

Morrison v New York City Tr. Auth.

2014 NY Slip Op 32413(U)

September 10, 2014

Sup Ct, NY County

Docket Number: 451314/2013

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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D'WANA MORRISON,

Plaintiff,

Index No. 451314/2013

- against -

THE NEW YORK CITY TRANSIT AUTHORITY,
ACCESS-A-RIDE, COLUMBUS TRANSIT, LLC.,
KARLEEN CAMPBELL, JOSE A. LUGO and
MICHAEL ANGEL LUGO,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Pursuant to CPLR 3216, 3042 (d) and 3126, defendants New York City Transit Authority, Access-A-Ride, Columbus Transit, LLC, and Karleen Campbell move to dismiss the complaint. Plaintiff opposes the motion.

BACKGROUND

In this action, plaintiff alleges that, on September 15, 2012, she was a passenger aboard an Access-A-Ride vehicle driven by defendant Karleen Campbell, that was involved in a motor vehicle collision with a vehicle owned by defendant Miguel Angel Lugo and operated by Jose Angel Lugo, at the intersection of York Avenue and East 66th Street in Manhattan.

Plaintiff commenced this action on February 6, 2013 in the Supreme Court, Bronx County. Defendants New York City Transit Authority, Access-A-Ride, Columbus Transit, LLC, and Karleen Campbell (the NYCTA Defendants) answered the complaint on March 27, 2013, and also served discovery demands dated March 27, 2013. (Amidon Affirm., Exs C, D.) By decision and order dated June 13, 2013, Justice Lizbeth Gonzalez granted a motion to change venue to Supreme Court, New York County. (*Id.*, Ex H.)

On February 28, 2014 (eleven months after issue was joined), the NYCTA Defendants served, by registered mail, a demand to resume prosecution within 90 days. (Amidon Affirm., Ex K.) The notice states, in relevant part:

“The defendants herein, NEW YORK CITY TRANSIT AUTHORITY, COLUMBUS TRANSIT LLC. and KARLEEN CAMPBELL, hereby demand pursuant to CPLR §3216 that prosecution of the above-entitled action be resumed herein within ninety (90) days after receipt of this demand. Default in complying with this demand within the ninety (90) day period will serve as a basis for a motion by defendants for dismissal for unreasonably neglecting to proceed.”

(*Id.*) By letters dated May 1, 2014 and May 31, 2014 addressed to plaintiff's counsel, counsel to the NYCTA Defendants stated that they had not yet received a bill of particulars or any other discovery responses from plaintiff. (Amidon Affirm., Ex I, J.)

On June 2, 2014, more than one year after issue was joined and more than 90 days after the notice was served, the NYCTA Defendants moved to dismiss the action, on the grounds that plaintiff failed to prosecute the action notwithstanding service of a 90-day notice pursuant to CPLR 3216, and that plaintiff did not serve a bill of particulars or otherwise respond to discovery. In opposition to the motion, plaintiff served responses to defendants' discovery demands, including a bill of particulars. (Munitz Opp. Affirm., Ex A.)

A preliminary conference and conference on the motion were scheduled for August 28, 2014 at 9:30 a.m. On August 28, at 11:15 a.m., the Court adjourned the conferences to September 11, 2014 at 10:30 a.m., because counsel for defendants Jose A. Lugo and Miguel Angel Lugo had not yet appeared.

DISCUSSION

The branch of the NYCTA Defendants' motion to dismiss the action on the grounds that plaintiff wilfully failed to comply with discovery demands is denied. "Dismissal is the most drastic sanction contemplated by the CPLR for failure to comply with discovery and should be imposed only when the conduct of the offending party was willful, contumacious, or in bad faith." (*Mateo v T & H Enters.*, 60 AD3d 411, 412 [1st Dept 2009].) Here, plaintiff

belatedly supplied the discovery sought, including the bill of particulars. Belated but substantial compliance undermines the position that the conduct was either willful or contumacious. (*Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2d Dept 2008]; see also *Gradaille v City of New York*, 52 AD3d 279, 284 [1st Dept 2008].)

Turning to the branch of the NYCTA Defendants' motion to dismiss the action pursuant to CPLR 3216,

"CPLR 3216, as it now reads, is extremely forgiving of litigation delay. A court cannot dismiss an action for neglect to prosecute unless: at least one year has elapsed since joinder of issue; defendant has served on plaintiff a written demand to serve and file a note of issue within 90 days; and plaintiff has failed to serve and file a note of issue within the 90-day period (CPLR 3216[b]). So long as plaintiff serves and files a note of issue within the 90-day period, all past delay is absolved and the court is then without authority to dismiss the action (CPLR 3216[c]). However, if plaintiff fails to file a note of issue within the 90-day period, "the court may take such initiative or grant such motion [to dismiss] unless the [defaulting] party shows justifiable excuse for the delay and a good and meritorious cause of action" (CPLR 3216[e]). Thus, even when all of the statutory preconditions are met, including plaintiff's failure to comply with the 90-day requirement, plaintiff has yet another opportunity to salvage the action simply by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit. If plaintiff makes a sufficient showing, the court is prohibited from dismissing the action.

* * *

[U]nder the plain language of CPLR 3216, a court retains some discretion to deny a motion to dismiss, even when plaintiff fails to comply with the 90-day requirement and proffers an inadequate excuse for the delay. . . . Although a court may possess residual discretion to deny a motion to dismiss when

plaintiff tenders even an unjustifiable excuse, this discretion should be exercised sparingly to honor the balance struck by the generous statutory protections already built into CPLR 3216.”

(*Baczkowski v D.A. Collins Constr. Co.*, 89 NY2d 499, 503 [1997].)

As the NYCTA Defendants point out, plaintiff did not offer an excuse or explanation for the delay, and there is no affidavit of merit. Plaintiff’s counsel simply attached discovery responses to the affirmation in opposition and argues that the motion is therefore moot. In a supplemental affirmation in opposition, plaintiff’s counsel argues that the motion should be denied because less than one year elapsed from joinder of issue to service of the NYCTA Defendants’ 90-day demand. (Munitz Suppl. Affirm. ¶ 8.)

The NYCTA Defendants are correct that plaintiff’s supplemental affirmation in opposition was an impermissible sur-reply. Contrary to plaintiff’s argument, the motion was not adjourned to permit the parties to submit additional papers. Rather, the motion was adjourned because counsel to defendants Jose A. Lugo and Miguel Angel Lugo had not yet appeared in court. (Furshipan Affirm. in Response, Ex A.) In any event, “CPLR 3216 does not specifically require that the 90-day demand be served only after one year has elapsed since the joinder of issue.” (7-3216 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3216.07; see also *Highlands Ins. Co. v Maddena Constr. Co.*, 109 AD2d 1071, 1072 [4th Dept 1985]

["there is no statutory basis for treating a demand made more than 90 days prior to the one-year period as a nullity"]; *Kushner v Woodcliff*, 75 AD2d 952 [3d Dept 1980] ["Premature service of the 90-day notice is permissible"].)

Nevertheless, the branch of the NYCTA Defendants' motion to dismiss based on CPLR 3216 is denied. First, the 90-day notice is defective, because it does not demand that plaintiff resume prosecution *and* serve and file a note of issue within 90 days. (CPLR 3216 [b] [3].) "[N]o motion to dismiss for failure to prosecute, brought prior to the filing of a note of issue, may be made unless the defendant has first served the plaintiff with a demand that he file a note of issue." (*Cohn v Borchard Affiliations*, 25 NY2d 237, 246 [1969].) Thus, the NYCTA Defendants did not meet a necessary condition for dismissal under CPLR 3216 (b). Second, even if the notice were not defective, the Court exercises its discretion not to dismiss the action. Even in the absence of any reasonable excuse, plaintiff's discovery responses evidence an intent not to abandon the action. The use of a CPLR 3216 motion under these circumstances was inappropriate, particularly because the NYCTA defendants could have, and should have, promptly filed a request for judicial intervention (RJI) and sought court management of disclosure, via a prompt request for a preliminary conference.


CONCLUSION

Accordingly, it is hereby

ORDERED that this motion by defendants New York City Transit Authority, Access-A-Ride, Columbus Transit, LLC, and Karleen Campbell is denied.

Dated: September 10, 2014
New York, New York

ENTER:



J.S.C.