.W. Davender, Jr. for an order dismissing the amended complaint as to them and any cross-claims as to them is granted and said amended complaint as to these moving defendants and the cross-claims contained in the amended answer of the defendant Kenneth R. Coder as well as those contained in the answer of these moving defendants as against the defendant Kenneth R. Coder are dismissed; and it is further

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**ORDERED** that the defendants Laura Fields and J.L.W. Davender, Jr. are hereby severed from the caption and this action shall continue only as against the defendant Kenneth R. Coder; and it is further

**ORDERED** that the third-party action, related to the main action, as between the defendant/third-party plaintiff Kenneth R. Coder and the third-party defendants Laura Fields and J.L.W. Davender, Jr., shall continue as part of this litigation.

This is a personal injury action arising out of a two-car motor vehicle accident on September 13, 2003. The original complaint was brought on behalf of two passengers (hereinafter the Browns) in car number one against the owner/driver (hereinafter Coder) of car number two.

Subsequently, Coder brought a third-party action against the owner (hereinafter Fields) and the driver (hereinafter Davender) of car number one. The Browns then amended their complaint to add as defendants Fields and Davender.

The statute of limitations on this action is three years (*see* CPLR 214[5]) which, in this case, would have ended on September 13, 2006.

On September 7, 2006 - one week before the statute was to run - the plaintiffs filed their original summons and complaint. Service upon the defendant Coder was not done pursuant to CPLR 308 but pursuant to CPLR 312-a. CPLR 312-a allows for service by first-class mail upon a defendant along with copies of a "Statement of Service by Mail" and an "Acknowledgment of Receipt by Mail." This section provides that the defendant is to return the completed executed "Acknowledgment of Receipt by Mail" - with service then being complete upon mailing or delivery - or, in the absence of such cooperation, service will then be undertaken, presumably under CPLR 308, but with the defendant being liable for the reasonable costs of serving process under the alternative method.

The risk to a plaintiff in using the provisions of CPLR 312-a is that if the defendant does not return the executed acknowledgment, the plaintiff will only have whatever is left of the 120 day period to make service and to satisfy the statute of limitations.

In this case, the mailing to the defendant pursuant to CPLR 312-a was on September 26, 2006 (19 days after filing and 13 days after the statute of limitations had run) and the defendant never returned the executed acknowledgment. And while the defendant Coder did answer (on October 9, 2006), an answer is not the equivalent of an executed acknowledgment (*see Kostelanetz & Fink, L.L.P. v Hui Qun Zhao*, 189 Misc 2d 847, 694 NYS2d 285 [Civ Ct, New York County 1999]). It thus appears that, as to the original summons and complaint, proper service may not have been effectuated upon Coder before the statute of limitations had run.

On the other hand, Coder's answer (as well as his subsequent amended answer) contains six affirmative defenses, including one for improper service, but none for the statute of limitations. And while Coder, perhaps, had a basis at law for seeking a dismissal of the original complaint on the basis of the statute of limitations - he waived that right by neither bringing a motion to dismiss before the time to serve his answer nor within 60 days of serving his answer (*see* CPLR 3211[e]).

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Thereafter, on October 25, 2006 - about a month and a half after the statute of limitations had run - Coder served his third-party complaint upon Fields and Davender. This third-party action was for contribution from these third-party defendants in the event that Coder was found liable on the main action. There is no statute of limitations issue as to the third-party action in this case because the initiating event for such purpose would not occur until, and if, there was an adverse decision against Coder.

The plaintiffs, however, then amended their complaint "as of right" pursuant to CPLR 1009 and served the amended complaint upon Coder and the third-party defendants, Fields and Davender. The method of service of the amended complaint was pursuant to CPLR 21103(b) which allows service upon counsel for parties in a pending action. While this section has been held to apply only to "interlocutory" papers and not to "initiatory" papers (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2103:1), it has been held that service of an amended complaint may be effectuated pursuant to CPLR 2103(b) (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1009).

Turning now to Coder's motion (001) to dismiss for improper service and for statute of limitations grounds, his application is denied as to the statute of limitations because he waived that objection by not including that ground as a defense in his answer and because he failed to move under CPLR 3211(e) within 60 days of his answer (*see Jacobowitz v Leak*, 19 AD3d 453, 798 NYS2d 67 [2d Dept 2005]; *Abramov v Board of Assessors*, 257 AD2d 958, 960, 684 NYS2d 326, 328 [3d Dept], *lv denied* 93 NY2d 813, 697 NYS2d 561 [1999]).

As to Coder's contention that service was improper, he preserved that ground as a defense since it is contained in his answer as well as his amended answer but he may not avail himself of CPLR 3211 because his time to move under CPLR 3211 has lapsed (*see* CPLR 3211[e]). In this case, however, Coder may utilize the provisions of CPLR 3212 to seek dismissal on this ground (*see* CPLR 3211[c]; *Diaz v DiGiulio*, 29 AD3d 623, 816 NYS2d 125 [2d Dept 2006]). Accordingly, the court shall treat this application as a motion for summary judgment on the ground of improper service and allow the plaintiffs and Coder this opportunity to make submissions and an appropriate record in the context of a summary judgment motion.

Turning now to the cross motion by the defendants Fields and Davender, the amended complaint which added Fields and Davender as defendants was served in January of 2007 - about 4 months after the statute of limitations had run. If the causes of action in the amended complaint were also in the third-party complaint, and if the third-party complaint was served within the statute of limitations period, then the amended complaint would be viable as to Fields and Davender (*see Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 478, 497 NYS2d 890, 893 [1985]). Here, however, the cause of action in the third-party complaint was for a claim (contribution) different than that contained in the amended complaint (negligence). Moreover, and in any event, the third-party complaint was served after the statute of limitations applicable to the personal injury. Accordingly, there is no legal basis or exception to allow the causes of action in the amended complaint as to the added defendants, Fields and Davender, and all such claims as to them in the amended complaint must be dismissed.

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In view of the dismissal of the main action as to Fields and Davender, the cross-claims contained in the respective answer and amended answer become moot and only continue insofar as they are contained in the claim for contribution in the third-party complaint.

This decision constitutes the order of the court.

Dated: July 10, 2007

**HON. PAUL J. BAISLEY, JR.**  
**HON. PAUL J. BAISLEY, JR.**  

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**HON. PAUL J. BAISLEY, JR. J.S.C.**