

<b>Sinsheimer v Amgras</b>
2007 NY Slip Op 33478(U)
October 23, 2007
Supreme Court, Richmond County
Docket Number: 0012982/2002
Judge: Robert Gigante
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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TIMOTHY SINSHEIMER, as Administrator  
of the Estate of LAWRENCE SINSHEIMER,  
deceased,

Plaintiff,

-against-

AJAY AMGRAS, KIRAN AMGRAS and  
MERCEDES BENZ CREDIT CORP.,

Defendants,

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DCM Part 4

Present:

HON. ROBERT J. GIGANTE

DECISION AND ORDER

Index No. 12982/02

Motion Nos. 1524-003  
1765-004

The following papers numbered 1 to 5 were used on these motions this 10<sup>th</sup> day of August, 2007.

Papers  
Numbered

Notice of Motion by Plaintiff for Multiple Reliefs,  
with a Combined Affidavit and Memorandum of Law  
and Exhibits  
(dated May 21, 2007).....1

Notice of Cross Motion by Defendants Ajay Amgras and  
Kiran Amgras, with Supporting Papers  
(dated June 7, 2007).....2

Affirmation in Partial Opposition to Plaintiff's  
Motion by Defendant Mercedes Benz Credit Corp.,  
with Exhibit  
(dated June 13, 2007).....3

Combined Reply Affidavit and Memorandum of Law  
by Plaintiff, with Exhibit  
(dated June 13, 2007).....4

Reply Affirmation by Defendants Ajay and  
Kiran Amgras, with Exhibit  
(dated June 27, 2007).....5

Upon the foregoing papers, the motions are decided as herein provided.

Plaintiff Timothy Sinsheimer, as administrator of the estate of Lawrence Sinsheimer, deceased, moves by notice of motion for an order:

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- (1) Pursuant to CPLR 3215: Entering a default judgment against the defendants, Ajay Amgras and Kiran Amgras, by reason of their failure to answer the plaintiff's amended complaint dated April 28, 2003; or, in the alternative,
- (2) Pursuant to CPLR 3124: Ordering the defendants, Ajay Amgras and Kiran Amgras, to comply with the plaintiff's demand for discovery and inspection dated December 28, 2006, and in the event of their failure to do so within a court ordered period of time, striking their answer(s) under CPLR 3126; and
- (3) Directing the defendant, Mercedes Benz Credit Corp., to produce for deposition a person with knowledge of Mercedes Benz Credit Corp.'s answer and affirmative defenses or, in the alternative, directing Mercedes Benz Credit Corp. to place on the record in open Court its stipulation (to be reduced to an order) that it will produce no witnesses from Mercedes Benz Credit Corp. at trial to testify concerning its answer and affirmative defenses.

Defendants Ajay Amgras and Kiran Amgras (hereafter, collectively, "Amgras") oppose the applications against them, and cross-move for (1) an order pursuant to CPLR 3215(c) dismissing plaintiff's amended summons and complaint, and (2) a protective order pursuant to CPLR 3103. Plaintiff opposes this cross motion. Defendant Mercedes Benz Credit Corporation (hereafter "MBCC") opposes that portion of plaintiff's motion which is against it.

This action arises out of an August 19, 2002 accident in which it is alleged that defendant Ajay Amgras, while driving a Mercedes Benz motor vehicle owned and leased by MBCC, struck plaintiff's deceased, a pedestrian, at the intersection of Midland Avenue and Olympia Boulevard in Staten Island, New York.

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In support of his motion for omnibus relief, plaintiff has submitted (1) two attorney's affidavits and a memorandum of law; (2) a copy of his amended summons and complaint; (3) a copy of his demand for discovery and inspection dated December 28, 2006; (4) the response thereto by the Amgras defendants, dated March 23, 2007; and (5) a stipulation dated April 25, 2007.

With respect to the motion against Amgras, it is uncontroverted that plaintiff is now attempting to enter a default judgment more than four years after the amended complaint was served<sup>1</sup>. It is further uncontroverted that Amgras, through their prior attorneys, interposed an answer to the original complaint.

Only subsequent to the service of that answer, was it discovered by plaintiff that the motor vehicle operated by Amgras was owned by MBCC. Accordingly, on or about April 28, 2003, plaintiff filed and served upon both defendants an amended complaint naming MBCC as a defendant. Defendant MBCC interposed an answer with affirmative defenses and cross claims on or about June 26, 2003. Some four years later (*i.e.*, on or about May 30, 2007) Amgras attempted to serve an amended answer, but it was rejected by plaintiff. In moving to enter a default judgment against Amgras, plaintiff offers no explanation for the pronounced delay in seeking such relief. However, should Amgras be allowed to interpose an amended answer, plaintiff asks that the Court to direct these

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<sup>1</sup>Plaintiff does not attach a copy of the original summons and complaint, nor does he indicate when it was filed or served.

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defendants to comply with its discovery demands or to strike their answer.

It is well settled that a plaintiff's unexplained failure to move for the entry of a default judgment within the statutory time period may result in the dismissal of the complaint ( see CPLR 3215[c]; Greenpoint Bank v Ginyard, 253 AD2d 451; Watt v New York City Tr. Auth., 97 AD2d 466, 467; Herzburn v Levine, 23 AD2d 744). However, it is equally well settled that where plaintiff offers a reasonable excuse for the delay and demonstrates the merit of his or her action, said delay, even if lengthy, may be overlooked (see Iorizzo v Mattikow, 25 AD3d 762; State Farm Mutual Auto Ins. Co. v Rodriguez, 12 AD3d 662).

In this case, plaintiff maintains in a reply affidavit that the prior proceedings in this matter demonstrate that it never intended to abandon the action. In this regard, it is uncontroverted that counsel for both plaintiff and Amgras appeared on no less than seventeen occasions for conferences and motions *after* the amended complaint had been served.

Whatever may be the merit of plaintiff's position on abandonment, it is clear to this Court that Amgras may well have been lulled into a false state of complacency by plaintiff's participation in the numerous conferences and motions that continued without objection after Amgras' time to answer had expired. In any event, in view of the extreme length of the delay and the strong historical preference that actions be resolved on

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their merits, both the motion for a default judgment and the cross motion to dismiss the complaint must be denied, and the Amgras defendants granted leave to serve an amended answer.

Turning to plaintiff's request for alternative relief, the Court has reviewed the discovery responses of the Amgras defendants and finds that it provides meaningful answers to plaintiff's demands. Contrary to plaintiff's position, it is the opinion of this Court that the request for Amgras to produce cell phone records and "driving and other records" of the defendant-operator are palpably improper and overbroad, and that a protective order should be issued with regard thereto.

Finally, with respect to plaintiff's motion against MBCC, it is uncontroverted that the latter entered into a stipulation with plaintiff on April 25, 2007 (Plaintiff's Exhibit "E"), wherein it was agreed that MBCC would produce no witness for deposition and agreed not to call any company representative to testify relative to its answer and affirmative defenses at any ensuing trial<sup>2</sup>.

Accordingly, it is

**ORDERED** that plaintiff's motion is denied except as to the request to memorialize the stipulation entered into with defendant Mercedes Benz Credit Corp. on or about April 25, 2007; and it is further

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<sup>2</sup>Of course, this does not limit MBCC's right to call any other witness, including Ajay Amgras, to testify regarding its affirmative defense, or that a MBCC representative cannot testify at trial regarding any other matters.

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**ORDERED** that the foregoing stipulation is so-ordered; and it is further

**ORDERED** that the cross motion of the Amgras defendants for dismissal of the complaint as against them is denied; and it is further

**ORDERED** that the time within which the Amgras defendants may serve an answer to the amended complaint is extended until 20 days after the service upon them of a copy of this Decision and Order with notice of entry; and it is further

**ORDERED** that so much of the cross motion as seeks a protective order is granted as to plaintiff's request to discover and inspect cell phone, driving and other miscellaneous records of defendant Ajay Amgras; it is further

**ORDERED** that any remaining branches of the motion and cross motion are denied.

E N T E R,

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J.S.C.

Dated: October 23 , 2007  
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