

Mannino v Kaufman

2007 NY Slip Op 30031(U)

March 1, 2007

Supreme Court, Queens County

Docket Number: 0012411

Judge: David Elliot

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November 21, 2006 and was transferred to this court due to the expiration of her term.

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries suffered as a result of a motor vehicle accident. The subject accident occurred on September 19, 2004. A second action arising out of the same accident was commenced in Civil Court, Queens County.

CPLR 602(b) gives the Supreme Court the power to remove an action or proceeding pending in another court for consolidation to have it tried with the case pending in the Supreme Court. A motion to remove and consolidate pending actions is addressed to the discretion of the court (see Village of Mamaroneck v Mamaroneck Affordable Condominium Corp., 13 AD3d 361 [2004]; Target Graphics v Deutsch, 282 AD2d 601 [2001]). Here, the movants seek to remove Davila v Kaufman, Index No. 39609/06, now pending in Civil Court, Queens County, and consolidate it with this action for joint trial. In this case, removal and consolidation is warranted as both actions arise out of the same accident and involve the same defendant (see Williams v Rockefeller Ctr. Props., 282 AD2d 285 [2001]; Dolphin v Angioletti, 259 AD2d 514 [1999]).

The branch of the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment is denied. Under CPLR 3212(a) if no date is set by the court a summary judgment motion must be made no later than 120 days after the filing of the note of issue, except with leave of court with good cause shown. Here, the note of issue was filed on May 19, 2006. Therefore, the plaintiff's cross motion for summary judgment, which was served on September 25, 2006, is untimely and must be denied as the movant did not seek leave of court or demonstrate good cause for the delay (see Miceli v State Farm Mut. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004]; Rivera v Toruno, 19 AD3d 473 [2005]; Thompson v Leben Home for Adults, 17 AD3d 347 [2005]).

The branch of the plaintiff's motion to strike the answer of the defendants is denied as the plaintiff has failed to show that the alleged failure of the defendants to comply with the disclosure order was the result of willful, deliberate and contumacious conduct (see Bates v Baez, 299 AD2d 382 [2002]; Patterson v Greater New York Corp. of Seventh Day Adventists, 284 AD2d 382 [2001]).

Accordingly the motion by the defendants to remove and consolidate is granted, and the proceeding in Civil Court, Queens

County, Index No. 39609/06, Davila v Kaufman, is pursuant to CPLR 602(b) removed forthwith to the Supreme Court, Queens County. The Clerk of Queens County Civil Court is directed to transfer all papers in Action No.2 under Index No.39609/06 to the Queens County Supreme Court for consolidation with the file for Action No.1 under Index No.12411/05 upon service of a copy of this order with notice of entry and payment of any required fees. The Clerk of the Supreme Court, Queens County is directed to amend her records accordingly. The plaintiff's cross motion is denied.

Dated: March 1, 2007

J.S.C.