

**Damone v Levy**

2008 NY Slip Op 33261(U)

December 3, 2008

Supreme Court, New York County

Docket Number: 104885/05

Judge: Doris Ling-Cohan

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

**JUSTICE DORIS LING-COHAN**

PRESENT:

PART 36

*Justice*

Index Number : 104885/2005

DAMONE, JOSEPH

VS.

LEVY, JOEL

SEQUENCE NUMBER : # 001

AMEND

INDEX NO. 104885-05

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for Amend

1-4

PAPERS NUMBERED

1,2

3

4

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

Answering Affidavits — Exhibits

Replying Affidavits (reply memo)

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to amend is granted

in accordance with the attached memorandum decision

**FILED**  
NOV 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**DORIS LING-COHAN**  
J.S.C.

Dated: 12/3/08

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
JOSEPH DAMONE, Individually, and as Trustee  
of the Joseph A. San Fillipo Generation  
Skipping Trust,

Motion Seq  
No.: 001

Plaintiff,

Index No.:  
104885/05

- against -

JOEL LEVY,

Defendant.

-----X  
JOEL LEVY,

Third-Party Plaintiff,

Index No.:  
57113/05

- against -

JERRY ROSENBAND,

Third-Party Defendant

-----X  
DORIS LING-COHAN, J:

In this negligence action, plaintiff, Joseph Damone  
(Damone), moves, pursuant to CPLR 3025 (b), for an order granting  
plaintiff leave to file an amended complaint. Specifically,  
plaintiff seeks to add third-party defendant, Jerry Rosenband  
(Rosenband), as a direct defendant in the initial action.

For the following reasons, plaintiff's motion is granted.

**Background**

On November 29, 1991, the Joseph A. San Filippo Generation  
Skipping Trust (the Trust) was formed, appointing Damone as the  
trustee of the trust. On March 6, 2001, Joseph A. San Fillipo

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(San Fillipo), the settlor of the Trust, died. Shortly thereafter, Damone met with Rosenband, a certified public accountant, who was San Fillipo's accountant, to determine the steps necessary to administer the Trust and settle San Fillipo's estate. Rosenband recommended defendant/third-party plaintiff Joel Levy (Levy), a trust and estates attorney. During that meeting, Rosenband telephoned Levy, who agreed to join the parties at the meeting.

Thereafter, Damone and the Trust allegedly retained Levy and Rosenband to assist in the administration of the Trust, including the determination of tax consequences to the Trust as a result of San Fillipo's death, and the preparation of a Generation-Skipping Tax Return for the Trust (IRS Form 706 return). The IRS Form 706 return was allegedly due to be filed by December 6, 2001, however it was not timely filed. As a result, certain penalties were assessed against the Trust.

Rosenband acknowledges that on August 25, 2003, he sent a letter to the IRS "with the expressed purpose of getting the penalty abated" (see August 25, 2003 letter, Bernstein Reply Aff., Exh. B; Rosenband dep., at 50 (Bernstein Aff., Exh. G), and admits that he worked on the matter at least through November 2003 (Rosenband dep., at 52-54, 56). Specifically, Rosenband received a response letter from the IRS dated November 14, 2003 and that he made notes on the letter concerning how to deal with

\* 4 ]  
it (see November 14, 2003 letter, Bernstein Reply Aff., Exh. B; Rosenband dep., at 56). When asked about the letter, at his deposition, Rosenband testified:

Q.: And you had received the IRS audit information request on November 14, 2003 ...?

A.: Yes, this is the letter I got and you see I was making notes on how to deal with it.

Q.: That's your handwriting?

A.: Yes.

Q.: And you say you basically sat on it?

A.: Yes. And then I called up [plaintiff] and told him he has to get somebody to do it.

(Rosenband dep., at 56).

In April 2005, plaintiff commenced this action against Levy alleging that Levy failed to properly prepare and timely file the IRS Form 706 return, resulting in significant damages to plaintiff. After serving his answer to the complaint, on or about November 2005, Levy filed a third-party complaint against Rosenband. Discovery was subsequently held, and a note of issue filed on or about May 20, 2008.

According to plaintiff, the depositions of Rosenband and Levy, which were held in January and February 2008, revealed, as discussed above, that Rosenband bears direct liability to plaintiff. As such, plaintiff seeks to add Rosenband as a direct defendant.

### Discussion

It is well settled that leave to amend a complaint should be freely granted at any time absent prejudice or surprise resulting directly from the delay to the defendant (see CPLR 3025 [b]; see also Liebowitz v Mount Sinai Hosp., 296 AD2d 340, 342 [1<sup>st</sup> Dept 2002]; Tishman Constr. Corp. of New York v City of N.Y., 280 AD2d 374, 377 [1<sup>st</sup> Dept 2001]). Further, leave to amend a complaint to add a third-party defendant as a direct defendant is granted by the courts where the third-party defendant participated in the litigation and is thereby no worse off than it would have been had the amended complaint been served as of right (Duffy v Horton Mem. Hosp., 66 NY2d 473, 477-78 [1985] [citation omitted]). Here, Rosenband was brought into this action as a third-party defendant prior to the commencement of discovery and is actively participating in this litigation. Specifically, Rosenband has actively participated in discovery and court conferences, including serving a subpoena for the deposition of non-party Elizabeth Borer.

While Rosenband contends that the third-party claims are limited to indemnification and/or contribution, the third party complaint alleges that "[a]ny failure to timely file the IRS Form 706 [return] was due to the inaction of plaintiffs themselves and/or their agent", i.e., Rosenband (see third-party complaint, ¶ 11, Bernstein Aff., Exh. C). It therefore, cannot be said that

Rosenband did not have adequate notice. Additionally, there has been no showing of prejudice (see Abdelnabi v New York City Trans. Auth., 273 AD2d 114, 115 [1<sup>st</sup> Dept 2000], citing Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981]).

As Rosenband concedes, a direct claim asserted against a third-party defendant relates back to the date of service of the third-party complaint for statute of limitations purposes (Duffy, 66 NY2d at 478; Peretich v City of New York, 263 AD2d 410, 411 [1<sup>st</sup> Dept 1999]). In professional negligence cases, the statute of limitations is three years (see CPLR 214 [6]; see also Williamson v PricewaterhouseCoopers LLP, 9 NY3d 1, 7 [2007]).

Here, Rosenband argues that the third-party claim against it is untimely. Specifically, Rosenband argues that the statute of limitations begins to run from December 6, 2001, the date the IRS Form 706 return was due to be filed. Rosenband argues that therefore, the third-party complaint was due to be filed no later than December 6, 2004. The third-party complaint was filed on November 14, 2005, which would render it untimely.

Plaintiff, however, argues that the third-party complaint is timely under the "continuous representation doctrine." "[U]nder the continuous [representation] doctrine, 'when the course of [the relationship] which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint,' the limitations period does not begin to

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run until the end of the [relationship]" (Williamson, 9 NY3d at 8, quoting Borgia v City of New York, 12 NY2d 151, 155 [1962]). The continuous representation doctrine, which is applicable in actions against accountants, "must be in connection with the specific matter directly in dispute, and not merely the continuation of a general professional relationship" (Ackerman v Price Waterhouse, 252 AD2d 179, 205 [1<sup>st</sup> Dept 1998]).

Plaintiff contends that Rosenband continuously represented its interests with respect to the Trust and the IRS Form 706 return, at least until November 2003 - the date in which Rosenband admits working on the matter (Rosenband dep., at 56). Using this date, under the continuous representation doctrine, the statute of limitations would expire in November 2006. The third-party complaint was filed on November 14, 2005. Therefore, as plaintiff argues, the third-party action is timely and the motion to amend the caption should be granted (Ackerman, 252 AD2d at 205).

As such, plaintiff's motion to amend the complaint is granted.

#### Conclusion

Accordingly, it is

ORDERED that the motion to amend the complaint by plaintiff Joseph Damone is granted, and the caption is amended to appear as follows:

[\* 8 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
JOSEPH DAMONE, Individually, and as Trustee  
of the Joseph A. San Fillipo Generation  
Skipping Trust,

Plaintiff,

Index No.:  
104885/05

- against -

JOEL LEVY and JERRY ROSENBAND,

Defendants.

-----X  
JOEL LEVY,

Third-Party Plaintiff,

Index No.:  
57113/05

- against -

JERRY ROSENBAND,

Third-Party Defendant.

-----X;  
and it is further

ORDERED that counsel for plaintiff shall serve a copy of  
this order with notice of entry upon the Clerk of the Court and  
upon the Clerk of the Trial Support Office (Room 158), who are  
directed to amend their records to reflect such change in the  
caption herein; and it is further

ORDERED that the motion for leave to amend the complaint by  
plaintiff is granted, and the amended complaint in the proposed  
form annexed to the moving papers shall be deemed served upon

service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant/third-party defendant Jerry Rosenband shall serve an answer to the amended complaint within 20 days from the date of said service; it is further

ORDERED that any additional discovery demands shall be served within 45 days of entry of this order, with responses to be supplied within 20 days of receipt; it is further

ORDERED that should Rosenband seek a further deposition of plaintiff, plaintiff shall be notified within 45 days of entry of this order, and plaintiff shall submit to a further deposition on or before January 30, 2009; it is further

ORDERED that the above limited discovery shall be conducted while this case remains on the trial calendar; it is further

ORDERED that within 20 days of entry of this order, plaintiff shall serve a copy of this order upon all parties, with notice of entry.

Dated: 12/3/2008

ENTER:

J.S.C.

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NEW YORK