SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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BETINA FILS-AIME,

Plaintiff,

-against-

RYDER TRS, INC., MATTHEW D. VERMILYEA, CRISTOFARO SCACCIA, MARIO A. SCACCIA, ERIC Y. DUNST, and SIMMIE DUNST, CORNELL UNIVERSITY, INTEGRAMED AMERICA, INC., MPD MEDICAL ASSOCIATES OF NEW YORK and REPRODUCTIVE SPECIALISTS OF NEW YORK, LLP,

Defendants

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AND THREE OTHER ACTIONS:
Index Nos. 10774/04, 1530/05 and 2635/02

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TRIAL TERM PART: 50

INDEX NO.:018821/01
ACTION NO. 1

MOTION DATE: 8-22-07
SUBMIT DATE: 9-12-07
SEQ. NUMBER: 027

The following papers have been read on this motion:

Notice of Motion, dated 8-3-07..... 1
Affirmation in Opposition, dated 9-7-07.....2
Reply Affirmation, dated 9-19-07.....3

This motion by Team Fleet Financing Corporation ("Team Fleet") for an order granting renewal and reargument of its cross motion to dismiss Action No. 1 as asserted against Team Fleet, denied by decision and order of this Court dated July 2, 2007, and, upon such renewal and reargument, granting such cross motion, is granted to the extent that the motion is treated as one for reargument only, reargument is granted, and upon such reargument the Court adheres to its original determination.

It is clear that no ground exists for renewal (*see*, CPLR 2221[e]) and accordingly the Court will treat this application as made for reargument only. Because the Court could have but did not fully consider the key arguments raised on this present application, reargument is granted. *See, Loland v City of New York,* 212 AD2d 674 (1st Dept. 1995).

On this motion the defendant argues that the Court erred in holding that the cross motion was untimely. It also argues that, on the merits, the cross motion should be granted because the plaintiff did not commence its action against it before the federal statute that exempted Team Fleet from vicarious liability became effective.

Team Fleet's cross motion was founded on a federal statute which shields vehicle lessors from liability by preempting Vehicle and Traffic Law § 388, New York's motor vehicle owner vicarious liability statute, for actions commenced after August 10, 2005. 49 USC § 30106 ("Graves Amendment"). This rendered Team Fleet's application one that could be brought under CPLR 3211(a)(7), failure to state a cause of action. It therefore contends on this application that because a CPLR 3211(a)(7) motion can be made "at any time" (CPLR 3211[e]) the Court erred in holding it to the time periods for making a motion for summary judgment.

However, all the appellate cases cited here by the defendants for the proposition that their cross motion was timely under CPLR 3211(a)(7) predate the Court of Appeals decision in *Brill v City of New York,* 2 NY3d 648 (2004). In view of the clear direction of that Court regarding how late summary judgment motions were to be evaluated by the trial courts, the ground upon which the cross motion was based cannot serve to render it exempt from the operation of this key case. Irrespective of the label, what was before the undersigned was

a motion for summary judgment based upon a CPLR 3211(a)(7) ground. In that regard, the defendant's original notice of cross motion stated that an order of dismissal was sought pursuant to CPLR 3211(a)(7) *and* CPLR 3211(c) and CPLR 3212.

Moreover, it is important to note that in *Brill* itself the defendant had asserted a statutory basis for its motion, arguing that it had no prior written notice of the alleged defect that allegedly caused the plaintiff's fall. A motion to dismiss founded on a prior written notice statute also is one that can be brought pursuant to CPLR 3211(a)(7) alone. *See, Ganzenmuller v Incorporated Vil. of Port Jefferson,* 18 AD3d 703 (2d Dept. 2005); *Fiordalisi v Town of Huntington,* 275 AD2d 299 (2d Dept. 2000). Nevertheless, the Court of Appeals obviously did not let this stand in the way of insisting that the defendant adhere to summary judgment time periods, implicitly declining to treat a motion to dismiss cognizable under CPLR 3211(a)(7) as well as CPLR 3212 any differently from one that could be brought only under the latter. Under these circumstances, endorsing the defendant's position would constitute a weakening of *Brill* that can come only from the Court of Appeals or from the Legislature. Accordingly, because the defendant does not challenge the undersigned's determination that it did not have "good cause" for making the motion after the applicable period to do so had expired, this Court adheres to its prior determination that the cross motion should be denied as untimely made.

The other procedural bases advanced by Team Fleet are without merit. This Court has subject matter jurisdiction to decide whether the plaintiff's claim against Team Fleet was timely advanced in view of the effective date of the Graves Amendment, and it certainly had the power to decide whether Team Fleet's own cross motion was timely made – which lead

to the actual holding of the July 2 order. Finally, the Court did not strike the note of issue in a subsequent order, dated July 17, 2007, which defendant implies "reset the clock" for a summary judgment motion. This later order did no more than strike the case from the trial calendar to allow for certain limited additional discovery to be completed, subject to restoration on 10 days' written notice by either party to the discovery dispute. It *denied* defendant Cornell University's application to strike the note of issue. No new trial certification order, which establishes the summary judgment time periods in this Court, nor another note of issue, was therefore required.

As to the Court's view of the merits, set forth as *dicta* in the July 2 order, it would not rule differently even if it agreed that it had erred regarding the timeliness of the cross motion to dismiss. It there expressed the opinion that because the plaintiff had to seek Court permission to amend her complaint and had submitted her motion before the Graves Amendment became effective, with a copy of the proposed pleading, it would be contrary to the policies expressed by the Court of Appeals to punish her with loss of the claim simply because the judge who was then assigned did not grant her application until afterwards.

There is no question that because the plaintiff could not obtain a stipulation to add Team Fleet (as it was represented by the same attorneys who represent defendant Ryder TRS, Inc., which objected) she was forced to move for Court permission to amend her complaint, or to commence a separate action. Had she filed an action against Team Fleet instead of moving for permission to amend there would have been no basis for a motion to dismiss under the Graves Amendment, but to hold that the plaintiff should have started a separate case instead of moving to amend, on pain of dismissal if the motion court did not issue its decision before Congress and the President acted, would be to encourage the multiple and

unnecessary suits that are disfavored by our courts. *See Perez v Paramount Communications,* 92 NY2d 749, 754 (1999).

This Court thus distinguished *Jones v Bill,* 34 AD3d 741 (2d Dept. 2006), which had held that a plaintiff could not assert her vicarious liability claim against a party in the defendant's position because no summons and complaint had been filed until after the Graves Amendment became effective. It noted that the Appellate Division had not had occasion to consider the circumstances present here. That Court subsequently reached a similar conclusion to that found in *Jones* in another case, *Kuryla v Halabi,* 39 AD3d 485 (2d Dept. 2007), in which it reversed the trial court's order granting leave to amend her complaint to add a party as vicariously liable. Again, however, the circumstances were different; the plaintiffs in *Kuryla* acknowledged that the motion to amend initially was returnable, and was submitted, after the Graves Amendment became effective. [1] Here, the motion to amend, with the proposed pleading, had been fully submitted beforehand. The Court thus would find that for purposes of interposing the claim against Team Fleet the submission date should be deemed sufficient.

The foregoing constitutes the Decision and Order of the Court.

ENTER

DATED: September 27, 20

HON. DANIEL PALMIERI
Acting Supreme Court Justice

[1] Plaintiff-Respondent's Brief, 2006 WL 4759477. The Graves Amendment became effective August 10, 2005; according to plaintiff's brief, the motion to amend was returnable August 18, 2005 and was not submitted until several months later.

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