

**Bartlett v DeFrancisco**

2020 NY Slip Op 35359(U)

November 19, 2020

Supreme Court, Oswego County

Docket Number: Index No. EFC-2020-0532

Judge: Gregory R. Gilbert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK  
SUPREME COURT : COUNTY OF OSWEGO**

**JEFFREY BARTLETT,**

**Plaintiff,**

v.

**JEFF D. DEFRANCISCO,**

**Defendant.**

**DECISION & ORDER**

**Index No.: EFC-2020-0532**

**RJI No.: 37-20-0256**

**HON. GREGORY R. GILBERT, JSC**

**Appearances:** Kristi F. Reppel, Esq.  
Olinsky Law Group  
Attorneys for Plaintiff  
250 S. Clinton Street, Suite 210  
Syracuse, New York 13202

Devika P. Kapoor, Esq.  
Pillinger Miller Tarallo, LLP  
Attorneys for Defendant  
126 N. Salina Street, Suite 215  
Syracuse, New York 13202

**BACKGROUND**

This attorney malpractice action commenced May 20, 2020 by summons and unverified complaint is now met with a pre-answer motion to dismiss asserting CPLR §3211(a)(5) [statute of limitations]; CPLR §3211(a)(1) [documentary evidence]; and CPLR §3211(a)(7) [failure to state a cause of action]. Plaintiff has filed opposition on the motion together with a cross motion seeking to amend the complaint pursuant to CPLR §3025(b). Defendant opposes the cross motion on the basis that the same is still untimely under the applicable statute of limitations.

**STANDARD**

A motion to dismiss is restricted to the pleading itself rather than the determination of the facts of a given case. Stukuls v. State, 42 NY2d 272 (1977) and Mansour v. Abrams, 120 AD2d 933 (4<sup>th</sup> Dept 1986). The Court is to look to the four corners of the complaint. 511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 (2002); Cole v. O'Tooles of Utica, Inc., 222 AD2d 88 (4<sup>th</sup> Dept 1996) and Nestor v. Putney Twombly Hall & Hirson, LLP, 153 AD3d 840 (2<sup>nd</sup> Dept 2017).

The factual allegations of the complaint are to be taken as true together with all favorable inferences that may be drawn or reasonably implied therefrom. Connaughton v. Chipotle Mexican Grill, Inc., 29 NY3d 137 (2017); Choromanskis v. Chestnut Homeowners Association, Inc., 147 AD3d 1477 (4<sup>th</sup> Dept 2017) and Palladino v. CNY Centro, Inc., 70 AD3d 1450 (4<sup>th</sup> Dept 2010). The complaint is to be given a liberal construction as prescribed by CPLR §3026. ABN AMRO Bank, NV v. MBIA Inc., 17 NY3d 208 (2011).

The Court is required to accept every allegation of the complaint as true without regard to the ability of plaintiff to ultimately establish the truth of the facts that have been asserted, particularly on a motion such as this presented prior to any disclosure. See 219 Broadway Corp. v. Alexander's, Inc., 46 NY2d 506 (1979) and Davis v. Boehem, 24 NY3d 262 (2014). If the motion is to be granted, it must be because the complaint actually states no cause of action or documentary or other evidence that is submitted conclusively shows there to be no cause of action as attempted. Smith v. Clark, 185 Misc2d 1 (Sup Ct, Monroe County 2000) affirmed 286 AD2d 880 (4<sup>th</sup> Dept 2001) motion for leave to appeal denied 97 NY2d 608.

In short, there have to be sufficient factual allegations in the complaint for the Court to conclude that there is basis for a cause of action that is stated and not just conclusory statements lacking factual support. Sager v. City of Buffalo, 151 AD3d 1908 (4<sup>th</sup> Dept 2017); Miller v. Allstate Indemnity Company, 132 AD3d 1306 (4<sup>th</sup> Dept 2015); Dominski v. Frank Williams & Son, LLC, 46 AD3d 1443 (4<sup>th</sup> Dept 2007) and Olszewski v. Waters of Orchard Park, 303 AD2d 995 (4<sup>th</sup> Dept 2003).

## DISCUSSION

The complaint alleges that on July 4, 2013, plaintiff was working at a construction site and had an accident when a roof joist gave way and he fell twelve (12) feet onto a concrete sidewalk. Plaintiff possessed claims for personal injury and workers' compensation benefits. Defendant undertook plaintiff's representation for the personal injury claim. The plaintiff was separately represented in the workers' compensation matter by counsel appearing for him in this matter.

According to the complaint, defendant commenced an action against plaintiff's employer, Carl Westcott d/b/a All Wall Builders and that the action was discontinued without the consent of the workers' compensation insurance carrier, Wesco Insurance Company. This, in turn, is stated to have caused plaintiff's workers' compensation medical benefits to be discontinued pursuant to WCL §29 by the Workers' Compensation Board. The cross motion by plaintiff seeks to amend the complaint to allege that the retainer of the defendant and the action that was commenced and then discontinued named National Contractors, LLC and Aldi, Inc. as defendants.

The documentary evidence submitted on the motion consists of defendant's retainer agreement executed March 12, 2015; the summons and complaint in an action by plaintiff against National Contractors, LLC and Aldi, Inc. dated March 6, 2015; a stipulation discontinuing the National Contractors/Aldi action dated November 30, 2016; and a letter by defendant transmitting the stipulation to defense counsel for National Contractors/Aldi dated December 6, 2016. Plaintiff does not challenge any of these documents, dates or the facts that flow therefrom.

As to the statute of limitations, the documentation supplied by defendant unequivocally establishes the date of the claimed malpractice asserted by the complaint as December 6, 2016. It was on that date that defendant sent out the stipulation discontinuing action. The cause of action accrues when the malpractice is committed. Mahran v. Berger, 137 AD3d 1643 (4<sup>th</sup> Dept 2016);

Priola v. Fallon, 117 AD3d 1489 (4<sup>th</sup> Dept 2014); Elstein v. Phillips Lytle, LLP, 108 AD3d 1073 (4<sup>th</sup> Dept 2013). The essence of the malpractice claim is that defendant sent a stipulation discontinuing action in the personal injury action without getting a consent from the workers' compensation carrier. The Court accepts as true for the purpose of this motion that this was done without consent of the workers' compensation carrier.

Defendant asserts that there was no act of continuing representation and that plaintiff's representation by defendant was concluded as of December 6, 2016. Plaintiff does not assert to the contrary in his opposition papers.

The action was commenced by filing on May 20, 2020 and even when the Court relates the filing back to March 13, 2020 to account for administrative and executive emergency orders, the action was not commenced within three (3) years as required under CPLR §214(6). Shumsky v. Eisenstein, 96 NY2d 164 (2001); Mahran v. Berger, 137 AD3d 1643 (4<sup>th</sup> Dept 2016); Tsafatinos v. Wilson Elser Moskowitz Edelman & Dicker, LLP, 75 AD3d 546 (2<sup>nd</sup> Dept 2010). This transfers the burden on the motion to plaintiff to establish why the action is timely commenced.

Plaintiff argues that the statute of limitation did not start to run until plaintiff was damaged by the termination of his Workers' Compensation benefits on October 3, 2017. The Court disagrees for the reasons and on the law as previously set forth. Plaintiff relies on the case McCoy v. Feinman, 99 NY2d 295 (2002). The McCoy case actually supports the motion as submitted by defendant. The act of settlement without consent of the workers' compensation insurance carrier (and hence the harm to plaintiff) was complete when the stipulation discontinuing the action was mailed on December 6, 2016. When plaintiff became aware of the claimed malpractice and that the same would later cause a termination of his benefits does not serve to extend or toll the statute of limitations even under McCoy. Elstein v. Phillips Lytle, 108 AD3d 1073 (4<sup>th</sup> Dept 2013).

Leeder v. Antonucci, 174 AD3d 1469 (4<sup>th</sup> Dept 2019) points out that plaintiff would need to show that the statute of limitations was tolled by the continuous representation doctrine. The complaint and proposed amended complaint make no allegation of continuous representation and no such claim is raised in opposition to the motion to dismiss. Defendant has met his burden on the motion to dismiss while plaintiff has not met his burden in opposition. The pleading does not state a cause of action in the face of the statute of limitations nor has the action been saved by any submission in opposition.

The alternative argument advanced by plaintiff is that the statute of limitations began to run when the workers' compensation carrier filed a request for further action based on the settlement without consent on March 21, 2017. The alternative argument is unavailing on the same basis as previously stated. The statute of limitations started to run on this malpractice claim on December 6, 2016 and should have been filed no later than December 6, 2019. The matter has nothing to do with COVID-19 pandemic issues or any tolling provisions taking place after March 16, 2020.

The balance of the motion to dismiss relies entirely on the complaint asserting that the

defendant was retained to commence an action against plaintiff's employer, Carl Westcott d/b/a All Wall Builders. There was no action against Carl Westcott d/b/a All Wall Builders. Defendant notes that no such action could be brought due to Workers' Compensation Law §11 in that plaintiff had not sustained the statutorily required "grave injury". The Court notes that even if plaintiff had met the requirement of a "grave injury", he still would have had no direct claim against his employer. Such a claim would have been pursued by National Contractors, LLC and Aldi, Inc.

None of this makes a difference on the motion to dismiss given that defendant did, in fact, commence an action on plaintiff's behalf and discontinued the same. The misidentification of the defendants in the underlying personal injury action is a correctable error under CPLR §2001 and would not affect a substantial right of defendant. Defendant's opposition to the cross motion does not indicate otherwise. While plaintiff's complaint is in error, the Court chooses to disregard the mistake for the purpose of this motion. The cross motion to amend is rendered moot given that the complaint is being dismissed based on the statute of limitations.

Accordingly, it is

**ORDERED**, that the motion of the defendant, Jeff D. DeFrancisco, Esq., pursuant to CPLR §3211(a)(7) seeking to dismiss the complaint of the plaintiff, Jeffrey Bartlett, for failure to state a valid cause of action by reason of the misnomer of the party defendants in the underlying personal injury action shall be and the same is hereby **DENIED** and, it is


**ORDERED**, that the motion of the defendant, Jeff D. DeFrancisco, Esq., pursuant to CPLR §3211(a) (1) and (5) based upon statute of limitations as being barred by reason of CPLR §214 shall be and the same is hereby **GRANTED** and the complaint of the plaintiff, Jeffrey Bartlett, shall be and the same is hereby **DISMISSED** as a matter of law and, it is

**ORDERED**, that the cross motion of the plaintiff, Jeffrey Bartlett, seeking leave to amend the complaint pursuant to CPLR §3025(b) shall be and the same is hereby **DENIED** as moot.

**IT IS SO ORDERED.**

ENTER

Dated: November 19, 2020  
Oswego, NY

  
HON. GREGORY R. GILBERT  
SUPREME COURT JUSTICE