

**Russell v Adams**

2012 NY Slip Op 30630(U)

March 15, 2012

Sup Ct, Greene County

Docket Number: 10-1707

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

STACEY RUSSELL and SUSAN RUSSELL,

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 10-1707**  
**RJI NO. 19-10-5395**

MARK R. ADAMS; RAYMOND E. ADAMS;  
VINCENT MELAPIONI; ANNA MELAPIONI;  
SANTO ASSOCIATES LAND SURVEYING AND  
ENGINEERING, P.C.; ALTON P. MACDONALD, JR.;

Defendants.

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Supreme Court Greene County All Purpose Term, March 1, 2012  
Assigned to Justice Joseph C. Teresi

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**TERESI, J.:**

Plaintiffs commenced this action in October 2010. Issue was joined by all Defendants,

discovery is complete and a Note of Issue was filed on August 3, 2011. The trial of this matter is set to begin on March 26, 2012.

Defendants Mark and Raymond Adams (hereinafter “the Adamses”) now move for summary judgment pursuant CPLR §3212, and to consolidate this action with another action captioned Adams v. Schneider (Index No: 11-988) pursuant to CPLR §602. Additionally, Defendants Santo Associates Land Surveying and Engineering, PC and Alton P. MacDonald, Jr. (hereinafter “Santo Defendants”) move to dismiss the complaint as time barred pursuant to CPLR §3211(a)(5). Plaintiffs oppose the motions. Because the Adamses’ summary judgment motion is untimely it is denied. However, the Adamses demonstrated their entitlement to consolidation and the Santo Defendants established their entitlement to dismissal.

Considering first the Adamses’ summary judgment motion, CPLR §3212(a) requires all summary judgment motions to be made “no later than one hundred twenty days after the filing<sup>1</sup> of the note of issue, except with leave of court on good cause shown.” Noncompliance requires denial of the motion. (Brill v City of New York, 2 NY3d 648, 652 [2004]; Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Coty v County of Clinton, 42 AD3d 612 [3d Dept. 2007]; Town of Kinderhook v Slovak, 47 AD3d 1093 [3d Dept. 2008]; Harrington v Palmer Mobile Homes, Inc., 71 AD3d 1274 [3d Dept. 2010]).

As previously held in this Court’s February 1, 2012 Decision and Order herein, the Note of Issue in this action was filed on August 3, 2011. Because the Adamses did not make this motion until January 27, 2012 (CPLR §2211), their motion violates CPLR §3212(a)’s one

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<sup>1</sup> 22 NYCRR 202.21(a) requires “the original note of issue... [to] be filed in duplicate with the county clerk.”

hundred twenty day time period and must be denied unless good cause for the delay is shown.

On this record, the Adamses failed to demonstrate good cause. Their attorney alleges that he did not take over the Adamses defense in this matter until October 2011,<sup>2</sup> that he encountered unspecified difficulties in communication with the Adamses and that this matter, with its related proceedings, is complex. Such allegations, however, raise nothing more than an insufficient “perfunctory claim of law office failure.” (Azcona v. Salem, 49 AD3d 343 [1st Dept 2008]; Hurley v Best Buy Stores, L.P., 71 AD3d 559 [1st Dept 2010]; Breiding v Giladi, 15 AD3d 435 [2d Dept 2005]; Baldessari v Caines, 61 AD3d 904, 905 [2d Dept 2009]).

Accordingly, the Adamses summary judgment motion is denied.

Considering next the Adamses’ consolidation motion, while they demonstrated their entitlement to consolidation of this action with the Adams v. Schneider (Index No: 11-988) action they set forth no factual basis to adjourn the trial of this matter.

“[C]onsolidation is favored by the courts” (Guasconi v Pohl, 2 AD3d 1202, 1203 [3d Dept 2003], quoting Fransen v Maniscalco, 256 AD2d 305, 306 [2d Dept 1998]) and “absent a demonstration by the opposing party of prejudice to a substantial right, the existence of common questions of law or fact warrants the granting of the motion.” (Marshall v Monegro Investors, 132 AD2d 651, 652 [2d Dept 1987]).

Here, the Adamses demonstrated common questions of fact and law. Both actions are premised upon the Adamses’ claim that they possess an easement, allegedly derived from an 1836 deed, over two adjoining parcels of real property owned by Plaintiffs and Susan Schneider.

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<sup>2</sup> The Consent to Change Attorneys the Adamses filed was executed on October 3, 2011, two months prior to the CPLR §3212(a)’s one hundred twenty day time period expiring. The two month delay is not explained.

In this action Plaintiffs seek a declaration that the Adamses have no such easement, with the Adamses asserting a counterclaim for the declaration of the easement's existence. Relatedly, in the Adams v. Schneider (Index No: 11-988) action the Adamses seek a declaration of their right to an easement over Ms. Schneider's property by operation of the 1836 deed, with Ms. Schneider setting forth a counterclaim for a declaration that the Adamses have no such easement. All facts and law are essentially identical in both actions, warranting consolidation.

In opposition, Plaintiffs' attorney, who also represents Ms. Schneider in the Adams v. Schneider (Index No: 11-988) action, failed to set forth a factual basis for her prejudice claim. Plaintiffs argue, almost exclusively, that they would be prejudiced by consolidation because the trial will be delayed. However, as the trial of this matter is not being delayed, this prejudice argument is unfounded. (*see generally* Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc., 11 AD3d 494 [2d Dept 2004] Fransen v Maniscalco, 256 AD2d 305 [2d Dept 1998], Guasconi v Pohl, *supra*). Conspicuously absent from Plaintiffs' prejudice argument is an allegation that there are discovery demands outstanding in the Adams v. Schneider (Index No: 11-988) action or a specification of the discovery that needs to be done. While Plaintiffs' counsel correctly notes that this motion should not have been delayed until the eve of trial, she failed to demonstrate that her clients will be prejudiced by consolidation.

Although the Adamses established their entitlement to consolidation, they set forth no facts to support their request for an adjournment of the trial date. Similar to Plaintiffs' proof, the Adamses did not specify any incomplete discovery in the Adams v. Schneider (Index No: 11-988) action. Nor did they set forth any legal reason for the adjournment. As such, their conclusory request for an adjournment is denied and the trial of these consolidated matters shall

commence on March 26, 2012. The order of trial shall be determined by the assigned Judge.

Turning next to the Santo Defendants' motion, they demonstrated their entitlement to dismissal of the complaint pursuant to CPLR §3211(a)(5).

“To dismiss a cause of action pursuant to CPLR 3211(a)(5), on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired.” (Morris v Gianelli, 71 AD3d 965, 967 [2d Dept. 2010] quoting Savarese v Shatz, 273 AD2d 219 [2d Dept 2000]; see also Siegel v Wank, 183 AD2d 158 [3d Dept 1992]; Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., 168 AD2d 822 [3d Dept. 1990]). Once the defendant has met this threshold requirement, “the burden shifts to the [plaintiff] to aver evidentiary facts establishing that the case at hand falls within [an exception to the statutory period.]” (Hoosac Val. Farmers Exch. v. AG Assets, supra at 823).

On this record, the Santo Defendants met their prima facie burden. Plaintiff's complaint alleges that the Santo Defendants negligently created a survey dated March 17, 2005. As such, Plaintiffs' negligence/malpractice cause of action against the Santo Defendants accrued on March 17, 2005. The complaint alleges no further acts of negligence or malpractice. Because this action was not commenced until October 28, 2010, the Santo Defendants established that CPLR §214(6)'s three year statute of limitations expired prior to commencement.

With the burden shifted, Plaintiffs failed to proffer sufficient evidentiary facts to establish an exception to the statute. Preliminarily, Plaintiffs are incorrect that this motion to dismiss is untimely. CPLR §3211 contains no limitation on when a statute of limitations motion to dismiss may be made, the cases Plaintiffs cite are inapposite and this Court's Scheduling Order did not

require this motion to be made earlier.<sup>3</sup> Plaintiffs similarly failed to demonstrate that the statute of limitations was tolled by the Santo Defendants' continuous representation of them. Plaintiffs singularly rely on Defendant MacDonald's use of the file he created for Plaintiffs, when drafting a 2008 letter. Assuming such assertion to be true, it does not demonstrate a continuing professional relationship, a course of representation or that the parties shared a mutual understanding that the relationship would continue. (City of Binghamton v Hawk Eng'g, P.C., 85 AD3d 1417, 1420 [3d Dept 2011] lv to appeal denied, 17 NY3d 713 [2011]; Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP, 9 NY3d 1 [2007]). Thus, Plaintiffs failed to proffer admissible proof of an exception to the statute of limitations.

Accordingly, the Santo Defendants' motion to dismiss is granted.

This Decision and Order is being returned to the attorneys for the Santo Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
March 15, 2012



Joseph C. Teresi, J.S.C.

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<sup>3</sup> The Scheduling Order states that "dispositive motion(s) shall be made returnable... per CPLR." Although a summary judgment dispositive motion is subject to a CPLR time limitation (CPLR §3212[a]) a CPLR §3211(a)(5) statute of limitations motion to dismiss is not so limited by any CPLR provision. As such, the Scheduling Order's "dispositive motion" provision did not limit the time for making this motion.

**PAPERS CONSIDERED:**

1. Notice of Motion, undated, Affirmation of Ralph Lewis, dated January 26, 2012, with attached Exhibits A-G; Affidavit of Charles Foote, dated January 24, 2012, with attached Exhibits A-D; Affidavit of Gary Harvey, dated January 26, 2012, with attached Exhibits A-B; Affidavit of Alton MacDonald, dated January 24, 2012, with attached Exhibits A-B.
2. Affirmation of Sarah Schneider, dated February 14, 2012, Affidavit of Kenneth Schwartz, dated February 8, 2012 with attached Exhibits A-L.
3. Affirmation of Ralph Lewis, dated February 23, 2012.
4. Notice of Motion, dated January 18, 2012, Affidavit of Alton MacDonald, dated January 31, 2012, with attached Exhibits A-D.
4. Affirmation of Sarah Schneider, dated February 20, 2012, with attached Exhibit A.
5. Affirmation of Robert Deily, dated March 1, 2012.
6. Notice of Motion, undated, Affirmation of Ralph Lewis, dated January 25, 2012, with attached Exhibits A-F.
7. Amended Notice of Motion, undated, Affirmation of Ralph Lewis, dated February 9, 2012, with attached Exhibits A-H.
8. Affirmation of Sarah Schneider, dated February 14, 2012, with attached Exhibits A-E.