

Kim v Enterprise-Rent-A-Car

2013 NY Slip Op 32937(U)

October 28, 2013

Sup Ct, Queens County

Docket Number: 700388/12

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X

TERRY DAHOON KIM

Plaintiff,

Index No.: 700388/12

-against-

Mot. Date: 8/8/13

**ENTERPRISE-RENT-A-CAR and WINNIE
CHAN,.**

Mot. Cal. No. 64

Defendants.

Mot. Seq. 3

-----X

The following papers numbered EF 1 - 6 read on this motion by defendant **WINNIE CHAN** for an order striking the plaintiff’s Note of Issue, extending time to serve a summary judgment motion on the basis that the plaintiff has not sustained a “serious injury” pursuant to Insurance Law §5102(d), and for an order pursuant to CPLR 3126 and 3124 to preclude the plaintiff from offering evidence at trial and/or compel the plaintiff to comply with defendant’s discovery demands.

	<u>PAPERS NUMBERED</u>
Amended Notice of Motion-Affirmation-Exhibits.....	EF 1-4
Affirmation in Opposition-Exhibits	EF 5-6

Upon the foregoing papers, it is ordered that the defendant Winnie Chan’s motion is decided as follows:

The plaintiff brings this action seeking damages for personal injuries sustained in an automobile accident on February 23, 2012. Defendant Winnie Chan now moves for various forms of relief, including striking the plaintiff’s Note of Issue, extending time to serve a summary judgment motion on the basis that the plaintiff has not sustained a “serious injury” pursuant to Insurance Law §5102(d), and for an order pursuant to CPLR 3126 and 3124 to preclude the plaintiff from offering evidence at trial and/or compel the plaintiff to comply with defendant’s discovery demands.

The New York Legislature, in Chapter 416 of the Laws of 2009, provided for the Chief Administrator of the courts to authorize a voluntary program for the

commencement of actions by electronic means (see generally Grskovic v Holmes, 2013 N.Y. App. Div. LEXIS 6505, 7-8 [2d Dept. Oct. 9, 2013]). The plaintiff commenced this matter via the New York State Unified Court System’s consensual electronic filing system.

E-FILING

The operative rules for e-filing in the New York State Unified Court System are embodied in 22 NYCRR §202.5-b et seq. entitled “Electronic filing in Supreme Court; consensual program”.

Section 202.5-b(b)(2)(i) of the Electronic-filing provision (“e-filing) provides, in pertinent part:

E-filing in an action after commencement.

(i) Consent of the parties required. After commencement of an action wherein e-filing is authorized, *documents may be electronically filed and served, but only by, and electronic service shall be made only upon, a party or parties who have consented thereto.* A party's failure to consent to participation in electronic filing and service shall not bar any other party to the action from filing documents electronically with the County Clerk and the court or serving documents upon any other party who has consented to participation. *A party who has not consented to participation shall file documents with the court and the County Clerk, and serve and be served with documents, in hard copy.* When an e-filing party serves a document in hard copy on a non-participating party, the document served shall bear full signatures of all signatories and proof of such service shall be filed electronically. [*Emphasis added.*]

There is absolutely no indication in this case that the defendant Winnie Chan failed to consent to participation in the e-filing program. In fact, the instant summary judgment motion was filed through the e-filing system. Thus, the defendants are deemed by this Court to have consented to participate in the e-filing program.

Section 202.5-b(d)(1) provides, in pertinent part:

(d) Electronic Filing of Documents.

(1) Electronic Filing of Documents. (i) Electronic filing required; format of

e-filed documents; statement of authorization. *In any action subject to e-filing, all documents required to be filed with the court by a party that has consented to such e-filing shall be filed and served electronically, except as provided in this section.* Documents shall be e-filed in text-searchable portable document format (PDF-A) and shall otherwise comply with the technical requirements set forth at the NYSCEF site. A filing agent (other than one employed by a governmental entity) shall e-file a statement of authorization from counsel of record in an action, in a form approved by the Chief Administrator, prior to or together with the first e-filing in that action by the agent on behalf of that counsel. [*Emphasis added.*]

The plaintiff filed his Note of Issue via e-filing, on November 28, 2012, at 11:40 a.m., and a copy was e-mailed to the defendant's agent Stephenie L. Boden at "sboden@carmanlawteam.com", according to the NYSCEF- Queens Confirmation Notice. Pursuant to the above rules, this was all that the plaintiff had to do in order to comply. The defendant Chan's current motion, which includes a branch requesting an order to strike that Note of Issue, was served by e-filing, and was received by NYSCEF, on June 10, 2013. Thus, defendant Winnie Chan consented to participate in the e-filing program, and to receive notices served by the plaintiff by e-filing.

As a consequence, the branch of the her motion to strike the Note of Issue is untimely by nearly three months. (see 22 NYCRR 202.21 [e]). Defendant Chan's explanation, that she "was never served with [sic] Note of Issue that was filed on November 28, 2012" (affirmation of Lauren M. Piacentini, Esq., at paragraph 31) is specious. Counsel's firm was served with the NYSCEF Confirmation form by email, and that constituted proper service by e-filing. To require service of a hard copy as well, would defeat the entire purpose of the e-filing system to which the defendant consented. It was incumbent upon counsel to check the status of this matter on the e-filing system, and, if any filings which she deemed premature or improper were served, to take the appropriate action by e-filing a motion, as it did in the case of the instant application, albeit untimely. No salient explanation has been provided by the defendants as to why they did not do so.

The Court notes that the plaintiff's Note of Issue contains misstatements regarding the status of discovery (see e.g. Gallo v SCG Select Carrier Group, L.P., 91 AD3d 714

[2d Dept. 2012]), and admonishes plaintiff's counsel for this practice. However, in this instance, where the lion's share of discovery has been completed, and all that is apparently outstanding are responses to supplemental notices for documentary discovery, and given the fact that the pervasive practice in this county is to continue the disclosure process while cases are on the calendar, defendant Chan has suffered no demonstrable prejudice.

As a further consequence of the defendant Chan's failure to notice the electronic filing of the plaintiff's Note of Issue and Certificate of Readiness, her motion for summary judgment must similarly be denied as untimely without good cause.¹ The Court of Appeals' case law mandates strict compliance with litigation deadlines (see Miceli v State Farm Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004]; Kihl v Pfeffer, 94 N.Y.2d 118 [1999]).

Litigation cannot be conducted efficiently if deadlines are not taken seriously, and disregard of deadlines should not and will not be tolerated (see Miceli v State Farm Auto. Ins. Co., *supra*; Brill, *supra*; Kihl v Pfeffer, *supra*).

The plaintiff's Note of Issue was e-filed on November 28, 2012. The defendant's motion was due within 120 days, on March 28, 2013. It was filed on June 10, 2013, over two and a half months late (see Lyebyedyev v Hoffman, 84 AD3d 751, 752 [2d Dept. 2011]) without good cause shown. Thus, based upon the foregoing, the Court is constrained to deny the defendant Chan's application to dismiss as untimely having been served upon the defendant 174 days after the plaintiff filed his Note of Issue.

The branch of the movant's papers regarding outstanding discovery is granted, to the following extent; It is

ORDERED, that the plaintiff shall be precluded from providing evidence at the trial of this action, unless, within thirty (30) days of service of a copy of this Order with Notice of Entry, the plaintiff provides responses to defendant Chan's supplemental notices for discovery and inspection, dated October 22, 2012 and December 7, 2012.

¹ A branch of the defendants' motion requests additional time to make a summary judgment motion, yet they were able to do so quite efficaciously in this matter, since their examining physicians examined the plaintiff in this matter on September 13, 2012 and September 17, 2012. In any event, they have failed to provide good cause for the delay.

In the event that the plaintiff is not in possession of the materials requested, an affidavit by someone with knowledge to that effect shall be provided; and it is further.

ORDERED, that any and all other applications not specifically addressed herein are denied.

This constitutes the opinion, decision and order of the Court.

Dated: October 28, 2013

TIMOTHY J. DUFFICY, J.S.C.