

Macchio v Guzman

2011 NY Slip Op 33618(U)

August 19, 2011

Sup Ct, Queens County

Docket Number: 24225/2007

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

CHRISTOPHER MACCHIO, Index No.: 24225/2007
Plaintiff, Motion Date: 06/09/11
- against - Motion No.: 24
HAROL GUZMAN and "JOHN DOE" #1, Motion Seq.: 4
(intended as Driver #2),

Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by the defendant, HAROL GUZMAN, for an order pursuant to CPLR 2221 granting leave to renew and reargue the prior motion and decision of this court dated March 2, 2011, and upon reargument dismissing the plaintiff's complaint for failure to properly serve the defendant and for an order granting renewal of the prior motion and upon renewal dismissing the plaintiff's complaint for failure to prove that the plaintiff sustained a physical injury as defined in Insurance Law § 5102

Papers Numbered

Notice of Motion-Affirmation-Exhibits-Service.....1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 9
Reply Affirmation-Exhibits.....10 - 12

This is an action for damages for personal injuries sustained by the plaintiff in an automobile accident which occurred on October 2, 2004, on Woodhaven Boulevard at or near the intersection with 73rd Avenue. The factual and procedural history of this action is fully set forth in this court's decision of March 2, 2011. Briefly, the plaintiff, CHRISTOPHER

MACCHIO, was the operator of a vehicle that was stopped at a red light when it was struck in the rear by the vehicle being operated by the defendant, HAROL GUZMAN. The defendant fled the scene of the accident. However, the plaintiff was able to take down the license plate number and through a license plate search with the Department of Motor Vehicles (DMV), it was determined that the vehicle was registered to defendant Harol A. Guzman, whose address was listed with the DMV as 56-10 94th Street Apartment 5J, Elmhurst New York.

A summons and complaint was filed on September 28, 2007. The affidavit of service states that the defendant was served on November 6, 2007 by personal service at 56-10 94th Street Apartment 5J, Elmhurst, New York, by delivering a copy of the summons and complaint to "PETER PIZAM/COUSIN," a person of suitable age and discretion at the defendant's address, and by mailing a copy of the summons and complaint to Harol Guzman at the same address. The affidavit of service was filed with the Court on November 9, 2007. The defendant did not serve or file an answer.

By decision and order dated January 20, 2009, this Court granted plaintiff's motion for a default judgment and set the matter down for an inquest and assessment of damages.

On October 28, 2009 this court conducted an inquest at which the plaintiff testified and also offered into evidence MRI reports as well as the medical records of Dr. Glassman and Dr. Pazarelli. Upon completion of the inquest, this Court awarded the plaintiff a judgment in the amount of \$100,000.00 as damages for the injuries he sustained in the motor vehicle accident.

By decision and order dated October 12, 2010, this Court granted the defendant's motion to vacate the default judgment without opposition, on the ground that the Court had not obtained personal jurisdiction over the defendant. The Court ordered that the judgment be vacated and the complaint dismissed.

The plaintiff subsequently moved for an order vacating this Court's decision dated October 12, 2010 and permitting the plaintiff to interpose opposition papers on the ground of law office failure and excusable default.

By decision dated March 2, 2011, this court held that the plaintiff demonstrated a reasonable excuse for its default by showing that the default resulted from law office failure to calendar and timely oppose defendant's motion. The Court also held that plaintiff's motion papers established a meritorious

claim. Defendant had previously argued, based upon the affidavit of defendant's former landlady, Rosa Pinzon, that Guzman did not live at the address on the date of the purported service because Pinzon stated that he had moved to Colombia in 2005 and as such personal jurisdiction was never acquired over the defendant. However, this court found that jurisdiction over defendant was obtained by the personal service that was made at the address listed with the DMV pursuant to CPLR 308(2). The Court stated that "as the defendant was served at the address listed both with the DMV and on the MV104 accident report which he personally filed, the defendant is estopped from contesting the validity of service made upon him at that address (see Choudhry v Edward, 300 AD2d 529 [2d Dept. 2002]; Traore v Nelson, 277 AD2d 443 [2d Dept. 2000]; Benjamin v Avis Rent-A-Car Sys., 208 AD2d 449 [1st Dept. 1994]; Deas v Brunke, 199 AD2d 43 [1st Dept. 1993]; Sherrill v Pettiford, 172 AD2d 512 [2d Dept. 1991]). The Court ordered that the plaintiff's complaint and the money judgment entered by the clerk of court on February 18, 2010 upon the inquest of October 28, 2009 be reinstated.

Defendant now moves pursuant to CPLR 2221 for leave to reargue the prior motion on the ground that the Court misapprehended the law and the facts in that defendant surrendered his license plates more than one year prior to the date of service, did not renew his license and relocated back to Colombia and therefore could not have provided a new address to the Commissioner of Motor Vehicles as his new address would be out of the United States. Counsel also argues that Vehicle and Traffic Law § 505(5) should not be applied against the defendant because there is no evidence in the record that Guzman did anything to purposefully evade service.

Defendant also seeks to renew its prior motion in regard to seeking dismissal of the plaintiff's complaint for failure to prove that the plaintiff sustained a serious injury as defined in Insurance Law § 5102. Defendant's counsel claims that the testimony at the inquest was insufficient to prove that the plaintiff sustained a serious injury. Defendant did not raise this issue in any of the prior motions and is raising it for the first time in this motion to renew.

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" in determining the prior motion (McGill v Goldman, 261 AD2d 593, 594 [2d Dept. 1999]; CPLR 2221 [d][2]; see Hague v Daddazio, 84 AD3d 940 [2d Dept. 2011]; Mazinov v Rella, 79 AD3d 979 [2d Dept. 2010];

Singleton v Lenox Hill Hosp., 61 AD3d 956 [2d Dept. 2009]). Here, the defendant has failed to satisfy his burden (CPLR 2221[d][2]). Although the defendant argues that Vehicle and Traffic Law § 505(5) is not applicable herein because the defendant allegedly moved back to Colombia and surrendered his license plates prior to the date of service, the movant has failed to provide an affidavit from the defendant attesting to those facts or to provide sufficient proof that he was living out of the country on the date of service (see Kalamadeen v Singh, 63 AD 3d 1007[2d Dept. 2009]). This court has reviewed the cases cited by defendant, to wit, Feinstein v Bergner, 48 NY 2d 234 and Matter of RBC Capital Mkts. Corp. v. Bittner, 24 Misc3d 728 and finds that they are not dispositive with respect to the facts of the instant case.

Accordingly, that branch of the defendant's motion to reargue is granted and upon reargument the prior decision of this court, dated March 2, 2011, is adhered to in its entirety. Defendant failed to present evidence that the court overlooked, misapprehended or misapplied any controlling principle of law.

That branch of the motion for leave to renew the prior motion to permit the defendant to raise for the first time his contention that the plaintiff failed to prove at the inquest that he sustained a serious injury as defined in Insurance law § 5102 is denied. The defendant has failed to provide any "reasonable justification for the failure to present such facts on the prior motion" (See CPLR 2221[e][3]; Mount Sinai Hosp. v Country Wide Ins. Co., 2011 NY Slip Op 5680 [2d Dept. 2011]; Rowe v Nycpd, 2011 NY Slip Op 5477 [2d Dept. 2011]).

Dated: August 19, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.