

**Biton v Turco**

2007 NY Slip Op 32870(U)

August 21, 2007

Supreme Court, New York County

Docket Number: 0115485/2006

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LELAND DEGRASSE

PART 25

Index Number : 115485/2006

BITON, CRYSTAL

vs

TURCO, JOE

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE JUL 20 2007

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DISMISSED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

MOTION DENIED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

21 ~~2007~~

AUG 21 ~~2007~~

**FILED**  
SEP 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CRYSTAL BITON,

Plaintiff,

-against-

Index No. 115485/06

JOE TURCO and SPAR & BERNSTEIN, P. C.,

Defendants.

-----X

**FILED**  
SEP 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**DeGrasse, J.:**

Defendants move for an order dismissing the complaint pursuant to CPLR 3211 (a)(5) and 3212 on the ground that the statute of limitations has expired. Defendant Joe Turco seeks dismissal on the additional ground that the court lacks personal jurisdiction over him. Plaintiff cross-moves for an order pursuant to CPLR 306-b extending her time to serve Turco with the summons and complaint. This legal malpractice action was commenced on October 16, 2006. Defendant Spar & Bernstein, P. C. (S&B), a law firm, appeared for plaintiff in Beraka v Biton, an action which was pending in the Civil Court of the City of New York. Turco was associated with S&B at the time of the representation. Defendants claim to have terminated the attorney - client relationship by written notice to plaintiff dated August 13, 2003. Based upon the said notice, defendants assert that the three-year statute of limitations provided for by CPLR 214 (6) had expired on August 13, 2006.

Under CPLR 321 an attorney may be changed upon written consent or discharged by order upon a motion. "Until an attorney of record is discharged by order of the court or by the filing of

the consent of the retiring attorney and the party in the prescribed form [citation omitted], the attorney represents the party” (*Hawkins v Lenox Hill Hosp.*, 138 AD2d 572, 573 [1988]). S&B did not obtain leave to withdraw as plaintiff’s attorneys until Civil Court (Smith, J.) conditionally granted its motion for same by order dated October 17, 2003. This action was therefore timely commenced.

An affidavit of service is submitted as proof of service of the summons and complaint upon Turco. The said affidavit of service recites delivery to Kira Repetto, Esq., a person of suitable age and discretion, at S&B’s office located at 225 Broadway, Suite 512 on February 9, 2007 and the mailing required by CPLR 308 on the same date. Turco asserts that the court lacks personal jurisdiction over him because the S&B office was no longer his place of business as of the date of purported service. Where a defendant is not served with the summons and complaint within 120 days after the filing of same, “the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for such service.” In this case, the summons and complaint were placed in the hands of an attorney within the 120-day period at the office where Turco practiced law when he represented plaintiff. Moreover, it does not appear that Turco would be prejudiced by an extension of time pursuant to the statute. Plaintiff promptly sought the extension upon learning that Turco no longer practiced at S&B’s office. Therefore, good cause exists for an extension of time and the same should be granted in the interests of justice.

For the foregoing reasons, defendants’ motion is denied in its entirety. Plaintiff’s cross motion is granted to the extent that the time for service of the summons and complaint upon Turco is extended to the 45<sup>th</sup> day following entry of this order. A preliminary conference shall be

conducted on November 5, 2007 at 2:00 p. m.

Dated: August 21, 2007



J. S. C.

**FILED**  
SEP 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE