

Contreras v Christensen

2007 NY Slip Op 30483(U)

March 7, 2007

Supreme Court, Suffolk County

Docket Number: 0016331/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
LEOCADIA V. CONTRERAS,

Plaintiff,

-against-

REBECCA K. CHRISTENSEN and GELCO
CORPORATION,.

Defendants.
-----x

CALENDAR DATE: February 28, 2007
MNEMONIC: MD; XMD

PLTF'S/PET'S ATTORNEY:

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1609 New York Ave.
Huntington Station, NY 11746

DEFT'S/RESP ATTORNEY:

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Woodbury, NY 11797

Upon the following papers numbered 1 to 27 read on this motion to amend answer _____;
Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross-Motion and
supporting papers 15-20; Answering Affidavits and supporting papers 21-24; Replying
Affidavits and supporting papers 25-27; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the defendant, Rebecca Christensen, to amend her answer to assert a jurisdictional defense and for summary judgment on lack of jurisdiction and statute of limitations grounds is hereby denied in its entirety. The cross-motion by plaintiff to extend the time to serve pursuant to CPLR §306-b is denied as moot.

Plaintiff instituted this action for personal injuries allegedly sustained in a rear end collision motor vehicle accident on June 16, 2003 on the Cross Island Parkway in Queens County on Long Island, New York. Plaintiff filed her summons and complaint on June 16, 2006 and service on the defendant, Rebecca Christensen, (hereinafter Christensen), was completed on June 24, 2006. Christensen, after receiving a stipulated extension of time by plaintiff to serve an answer, subsequently served an answer on August 10, 2006 which included eleven (11) affirmative defenses but notably did not include a jurisdictional defense of lack of jurisdiction or statute of limitations.

Defendant Christensen now moves to amend her answer to assert an affirmative defense of lack of jurisdiction and a statute of limitations defense. Plaintiff argues in opposition that the defendant waited until the 120 days provided to serve the complaint after filing pursuant to CPLR §306-b had run before attempting to move to amend and assert a jurisdictional defense. Plaintiff claims severe prejudice and scores Christensen's tactics as trial by ambush and "sharp practice" that the Court should not countenance.

For the following reasons, Christensen's motion to amend her answer is denied in its entirety. The plaintiff's cross-motion seeking leave to extend his time to serve an additional 120 days is denied as moot in light of the court's decision on the main motion.

Leave to amend is usually to be freely given, In exercising its discretion in determining whether to grant leave to amend the answer, the Court should consider how long the amending party was aware of the facts upon which the motion to amend is predicated, whether a reasonable excuse for the delay is offered and whether prejudice would result from the granting of the motion. **Haller v. Lopane**, 305 AD2d 370, 759 NYS2d 504 (2nd Dept. 2003). The defendant proffers only that she failed to recognize that a jurisdictional defense had not been asserted in the answer which asserted eleven other affirmative defenses. Even more suspect, is the fact that Christensen's attention to her failure to assert a jurisdictional defense only came to light after the statute of limitations had run. Finally, the amendment is clearly prejudicial to the plaintiff.

As noted in **Urena v. NYNEX Inc., et al.**, 223 AD2d 442, 637 NYS2d 49 (1st Dept. 1996), a case directly on point:

“...any deficiency in the manner in which the summons and complaint first came into Laursen's possession does not render its first answer a nullity, and its failure to raise the jurisdictional issue in that answer therefore constitutes a waiver of the affirmative defense pursuant to CPLR §3211 (e)...”

Moreover in **McGowan v. Hoffmeister**, 15 AD2d 297, 792 NYS2d 381 (1st Dept. 2005) the Court restated the rule:

“ However meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR §3211, is waived...” See also, **Smith v. Maya**, NYS2d , citation unavailable except by Westlaw at 1999 WL 1037917 (2nd Dept. 1999).

Christensen's failure to assert in the initial answer to the plaintiff's summons and complaint the jurisdictional defense of lack of service is therefore, pursuant to CPLR §3211 (e), waived and the defendant has failed to establish any basis to amend her answer since there is clear prejudice to the plaintiff and there has not been a sufficient offer by the defendant for the lateness and delay in seeking the amendment. The Court will not allow a plaintiff to be “lulled” into non-action by Christensen's initial answer or allow a defendant to “sit” on a jurisdictional defense until the statute of limitations runs on the plaintiff's action and then seek leave of the Court to amend her answer to assert the jurisdictional defense. The amendment to her original answer was not as a matter of right and is therefore waived. See, **Iacovangelo v. Shepherd**, 5 NY3d 184, 800 NYS2d 116 (2005); See also, **Nunez v. Mousouras**, 21 AD3d 355, 800 NYS2d 185 (2nd Dept. 2005).

Christensen's motion to amend is denied. **Smith v. Maya**, supra; **Corsale v. Pantry Pride Supermarket, Inc.**, 197 AD2d 659, 602 NYS2d 887 (2nd Dept. 1993). Plaintiff's cross motion seeking an extension to serve the summons and complaint is denied as moot in light of the Court's decision on the main motion.

The foregoing constitutes the decision of the Court.

Dated: March 7, 2007



J.S.C.