

Martin v Witkowski
2014 NY Slip Op 33907(U)
January 14, 2014
Supreme Court, Erie County
Docket Number: 2013-802483
Judge: Thomas P. Franczyk
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**STATE OF NEW YORK
COUNTY OF ERIE
SUPREME COURT**

**ANTOINE MARTIN II
PLAINTIFF**

v.

**DECISION & ORDER
INDEX # 2013 - 802483**

**WALTER WITKOWSKI
DEFENDANT**

APPEARANCES:

**Jeanne M. Vinal, Esq.
Vinal & Vinal, P.C.
193 Delaware Avenue
Buffalo, NY 14202
For the Plaintiff**

**James J. Nash, Esq.
Cohen & Lombardo, P.C.
343 Elmwood Avenue
P.O. Box 5204
Buffalo, NY 14213 - 5204
For the Defendant, Walter S. Witkowski, Jr.**

**Scott J. Bizub, Esq.
Law Office of Epstein, Gialleonardo and Hartford
2350 North Forest Road, Suite 7A
Getzville, NY 14068
For the Defendant, Walter S. Witkowski, Sr.**

The defendant, Walter Witkowski, Jr. moves pursuant to CPLR 1003 and 3211 (a) (8) to dismiss this complaint on the grounds that the plaintiff erroneously commenced the action by service of summons and complaint upon his father Walter Witkowski, Sr. (who had no

involvement in the motor vehicle accident giving rise to this lawsuit), and then, without obtaining leave to supplement the complaint by adding him as a defendant, served him beyond the statute of limitations. In his view, the defendant's non-compliance with CPLR 1003 is jurisdictional in nature (Crock v. E.I Dupont de Nemours and Co. 81 NY 2d 807 [1993]) and, therefore, requires dismissal of the complaint.

The plaintiff contends that his intention was to sue the Walter Witkowski who was involved in the accident and that while the defendant was improperly served at his prior address on October 30, 2013, he was properly served at his correct home address on November 23, 2013, well within 120 days of the filing of the summons and complaint (listed on the RJ1 at October 22, 2013) in compliance with CPLR 306 - b.

The summons and complaint name as the defendant "Walter Witkowski of 121 Pearl Street, Buffalo, NY." The complaint alleges that on November 4, 2010, the plaintiff was operating his motor vehicle through the intersection of Grider and Sussex in Buffalo with the right of way when he was struck by a motor vehicle with New York State license plates, owned and operated by Walter Witkowski. He alleges that the accident was caused by the negligence of Mr. Witkowski which resulted in serious injury to the plaintiff.

Plaintiff's counsel reportedly received the case from his personal attorney on June 4, 2013. On that day, counsel sent a letter to Donegal Insurance advising of their representation of Mr. Martin and requesting information as to coverage and policy limits. Donegal responded by letter of June 10, 2013 with coverage information and a request for medical releases and completion of Medicare forms. The caption lists the insured, "Walter Witkowski," the claim number, date of loss, 11/4/10 and claimant, "Antoine Martin." Counsel states that the adjuster

referred to its insured as Walter Witkowski.

Counsel also performed an "Accurint Lexis Nexis" search and noted that neither party (father or son) used "Junior or Senior." It should be noted, however, that entries # 5 and # 6 respectively on the search (Plaintiff's Exhibit A), show "Walter S. Witkowski, DOB 10/xx/1922 [91] of 121 Pearl Avenue, Blasdell, NY 14219 and Walter S. Witkowski, Jr. DOB 10/xx/1950 [63] residing at 205 Glenwood Rd., West Falls, NY, 14170." Both entries are designated as "probable current address." Entry # 20 also lists Walter S. Witkowski, Jr. as having a P.O. box in West Falls.

According to an affidavit of service (Defendant's Exhibit B), on October 30, 2013 service upon Walter Witkowski was effected upon one Matthew Putnam, (described as the defendant's 35 year-old "co-tenant, grandson") at 121 Pearl Street in Blasdell, NY.

Thereafter, upon learning from counsel for Walter Witkowski, Jr. that Sr. was not involved in the accident on November 23, 2013, the summons and complaint were served upon Walter Witkowski, Jr. (still referred to as Walter Witkowski), via his wife, Denise Witkowski at their dwelling at 205 Old Glenwood Rd. in West Falls. (Defendant's Exhibit C).

In an affidavit of December 3, 2013, Walter Witkowski, Jr. states that he has not lived at 121 Pearl Avenue in Blasdell since the 1960's and that service upon Matthew Putnam (his nephew) at his father's address and certified mailing to that address did not effect service upon him since neither Matthew nor his father were authorized to accept process on his behalf. He further notes that he has resided at the West Falls address for over thirty years and that his address has been listed on his driver's licence, registration and insurance (which presumably were provided to the plaintiff at the time of the accident) for several years.

Plaintiff's counsel argues that the correct defendant's insurance carrier had notice of the accident, submitted an answer on his behalf through counsel and that the defendant, who acknowledges his involvement in the accident, (per his affidavit of 12/3) was timely and properly served.

According to counsel for Walter Witkowski, Sr. (Scott Bizub, Esq.), after Sr. was served with the summons and complaint, the matter was turned over to Sr.'s carrier, Harleysville Insurance who, in turn, retained counsel (Bizub) to represent him. Counsel learned that Mr. Nash was also representing Mr. Witkowski (not then knowing it was Jr.), and had submitted an answer on his behalf. On December 3, 2013, Mr. Nash and the Power of Attorney for Sr. executed an affidavit consenting to transfer Sr.'s representation to Mr. Bizub. On December 9, 2013, an amended answer was submitted on Sr.'s behalf alleging, inter alia, that he was not a proper party. (Counsel for Jr. notes that he had interposed an answer on Jr.'s behalf to avoid a default). By letter of December 9, 2013, Jr.'s counsel advised plaintiff's counsel that the wrong party had been served.

Analysis and Conclusion

Plaintiff's counsel contends that suit was timely commenced under CPLR 306-b. That section states that "(s)ervice of the summons and complaint... shall be made within 120 days of filing of the summons and complaint. Here, while the three year statute of limitations in this personal injury action (CPLR 214 [5]) expired on November 4, 2013, the summons and complaint were filed on October 22, 2013 and the defendant (Walter Witkowski, Jr.) was served with the summons and complaint 32 days later on November 23, 2013.

Defendant's counsel argues, however, that since the wrong person (Walter Witkowski,

Sr.) was named as defendant in the first instance (as evidenced by the listing of his address on the summons and complaint served upon him via his grandson at that address), CPLR 306-b does not provide an avenue for extended service upon the right person (Walter Witkowski, Jr.) who was not named in the complaint.

In the defendant's view, the proper road to relief, not taken by the plaintiff, was to obtain leave of court under CPLR 1003 to add him as a party to the action and obtain jurisdiction over him by timely service of a summons and complaint. Failing that, he contends, service of the same summons and complaint against "Walter Witkowski" was a nullity, and the time to bring suit against had since expired.

Plaintiff's counsel contends that their intention all along was to sue the Walter Witkowski who operated the motor vehicle that was involved in the accident with Antoine Martin on November 4, 2010 and that the intended defendant (who was named in the complaint), was served, albeit erroneously, via substitute service on October 30, 2013 at his former address, and then properly at his current address on November 23, 2013. Moreover, counsel notes that the defendant's own insurance company referred to him as "Walter Witkowski" with no designating suffix, and interposed an answer on his behalf.

While this court has no doubt that the plaintiff intended to sue the Walter Witkowski who was involved in this accident, it is evident that neither he nor his counsel knew exactly who Walter Witkowski was or where he resided when the lawsuit was filed. Counsel appears to have assumed, based on the carrier's designation of its insured with no reference to Jr. or Sr. (even though their own investigation revealed the existence of both a Sr. and a Jr.), that it must have been the Walter Witkowski who resided on Pearl Street because that's the one who was named in

the summons and complaint and who was served on October 30, 2013. Moreover, it was not until counsel was informed by opposing counsel that the wrong person was sued, the service was effected upon the right person on November 23, 2013. (While the insurance company's silence on the issue undoubtedly added to the confusion, its knowledge of the case and correct party does not, ipso facto, translate into jurisdiction over its insured when suit is commenced against a different person who happens to have the same name).

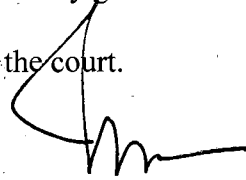
In this court's view, once counsel was made aware of the true identity of the person actually involved in the accident, leave should have been sought to supplement the summons and complaint by naming him as a party rather than by just serving him with the same summons and complaint previously served upon his father. As in Jordan v. Lehigh Construction Group 258 AD 2d 962 (4th dept. 1999), "(t)his is not a case where a party is misnamed," but rather, one where the wrong party was sued. (See also Brown v. Marine Midland Bank 224 AD 2d 1016 [4th dept. 1996]). Under the circumstances, it cannot be said that jurisdiction was timely obtained over the son under CPLR 306-b when the summons and complaint that had been filed were brought against the father. (See Henriquez v. Inserra Supermarkets, Inc. 68 AD 3d 927 [2nd dept. 2009]).

In contrast, see Wideman v. Barbel Trucking 300 AD 2d 184 (1st dept. 2006) where the plaintiff's application for an extension of time to serve the summons and complaint should have been granted in the interests of justice under CPLR 306-b where the summons and complaint, which were timely filed, misnamed the defendant "Barbel Trucking, Inc. a/k/a Barbell Trucking." See also Rivera v. Beer Garden, Inc. 57 AD 3d 479 (1st dept. 2008), where after the plaintiff's motion, (made after the statute of limitations expired), to amend the complaint to correct the

[*7]
defendant's name, was deemed to have been properly granted inasmuch as the summons and complaint were timely filed and the defendant, who knew it was the intended defendant, had been served (albeit in the wrong name) and was not prejudiced. This case, by contrast, is not a matter of the right party being misnamed but, rather, a matter of the wrong party being named in and served with a summons and complaint.

Accordingly, the motion of Walter Witkowski, Jr. to strike the summons and complaint served upon him and to dismiss him from this lawsuit is hereby granted.

This decision shall constitute the order of the court.



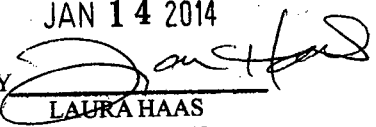
Thomas P. Franczyk
Acting Supreme Court Justice

dated: _____

GRANTED

JAN 14 2014

BY



LAURA HAAS
COURT CLERK