

<b>Koplinka-Loehr v County of Tompkins</b>
2020 NY Slip Op 34538(U)
January 22, 2020
Supreme Court, Tompkins County
Docket Number: EF2018-0351
Judge: Joseph A. McBride
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 22<sup>nd</sup> day of November, 2019.

PRESENT: HON. JOSEPH A. MCBRIDE  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TOMPKINS COUNTY

MICHAEL A. KOPLINKA-LOEHR,

Plaintiff,

-vs-

DECISION AND ORDER

Index No. EF2018-0351  
RJI No. 2018-0294-M

COUNTY OF TOMPKINS, ITHACA-TOMPKINS  
COUNTY TRANSPORTATION COUNCIL, and  
JOHN DOES 1-10,

Defendant(S).

APPEARANCES:

Counsel for Plaintiff:

Russell E. Maines  
109 Seneca Street  
Ithaca, NY 14850

Counsel for Defendant:

TOMPKINS COUNTY ATTORNEY  
By: Jonathan Wood, Esq.  
125 E. Court Street  
Ithaca, NY 14850

**JOSEPH A. MCBRIDE, J.S.C.**

This matter is before the Court to address the Defendants' Motion to Dismiss the Second Amended Verified Complaint and Plaintiff's Cross-Motion. Defendants County of Tompkins, Ithaca-Tompkins County Transportation Council, Martha Robinson and John Does 1-10 (collectively "Defendants") filed a Motion to Dismiss the Second Amended Verified Complaint adding a defamation claim against Martha Robinson as being filed outside of the statute of limitations. Plaintiff, Michael A. Koplinka-Loeher ("Plaintiff") filed opposition citing law office failure seeking the following relief: 1) vacating the Court's June 4, 2019 Order in this matter on the grounds of irregularity, 2) deeming the proposed amended complaint filed with his February motion to amend as having been filed *nunc pro tunc* within the statute of limitations, 3) deeming the June 4, 2019 entry of the Court's Order to have been entered when Plaintiff received actual notice of entry, and 4) authorizing Ms. Robinson as a defendant pursuant the relation back doctrine. The parties through their counsel appeared for oral argument on the motion on November 22, 2019. The Court received and reviewed moving papers filed electronically and maintained by the County Clerk and made a determination as discussed below.

**BACKGROUND FACTS**

The case before the Court appears to be a wrongful termination / rescission of an employment offer case and now defamation claim. Plaintiff originally filed a summons and complaint on June 18, 2018. Subsequently, on July 2, 2018, Plaintiff filed an amended complaint as of right pursuant CPLR 3025(a). On August 8, 2018, Plaintiff filed another summons and complaint under separate index number (EF2018-0515). This new case is nearly identical to the first complaint filed June 18 and arising out of the same occurrences. On October 4, 2018, the Court, signed by Hon. Molly Fitzgerald, granted Plaintiff's Motion to Consolidate the two indexed cases.

On February 5, 2019, Plaintiff filed a motion to amend the complaint seeking permission to file a Second Amended Verified Complaint to add a new party, Martha Robinson under a new legal theory (defamation). Plaintiff alleged that Ms. Robinson made defamatory statements on February 20, and 27, 2018 which caused Plaintiff's employment offer rescinded. The motion was returnable and argued on April 12, 2019. That motion was granted pursuant a Decision and Order signed by the Court dated June 4, 2019. The Decision and Order was uploaded and

entered by the Court via the NYSCEF system on June 4, 2019 at 10:44 am. At sometime in August, Plaintiff's attorney called the Court to inquire when the Decision and Order would be completed, to which he was informed the Decision and Order was entered on June 4, 2019. On August 21, 2019, Plaintiff filed he Second Amended Verified Complaint with the Court via the NYSCEF system and completed personal service on Ms. Robinson on August 28, 2019.

Defendants filed the current motion to dismiss arguing the claims against Ms. Robinson are untimely as a matter of law. Plaintiff files a cross-motion seeking permission to let the Second Amended Verified Complaint remain due to law office failure. First, Plaintiff seeks to extend the deadline for filing his second amended verified complaint until the date he received notice of the decision rather than the actual date of entry. Further, Plaintiff argues that when he filed and served the proposed second amended verified complaint along with his motion for leave to amend in February 2019, that shall be deemed sufficient notice.

#### ANALYSIS AND DISCUSSION

It is undisputed that the statute of limitations for a defamation cause of action expires one year after the alleged act of defamation. See CPLR §215(3); See also Ramsay v. Mary Imogene Bassett Hospital, 113 A.D.2d 149, 152 (3<sup>rd</sup> Dept. 1985). However, “the submission of a motion for leave to amend, properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments, tolls the statute of limitations, even though the amended complaint will not be filed until the court rules on the motion.” Perez v. Paramount Communs., 92 N.Y.2d 749, 755 (Ct. of App. 1999). Likewise, although the statute of limitations is tolled, just because the motion for leave to amend “included a copy of the proposed supplemental summons and amended complaint, [the inclusion is] not itself the interposition of the claim within the meaning of CPLR 203(a).” Id. at 755-56. Thus, the statute of limitations begins to run again as of “the date of entry of the order” that granted permission to add the defendant. See Id. at 756; see also Schlapa v. Consolidated Edison Co. of NY, Inc., 174 A.D.3d 934, 936 (2<sup>nd</sup> Dept. 2019).

Just recently in July 2019, the Second Department in Schlapa, contemplated a situation almost identical to the case at hand. The Schlapa Court held that “the toll encompasses only the period from the date the motion for leave to amend is filed until the date the order granting the

motion is entered.” 174 A.D.3d at 936. The Second Department further commented that “neither [an] extensive delay in preparing and serving the notice of entry nor any language contained in the Supreme Court’s [ ] Order granting leave to amend rendered the commencement of the action against the [ ] defendant’s timely.” Id.

Here, the Court is not persuaded by Plaintiff’s arguments. Plaintiff’s “law office failure” amounted to the office email system was down for one day on June 4, 2019. However, Plaintiff did not file the amended complaint or effectuate service for two and a half months after the date of entry of the order. Based on the Court of Appeals decision rendered in Perez and the further interpretation by the Second Department in Schlapa make it quite clear that the statute of limitations is a strict construct that is only tolled by a motion for leave to amend because the CPLR requires such motion for amendments. Neither mistake by counsel or language of the court can delay or change that statute of limitations. See Schlapa, 174 A.D.3d at 936. The Court is bound by the one-year statute of limitations that was tolled *only* from the period of the date of filing of the motion for leave to amend to the date of entry of the order. Further, as to Plaintiff’s argument that Defendants had notice in February when the proposed amendment was filed, the Perez Court makes clear that even though the proposed amendment is required for the motion for leave to amend, the accompanying documents do not constitute notice of the claim. Therefore, Defendants’ motion to dismiss the defamation claim against Ms. Robinson is GRANTED as time barred.

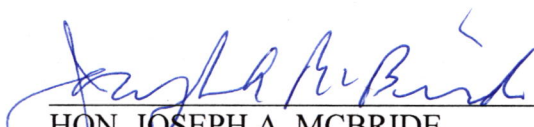
**CONCLUSION**

Based upon the foregoing, Defendants’ motion is GRANTED, and the Plaintiff’s cross-motion is DENIED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 1/22 2020  
Ithaca, New York

Entered 01/22/2020

  
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HON. JOSEPH A. MCBRIDE  
Supreme Court Justice