

Goodman v Skanska USA Civ., Inc.
2016 NY Slip Op 33045(U)
August 9, 2016
Supreme Court, Queens County
Docket Number: 710630/15
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

DALE R.F. GOODMAN, as trustee of the
Bankruptcy Estate of KWAME GORDON,
debtor-plaintiff,

Index No: 710630/15

Motion Date: 5/3/16

Plaintiff,

Motion Seq. No.: 1 & 2

-against-

SKANSKA USA CIVIL, INC., SKANSKA USA
CIVIL NORTHEAST, INC., TULLY CONSTRUCTION
CO., INC., SKANSKA/TULLY, a joint venture
and SCHLESINGER-SIEMENS ELECTRICAL, LLC,

Defendants.

FILED
AUG 15 2016
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion(Seq.#1) by defendants, Skanska USA Civil, Inc., Skanska USA Civil Northeast, Inc., Tully Construction Co., Inc. and Skanska/Tully and separate motion(Seq.#2) by defendant, SCHLESINGER-SIEMENS ELECTRICAL, LLC, for an Order dismissing the complaint pursuant to CPLR 3211(a)(2)(3)&(5) as this action is barred by the applicable statute of limitations and, in the alternative, an Order limiting the plaintiff's recovery to the value of the unsecured claims in the bankruptcy action plus reasonable expenses associated with the collection of that amount.

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Upon the foregoing papers it is ordered that these motions are denied in all respects.

Kwame Gordon (Gordon) was allegedly injured on May 4, 2011 in the course of his employment at the construction project for the construction of the Croton Water Treatment Plant in Bronx County. He commenced an action in this court on September 25, 2013 to recover for those injuries under Index No. 17925/13. During the course of discovery it was learned that, on July 31, 2013, before commencing the personal injury action, Gordon filed a Chapter 7 voluntary bankruptcy petition which resulted in a discharge of Gordon's debts by Order dated July 9, 2014. Gordon's personal injury action was dismissed by Order of Judge Butler, entered on April 17, 2015, on the ground that Gordon lacked capacity to bring the action on his own behalf.

The Bankruptcy action was reopened on June 17, 2015 and the plaintiff, Trustee of the Bankruptcy Estate of Gordon, commenced this action by filing on October 13, 2015. Defendants were served with process on October 14, 2015.

The defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(5)¹ on the ground that this action is barred by the statute of limitations having been commenced more than 3 years after accrual. Defendants further assert that neither 11 USC § 108 (a)(2) nor any New York State tolling or saving statute, in particular CPLR 205(a) applies so as to render this action timely.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the movants must establish, prima facie, that the time within which to commence the action has expired (New York City School Const. Authority v Admiral Const., LLC, 114 AD3d 914 [2014]). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (Matteawan on Main, Inc. v City of Beacon, 109 AD3d 590, 590 [2013]).

The defendants have failed to demonstrate that CPLR 205(a) is inapplicable and that the action was not timely commenced.

CPLR 205 (a) provides: "If an action is timely commenced and is terminated in any other manner than by a voluntary

¹Although the motions state that dismissal is also sought pursuant to CPLR 3211(a)(2) and (3), no basis for this relief is asserted in the moving papers.

discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

The defendants contend that that the plaintiff is not entitled to invoke CPLR 205(a) to commence this new action within the six-month period following the court's dismissal of the first action because the new action was not filed by Gordon or on the Gordon's behalf, since the Trustee in Bankruptcy does not represent the interests of Gordon, but solely the interests of the creditors of the bankruptcy estate.

The defendants' argument is without merit. The Trustee is the manager of the assets of the estate. The Trustee does what Gordon could himself have done except for the bankruptcy proceeding, which, in this case, is to undertake whatever action necessary to convert a personal injury cause of action into monetary damages, pay off the creditors and if there is a balance left, pay it over to Gordon. While the prior action was defective and rendered the action subject to dismissal having been brought by Gordon who no longer had capacity to do so by virtue of the bankruptcy proceeding, it was not the type of defect which precludes application of CPLR 205 (subd [a]). Although the named plaintiff in each case is different, i.e. they appear in a different capacity, the person on whose behalf relief is sought, the underlying circumstances, the claim and causes of action are the same in both actions (see Reliance Ins. Co. v PolyVision Corp. 9 NY3d 52, 57 [2007] see also George v Mt. Sinai Hosp., 47 NY2d 170, 178-179 [1979]; Pinto v Ancona, 262 AD2d 472 [1999]).

It is undisputed that the instant action was commenced within the six month extension provided by CPLR 205(a) and that the prior action was timely commenced. Thus, applying the six month extension provided by CPLR 205(a), the instant action is not untimely and the defendants' separate motions to dismiss on that ground are denied.

The branch of the defendants' respective motion for an Order limiting the amount of plaintiff's recovery is denied. The Trustee in Bankruptcy manages the assets of the bankruptcy estate

and acts for the benefit of the debtor and the creditors. It would be inequitable and unjust to preclude Gordon from bringing an action on his own behalf and at the same time limit the amount of damages recoverable by the Trustee, the only person authorized by the Bankruptcy Code to bring the action. Defendants have provided no authority to which authorizes such relief.

With respect to the branches of the motion seeking dismissal pursuant to CPLR 3211(a)(2) and (3) lack of subject matter jurisdiction and lack of capacity, the defendants have failed to demonstrate any basis for dismissal on these grounds and have submitted no argument in support.

Dated: August 9, 2016
D# 54

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J.S.C.

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QUEENS COUNTY