Griffin v Perrotti
2013 NY Slip Op 33777(U)
September 11, 2013
Supreme Court, Westchester County
Docket Number: 70095/2012
Judge: William J. Giacomo

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED
AND
ENTERED
ON 9-11 2013
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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THOMAS GRIFFIN,

Plaintiff,

-against-

GEORGE PERROTTI,

Defendant.

Index No. 70095/2012
DECISION & ORDER

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The following papers numbered 1 to 12 were read on the defendant's motion to dismiss the complaint as time barred:

	PAPERS NUMBERED
Notice of Motion/Affirmation/Exhibits A-D	1-6
Memo of Law in Opposition/Affirmation/Affidavit/Exhibits A-B	7-10
Reply Affirmation/Exhibit A	11-12

Factual and Procedural Background

On March 7, 2011, at about 12:00 p.m., plaintiff was riding his bicycle on North Broadway in White Plains when defendant made a left turn into the path of plaintiff causing plaintiff to strike the vehicle driven by defendant. Defendant is an employee of Metro North Commuter Railroad Co. ("Metro North") and the vehicle driven by defendant was owned Metro North.

Plaintiff commenced this action on December 6, 2012 seeking damages for personal injuries he sustained as a result of this accident.

In this pre-answer motion, defendant moves pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. Defendant argues that as an employee of Metro North who was driving a Metro North vehicle this action is barred by Public Authorities Law § 1276. Public Authorities Law provides for a one-year statute of limitations for actions against a Public Authority, to wit, Metro North. Therefore, although defendant was on his lunch break at the time of the accident, since he is a union employee who is paid for lunch and was also "directed" to pick up a co-worker and head back to the Metro North premises, he was acting within the scope of his employment. Defendant also argues that as an on-call employee his is always acting within the scope of his employment. Thus, the real party in interest is Metro North and this action is time barred since it was commenced on December 6, 2012 after the expiration of the one year statute of limitations on March 7, 2012.

In opposition, plaintiff argues that whether or not defendant was acting within the scope of his employment is a question of fact. Nevertheless, plaintiff argues that defendant was on his lunch break, picking up a co-worker at CVS and, therefore, was not acting within the scope of his employment. Thus, the three year statute of limitation applies to this personal injury action (see CPLR 214).

Plaintiff's attorney contends that during one of his conversations with a Metro North claims adjustor, the adjustor read a statement from defendant made shortly after the accident wherein he stated that he was on lunch break and picking up a friend at CVS before returning to work. Plaintiff's attorney claims that he asked for a copy of this statement from Metro North's attorneys but was told it was "attorney work product."

According to plaintiff, because defendant now claims, in a conclusory fashion, to have been "directed" to pick up a co-worker this statement raises an issue of fact as to whether his actions were within the scope of his employment. Likewise, the fact that defendant can be on-call does render all his actions within the scope of his employment.

Accordingly, plaintiff argues that he has properly plead a personal injury cause of action against defendant and one of the issues to be determined by a jury is whether defendant was acting within the scope of his employment at the time of the accident. Thus, it is premature to determine whether this action is time barred.

Discussion

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. (*See Sabadie v. Burke*, 47 A.D.3d 913 [2nd Dept 2008]; *Matter of Schwartz*, 44 A.D.3d 779 [2 nd Dept 2007]). In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. (*See Sabadie v. Burke*, 47 A.D.3d 913 [2nd Dept 2008]; *Matter of Schwartz*, 44 A.D.3d 779 [2nd Dept 2007]).

Here, defendant argues that since he was acting in the scope of his employment at the time of the accident, Metro North is the real party in interest and this action is time barred since the statute of limitations expired on March 7, 2012 (*see* Public Authorities Law § 1276 [2]).

At this time,
However, it is not clear on this limited pre-answer record whether defendant was acting within the scope of his employment at the time of the accident. While the fact that defendant receives a paid lunch and is a union employee might be some evidence that he

was acting within the scope of his employment at the time of the accident, it is not dispositive on this issue. Moreover, defendant's self-serving statement that he was "directed' to pick up co-worker at CVS, without more, is also not dispositive on this issue. Notably, defendant does not state by whom he was "directed" and for what purpose he was picking up a co-worker/friend at CVS. Thus, there must be a factual determination on this issue (*see Albano v Hawkins*, 82 A.D.2d 871, 440 N.Y.S.2d 327 [2nd Dept 1981]), before the appropriate statute of limitations can be applied.

Based upon the foregoing, the defendants' CPLR 3211(a)(5) motion to dismiss is DENIED. However, once the record in this matter has been fully developed defendants may move for summary judgment, if appropriate.

The parties are directed to appear in the Preliminary Conference Part on September 30, 2013 at 9:30 a.m. room 800 for further proceedings.

Dated: White Plains, New York
September 11, 2013

HON. WILLIAM J. GIACOMO
SUPREME COURT JUSTICE

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