

Brunero v Central Park Conservancy
2014 NY Slip Op 32701(U)
October 10, 2014
Supreme Court, New York County
Docket Number: 155936/13
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

NICHOLAS BRUNERO,

Plaintiff,

Index No.: 155936/13

Motion Date: _____

- v -

Motion Seq. No.: 01

THE CENTRAL PARK CONSERVANCY,

Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
	1
	2, 3
	4, 5

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant the motion of the defendant to dismiss the complaint on the grounds of statute of limitations. There is no dispute that this personal injury action was filed against this defendant more than three years after its accrual. See CPLR 214 (5). The plaintiff however argues that due to the conduct of the Corporation Counsel in representing the City of New York in a related action the defendant here, The Central Park Conservancy (the "Conservancy"), also being represented by the Corporation Counsel, should be equitably estopped from relying upon the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SETTLE/SUBMIT ORDER/JUDG.

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

limitations defense.

Plaintiff alleges that he suffered injuries from a bicycle accident that occurred in Central Park when Nicholas Marotta drove a City maintenance vehicle in a manner that caused the accident. The accident occurred on July 8, 2009, a Notice of Claim was filed with the City of New York on August 19, 2009, and plaintiff commenced an action against the City on June 8, 2010 (Brunero v City of New York, Index No.: 107565/2010, Sup Ct, NY County, Wright, J., ["Brunero I"]).

As stated by the Justice in Brunero I in an Order dated March 27, 2013, "[a]fter some difficult and prolonged discovery, the Plaintiff was advised that Mr. Marotta was not a City employee, but an employee of the Central Park Conservancy. As of the making of this motion, the time to serve the Central Park Conservancy has expired." In that Order the court denied plaintiff's motion to amend the complaint to add the Conservancy as a party to that action. Although the court's Order was without citation, the text of the court's decision makes it clear that the court's decision was based upon plaintiff's failure to demonstrate that he was entitled to use the relation back doctrine set forth in CPLR 203 (c) because the failure to make timely service upon the Conservancy "was not due to a mistake on the part of plaintiff in identifying the proper parties. Rather, it was due to plaintiff's failure to timely request the [] record

and ascertain [putative defendant's] identity." Tucker v Lorieo, 291 AD2d 261, 262 (1st Dept 2002).

In opposition to the current motion, plaintiff argues that the discovery delays it asserts were caused by the Corporation Counsel's office in Brunero I should equitably estop the Conservancy from asserting the expiration of the limitations period as a defense since Corporation Counsel is similarly representing the Conservancy. Plaintiff argues that the failure of the Corporation Counsel to inform it that Marotta was not a City employee until after the expiration of the limitations period constitutes the type of act justifying the application of equity to prevent the Conservancy from invoking the limitations period to the detriment of the plaintiff.

The legal principal as set forth by the Court is that

It is well established that where a defendant induces a plaintiff to refrain from instituting an action, either by false statements of fact or by active concealment of the true facts, he may be estopped from using the Statute of Limitations to dismiss an otherwise untimely suit against him. Where the estoppel is based upon an actual misrepresentation by defendant, the plaintiff is required to allege that justified reliance upon the misrepresentation was the reason for not timely starting the action. Similarly, where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing an action within the Statute of Limitations, the courts have invoked estoppel only where there was a fiduciary relationship which gave defendant an obligation to inform plaintiff of facts underlying the claim.

Where the injured party is simply unaware that a cause of action is available to him, either due to lack of diligence on his own part or because of the difficulty of discovering the injury, the courts have not applied the

doctrine of equitable estoppel. A party against whom a claim exists is not, without more, under a duty to inform the injured party thereof, and such failure to inform does not constitute the kind of fraudulent concealment which gives rise to an estoppel.

Jordan v Ford Motor Co., 73 AD2d 422, 423-24 (4th Dept 1980)

(citations omitted).

Plaintiff in opposition to defendant's application to dismiss has failed to proffer facts warranting the imposition of any estoppel against the defendant. Even assuming the facts as alleged by the plaintiff are true as regards the conduct of the Corporation Counsel in Brunero I, the court in Brunero I noted that "although the name of Mr. Marotta was apparently known ab initio, he has not been named or served. That action alone might have garnered the information about his employment at a much earlier stage in the litigation." Id. Plaintiff has therefore not only failed to establish that there was any duty on the part of this defendant to notify him of a possible claim, but plaintiff, knowing the identity of defendant's employee, failed to take steps, such as naming the employee as a party, which would have led to the discovery of the Conservancy as the employee's employer.

Accordingly, it is

ORDERED that defendant's motion to dismiss is GRANTED and the complaint and this action is DISMISSED in its entirety and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: October 10, 2014

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.