

<b>Pooler v OAC 550 Owner LLC</b>
2022 NY Slip Op 31013(U)
March 30, 2022
Supreme Court, New York County
Docket Number: Index No. 154237/2021
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b> <u>HON. SABRINA KRAUS</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>HOWARD POOLER</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>OAC 550 OWNER LLC,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <span style="float: right;"><b>57TR</b></span></p> <p><b>INDEX NO.</b> <u>154237/2021</u></p> <p><b>MOTION DATE</b> <u>12/20/2021</u></p> <p><b>MOTION SEQ. NO.</b> <u>001</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISSAL.

**BACKGROUND**

This action arises from personal injuries sustained by plaintiff, while at work on December 18, 2017, at 550 Madison Avenue, New York, New York, owned and operated by the defendant. On December 2, 2020, plaintiff filed a personal injury action against 550 Madison Fifth LLC, Tishman Construction Corporation, Tishman Construction Corporation of New York, Olayan America Corporation, and AECOM based on the same underlying facts under index number 160412/2020. On, April 30, 2021, plaintiff filed this instant action under index Number 154237/2021.

**PENDING MOTION**

On May 24, 2021, the defendant moved, pursuant to CPLR § 3211(a)(5) to dismiss the complaint as untimely. For the reasons stated below, the motion is denied.

## DISCUSSION

On a motion to dismiss a cause of action pursuant to CPLR § 3211 (a)(5) on the ground that it is time-barred, the defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. In order to make *prima facie* showing, the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued (*see Swift v New York Med. Coll.*, 25 A.D.3d 686, 687 [2<sup>nd</sup> Dept 2006]). In this case it is undisputed that plaintiff's cause of action accrued on December 18, 2017.

Generally, an action to recover damages for a personal injury must be commenced within three (3) years from the date of the injury, as such defendant has made a *prima facie* showing that the complaint has been filed after three years from accrual, and the burden shifts to the plaintiff to establish that the case falls within an exception or is tolled (*Arnell Constr. Corp. v NYC Sch. Constr. Auth.*, 129 N.Y.S.3d 129, 131 [2<sup>nd</sup> Dept 2020]).

Plaintiff has met this burden. In this instance, the statute of limitations had not run at the time the action was filed due to the fact that the statute of limitations was tolled by the series of Executive Orders issued by the Governor during the COVID-19 pandemic, that were in effect through November 3, 2020, and those Executive Orders effectively stopped the clock on the running of the statute of limitations until November 4, 2020.

Executive Order No. 202.72 was issued on November 3, 2020. Said Order was an extension of the original Executive Order 202.8 which was issued on March 20, 2020, which provides in pertinent part:

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform

court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020... .

Governor Cuomo extended that Order several times, but the last time he extended it was in Executive Order No. 202.72, which provides in pertinent part:

Pursuant to Executive Order 202.67, the suspension for civil cases in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby no longer in effect as of November 4, 2020 ...

The order very clearly “tolls” the time for “commencement” through November 4, 2020. Plaintiff's injury in this case occurred on December 18, 2017. The statute of limitations was three (3) years from then, on December 18, 2020. However, on March 20, 2020, the tolling of the statute of limitations began and 273 days remained until December 18, 2020, the time in which plaintiff could timely file his action against defendant.

On November 4, 2020, those two hundred seventy-three (273) days began to run again pursuant to Executive Order No. 202.72. Therefore, the applicable statute of limitations deadline was August 4, 2021.

This interpretation of the executive orders has been found by other courts examining the same issue [*see eg Foy v State of New York* 71 Misc3d 605; *Bastell v Village of Rye Brook* 2021 NY Slip Op 50394; *Brash v Richards* 195 AD3d 582; *Vivar v BSREP UA River Crossing LLC* 2021 NY Slip Op 32153(U); *Cruz v Guaba* 74 Misc3d 1207(A)].

Since plaintiff commenced this action prior to that date, the action is timely commenced and the motion to dismiss must be denied.

**CONCLUSION**

WHEREFORE it is hereby:

ORDERED that defendant’s motion for an order for dismissing the complaint pursuant to CPLR § 3211(a)(5) is denied; and it is further

ORDERED that defendant shall serve and file its answer within 20 days of the date of this order; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh));].<sup>1</sup>

3/30/2022

DATE

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SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

<sup>1</sup> Generally, the court would set the matter for a preliminary conference at this stage. However, the court is aware that the parties may seek to consolidate this with the prior pending action. In the event no consolidation is sought, counsel should request a preliminary conference with the court at their earliest convenience.