

**Richey v Hamm**

2009 NY Slip Op 33436(U)

September 23, 2009

Supreme Court, Erie County

Docket Number: I2009-5005

Judge: Timothy J. Drury

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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**CHANELLE C. RICHEY**

Plaintiff

-vs-

Index No. I2009-5005

**MARY LOU HAMM**

Defendant

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**LOUIS ROSADO, ESQ.**  
Attorneys for Plaintiff

**THOMAS P. CUNNINGHAM, ESQ.**  
Attorneys for Defendant

**DECISION**

**DRURY, TIMOTHY J., J.S.C.**

The defendant has moved to dismiss the complaint pursuant to CPLR Section 3211(a). The complaint alleges that the instant action arose out of an automobile accident that occurred on July 12, 2005. The statute of limitations expired on July 12, 2008. The plaintiff filed a summons and complaint on July 14, 2008. On July 19, 2008, Mr. Rosado sent a letter to Alex Miloszewski, the adjuster then involved, indicating that he would extend the time to answer the complaint. The purpose of the extension was to allow the insurance company time to obtain the no fault file and allow for possible settlement of the claim without litigation. There was no mention in the letter about the service

of the complaint, nor was there any mention of any agreement to extend the time to serve the complaint.

Mr. Miloszewski then replied to Mr. Rosado on August 12, 2008 acknowledging receipt of the summons and complaint and acknowledging that the defendant would have a general extension to answer the complaint in order to obtain medical records. Again, there was no mention of an extension by the defendant of the time to serve the complaint.

The time to serve the complaint pursuant to CPLR Section 306-b lapsed in November, 2008. The original action was dismissed by Justice James A. Dillon on April 23, 2009 for failure to serve the defendant within 120 days in accordance with CPLR Section 306-b and the plaintiff was allowed to recommence her action *nunc pro tunc* as of March 11, 2009 by Justice Dillon.

The action was recommenced by a filing of a summons and complaint on April 29, 2009 in the Erie County Clerk's Office. The defendant was served by personal service on May 20, 2009.

The defendant has now moved to dismiss the complaint because the defendant was not served within the statutory period provided by CPLR Section 306-b. The defendant has argued that the plaintiff has not applied for additional time to serve the summons and complaint and has not shown reasonably diligent efforts to serve the complaint to warrant such an extension.

Mr. Rosado has submitted his own affidavit claiming that Mr. Miloszewski agreed to hold off service of the summons and notice upon defendant to possibly settle the claim by obtaining and reviewing the plaintiff's medical records. Mr. Rosado has stated that Mr. Miloszewski made this agreement abundantly clear to him on a number of occasions. Mr. Rosado has stated that he relied on Mr. Miloszewski's representations and did not effect service of process on the defendant within the 120 day period set forth in CPLR Section 306-b. Mr. Rosado has stated that immediately after the 120 day period had elapsed, he was notified by Mr. Miloszewski that the claim had been transferred to another claims adjuster, Chris McDermott. Mr. Rosado stated that Mr. McDermott then told him that he would not pay anything on the claim and that he was not bound by any representation made by Mr. Miloszewski about settling the claim.

The defendant has now submitted the affidavits of Mr. Miloszewski and Mr. McDermott denying that they agreed to extend the time for the plaintiff to serve the summons and complaint on the defendant. In his affidavit, Mr. Miloszewski has pointed out that the service of the summons and complaint was not addressed in his letter and because there was never any discussion about this issue.

Pursuant to *Allstate Insurance Company v Marrano Development Corp.* (26 AD3rd 727), it is not incumbent upon the trial court to resolve

conflicting affidavits as to this same issue because CPLR 2104 requires that all agreements between parties or their attorneys be in writing and be subscribed by those to be bound (unless the agreement is made in open court). Therefore, this Court will not conduct a hearing to resolve the issue of the purported agreement since only an agreement signed by one or both of the adjusters involved would be acceptable proof that the defendant had agreed to extend service of the complaint, and there is no such agreement.

The plaintiff has also opposed the instant motion arguing that *Marsh v Phillips* (167 AD2d 905) is authority for the proposition that CPLR 205-a afforded her six months after the original claim was dismissed to commence a new action. However, the six month period only applies when the action has been recommenced within the time allowed by the statute of limitations, which was not the case in the instant situation.

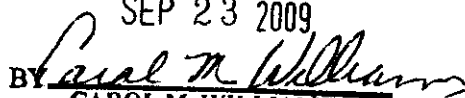
Therefore, the defendant's motion to dismiss the complaint pursuant to CPLR Section 3211(a) is granted.

Submit order.

DATED: Buffalo, New York  
September 23, 2009

**GRANTED**

SEP 23 2009

BY   
CAROL M. WILLIAMS  
COURT CLERK

  
HON. TIMOTHY J. DRURY  
Justice of the Supreme Court