

Grskovic v Cecere

2011 NY Slip Op 33727(U)

August 12, 2011

Sup Ct, Westchester County

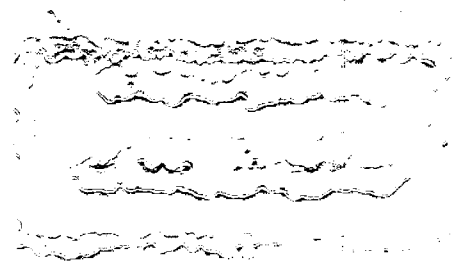
Docket Number: 51292/11

Judge: J. Emmett Murphy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

P R E S E N T: HON. J. EMMETT MURPHY
SUPREME COURT JUSTICE

-----X

VINKO GRSKOVIC,
Plaintiff,

SHORT FORM ORDER

-against-

Index No. 51292/11
Motion Date: July 27, 2011

JAMES CECERE,
Defendant.

-----X

The following papers numbered 1 to 17 were read on this motion brought by order to show cause by plaintiff Vinko Grskovic seeking an Order pursuant to CPLR 2001 granting leave to deem the summons and notice with verified complaint filed nunc pro tunc as of May 4, 2011:

<u>Papers</u>	<u>Numbers</u>
Order to Show Cause/Affirmation/Affidavit;	1 - 3
Affirmation in Opposition;	16
Replying Affirmation;	17
Exhibits;	4 - 15

Upon the foregoing papers, it is hereby ORDERED that, for the reasons that follow, the plaintiff's motion is denied.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a vehicular accident occurring on May 30, 2008 when his vehicle was struck head on by the vehicle operated by the defendant, when it crossed over the marked double yellow line and collided with plaintiff in plaintiff's lane of travel.

In this application, plaintiff asserts that on January 29, 2010 he retained counsel to represent him and that on January 3, 2011, counsel received a letter from defendant's insurance carrier, denying liability on the basis that the defendant "suffered an unforeseen medical event"

which rendered him not responsible for the event. On April 25, 2011, plaintiff's counsel sent Gotham Process Service, Inc., the original and two copies of the summons and complaint naming the defendant, together with a check for \$210 to purchase an index number to commence this action. According to plaintiff's counsel, a representative of Gotham Process Service, Inc., called counsel's office on May 2, 2011 and informed him that as of March 1, 2011, this action was subject to the mandatory e-filing requirements.

According to the affidavit of Elizabeth Maruri-Haz, the case manager for the New York litigation department of Davis Saperstein & Salomon, attorneys for plaintiff, she created a user account for Marc C. Saperstein of Davis Saperstein & Salomon and was issued, by e-mail, a temporary user account identification and password. In a second e-mail from New York State Courts E-Filing (NYSCEF), Ms. Maruri-Haz was advised that the temporary password needed to be reset. She avers that she did as instructed and that she completed and faxed a User Registration Form as an authorized agent and was issued a user identification and password. Ms. Maruri-Haz states that she "proceeded to electronically file the Summons and Complaint using the temporary user account ID and re-set password, including the credit card information for the index number" and she contends that she received a confirmation and receipt, both of which are annexed to movant's application. Between May 4, 2011 and June 2, 2011, Ms. Maruri-Haz states that she called the Office of the Westchester County Clerk to obtain the index number assigned to the instant action. Initially, she avers, she was told that "the Summons and Complaint did not get to their office yet." When she called again on June 2, 2011, Ms. Maruri-Haz states that she was told to contact NYSCEF's office directly. In so doing, Ms. Maruri-Haz avers that she sent an e-mail to NYSCEF, attaching copies of the confirmation and e-filing receipt she received on May 4, 2011 and was later contacted by a NYSCEF representative who told her that she had not filed the action in the "live" system but rather in the "practice/training" system and thus, that the action had not been filed. Ms. Maruri-Haz avers that the NYSCEF representative further informed her that she could not e-file on behalf of Mr. Saperstein unless he actually had a user identification and password. Ms. Maruri-Haz avers that since Mr. Saperstein had been issued a temporary user identification and temporary password, she believed that she had duly filed the summons and complaint in this action and that she had no idea that the purpose of the temporary user identification and temporary password was for practice and training.

Since this action was not properly e-filed until June 7, 2011 and the statute of limitations expired on May 30, 2011, plaintiff has brought this motion seeking leave to deem the summons with notice and verified complaint filed nunc pro tunc as of May 4, 2011, the date in which it was inadvertently filed in NYSCEF's practice/training mode. Defendant opposes the application and argues that, having not received an index number, plaintiff's counsel was on notice that an error had been made and that defendant should not be prejudiced by inexcusable law office failure on the part of plaintiff's counsel.

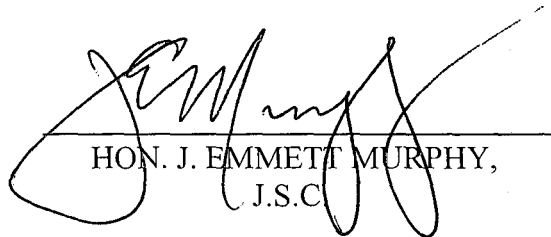
An action to recover damages for personal injuries must be commenced within three years of the date of the incident (CPLR 214[5]). Plaintiff's accident occurred on May 30, 2008 and thus this action, which was not properly filed until June 7, 2011, was not commenced until after the expiration of the statute of limitations. Plaintiff's counsel, who immediately brought this motion the following day seeking relief under CPLR 2001, argues that the law office failure that occasioned the late filing was innocent, technical and entirely non-prejudicial.

In determining whether to permit the correction of an error made with respect to the commencement of an action or whether to disregard the error, the Court must consider whether, if the correction is permitted or the mistake disregarded, a substantial right of the defendant would be prejudiced (*see MacLeod v. County of Nassau*, 75 AD3d 57 [2d Dept., 2010]). While plaintiff insists he merely asks the Court to disregard a non-prejudicial procedural misstep, to deem the action filed as of May 4, 2011 would effectively deprive defendant of a viable statute of limitations defense. The remedial language of CPLR 2001 is unavailable to cure the error of plaintiff's counsel since the failure to file the initiatory papers within the statute of limitations is a nonwaivable jurisdictional defect (*see Goldenberg v. Westchester County Healthcare Corp.*, 68 AD3d 1056 [2d Dept., 2009]; *Matter of Miller v. Waters*, 51 AD3d 113, 117-118 [2d Dept., 1995]). Since the filing of the summons and complaint interposes the claim for the purposes of determining whether the statute of limitations is satisfied, the failure to do so is more than a mere technical infirmity (CPLR 203[c][1]); *see Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 100 [2001]; *Fry v. Village of Tarrytown*, 89 NY2d 714 [1997]; *Matter of Spodek v. New York State Commr. of Taxation & Fin.*, 85 NY2d 760 [1995]).

In this case, the index number was not actually obtained nor was the filing fee paid until June 7, 2011 and thus, since the action was not properly commenced prior to the expiration of the statute of limitations, plaintiff's omission may not be cured by a nunc pro tunc order since a judicial extension of the statute of limitations would necessarily prejudice a substantial right of the defendant (*see Stenger v. Town of Carmel Zoning Bd. of Appeals*, 260 AD2d 641 [2d Dept., 1999]).

Accordingly, the plaintiff's motion is denied.

Dated: White Plains, New York
August 12, 2011



HON. J. EMMETT MURPHY,
J.S.C.

TO:

DAVIS SAPERSTEIN & SALOMON, P.C.
Luis L. Haquia
39 Broadway, Suite 520
New York, NY 10006

LAW OFFICES OF KAREN L. LAWRENCE
Michelle R. Kolodny
660 White Plains Road, Suite 200
Tarrytown, NY 10591