

Concepcion v JetBlue Airways Corp.

2015 NY Slip Op 30474(U)

March 30, 2015

Sup Ct, Queens County

Docket Number: 704599/2014

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

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

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EDITH CONCEPCION, Index No.: 704599/2014
Plaintiff, Motion Date: 03/06/15
- against - Motion No.: 21
JETBLUE AIRWAYS CORPORATION, Motion Seq.: 1

Defendant.

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The following papers numbered 1 to 17 were read on this motion by defendant, JETBLUE AIRWAYS CORPORATION, for an order pursuant to CPLR 3012(b), dismissing the plaintiff's action on the ground that plaintiff failed to serve the defendant with a complaint within 20 days after demand therefore; and the cross-motion of the plaintiff for an order pursuant to CPLR 3012(d), denying the defendant's motion to dismiss and compelling the defendant to accept the plaintiff's untimely complaint:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law....1 - 6
Affirmation in Opposition-Cross-Motion-Affidavits-
Exhibits-Memo of Law.....7 - 11
Reply Affirmations(2)-Exhibits-Memo of Law.....12 - 17

The plaintiff commenced the instant action by filing a summons with notice on July 1, 2014. On October 23, 2014, the defendant, JetBlue Airways Corporation ("Jetblue") was served with a Summons with Notice. The Notice states that the nature of the action is to recover damages for physical injuries allegedly sustained by the plaintiff as a result of being struck in the head by a collapsing tent/canopy on premises operated and controlled by JetBlue at JFK Airport Terminal 5 on July 1, 2011. Service of the Summons with Notice was made on JetBlue by service upon the New York Department of State, Division of Corporations, pursuant to BCL § 306.

On November 20, 2014, counsel for defendant, Steven Raffaele, Esq. served a demand for a copy of the complaint upon counsel for plaintiff, Thomas D. Barra, Esq. Pursuant to CPLR 3012(b) the plaintiff was required to serve a copy of the complaint within twenty days which would have been December 10, 2014.

Counsel for JetBlue now moves to dismiss the action stating that to date (December 23, 2014) plaintiff has not served JetBlue with a complaint. Counsel contends that CPLR 3012(b) requires a plaintiff who commences an action by filing a summons with notice to serve a complaint within 20 days after the defendant serves a demand for the complaint or be subject to having the action dismissed. Counsel contends that to defeat the defendant's motion to dismiss the complaint the plaintiff must come forward with a reasonable excuse for the delay and a meritorious cause of action (citing Harris v City of New York, 121 AD3d 852 [2d Dept. 2014]).

The plaintiff opposes the motion to dismiss and cross-moves for an order pursuant to CPLR 3012(d) compelling the defendant to accept the plaintiff's late complaint. In support of the cross-motion, plaintiff's counsel submits a copy of the complaint verified by the plaintiff. He states in his affirmation that in September 2011, plaintiff filed a notice of claim against the Port Authority of New York and New Jersey. He asserts that the Port Authority sent at least two letters to JetBlue with a copy of the notice of claim and police report informing it of the plaintiff's accident and stating that the facts of the claim falls within JetBlue's leasing +agreement with the Port Authority. In addition, counsel claims that he was out of his office when the demand for a complaint was served and he asked an associate to call opposing counsel and ask for an extension until after the New Year to file the complaint. He states that he assumed that the request was granted and that a stipulation was executed. He states that the instant motion to dismiss was filed during a time his office was closed for the holidays. He states that he was unable to reach his client during the first week in January as she was out of state for a few weeks. He states that he has now learned that the associate did not seek an extension. He states that he takes full responsibility for the oversight and the delay in serving a complaint based upon law office failure.

Plaintiff also submits an affidavit from the plaintiff, Edith Concepcion. She states that on July 1, 2011, she was in the Pet Relief Area of Terminal 5 at JFK Airport for a barbeque hosted by the defendant JetBlue Airways and its employees. She states that the Pet Relief Area in terminal 5 is an area operated and controlled exclusively by JetBlue. She states that at that

time she was sitting under a tent/canopy set up by the defendant's employees. She states that suddenly the tent collapsed and she was struck in the head and knocked unconscious by a large heavy metal pole from the tent. She contends that the defendant was negligent in setting up the tent in an improper and dangerous manner. She asserts that the defendant's employees were aware of her injuries as they were on the scene at the time.

Plaintiff's counsel argues that the plaintiff may avoid dismissal for failure to serve a timely complaint after a demand by demonstrating a reasonable excuse and meritorious cause of action (citing Perez-Faringer v Heilman, 79 AD3d 837 [2d Dept. 2010]; Gibbons v Court Officers' Benevolent Assn. of Nassau County, 78AD3d 654 [2d Dept. 2010]; Pristavec v Galligan, 32 AD3d 834 [2d Dept. 2006]). Factors to consider include the extent of the delay, the prejudice to the opposing party, and the lack of intent to abandon the action (see Grace v Follini, 80 AD3d 560 [2d Dept. 2011]).

Plaintiff asserts that the extent of the delay was minimal in that the defendant filed its motion two weeks after the complaint was due. Further, counsel claims that there is no prejudice to the defendant as the defendant was aware of the exact nature of the claim for over three years based upon the notice of claim and the fact that the accident occurred on the premises of the defendant and in the presence of plaintiff's employees. Lastly, plaintiff asserts that based upon the affidavit of the plaintiff she has a meritorious cause of action and has no intention of abandoning the action.

In reply, defendant states that neither Mr. Bara nor his associate ever contacted Holland & Knight for an extension of time to serve the complaint. He also states that the Second Department has found that law office failure which has not been substantiated is not a reasonable excuse pursuant to CPLR 3012(b) (citing Carducci v Russell, 120 AD3d 1375 [2d Dept. 2014]; Grace v Follini, 80 AD3d 560 [2d Dept. 2011]). Counsel claims that the plaintiff provided only conclusory and unsubstantiated claims of law office failure (citing Neilson v 6D Farm Corp., 123 AD3d 676 [2d Dept. 2014]). Defendant also argues that JetBlue will be prejudiced as it has been three and a half years since the alleged occurrence and as a result JetBlue's ability to defend itself has diminished considerably.

Upon review and consideration of the defendant's motion, plaintiff's cross-motion and affirmation in opposition and defendant's reply thereto, this Court finds as follows:

"Where, an action is commenced by the filing of a summons with notice, "to avoid dismissal for failure to timely serve the complaint after a demand had been made pursuant to CPLR 3012(b), and to be entitled to an extension of time to serve the complaint under CPLR 3012(d), the plaintiff has to demonstrate both a reasonable excuse for the delay and a potentially meritorious cause of action" (Harris v City of New York, 121 AD3d 852 [2d Dept. 2014] citing Country Serv., Inc. v Feiden & Assoc., P.C., 92 AD3d 914 [2d Dept. 2012]; Dayan v Darche, 96 AD3d 708 [2d Dept. 2012]; Perez-Faringer v Heilman, 79 AD3d 837 [2d Dept. 2010]).

This court finds that counsel credibly substantiated his excuse of law office failure based upon the miscommunication with an associate, the holidays at the time, and a heavy caseload which he particularized in his reply. This court finds that counsel did not evince a wilful default or neglect (see CPLR 2005)[with respect to an application pursuant to 3012(d), a court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure]; also see Neilson v 6D Farm Corp., 123 AD3d 676 [2d Dept. 2014]).

Here, in view of the short delay in serving the complaint after service of the summons with notice, the reasonable excuse proffered by the plaintiff's counsel for the delay, the absence of any prejudice to the defendants as they were on notice of the plaintiff's accident since receiving a copy of the notice of claim and police report in 2011, the existence of a potentially meritorious cause of action as set forth in the plaintiff's affidavit of merit, and the strong public policy in favor of resolving cases on the merits (see Mitrani Plasterers Co., Inc. v SCG Contr. Corp., 97 AD3d 552 [2d Dept. 2012]; Aquilar v. Nassau Health Care Corp., 40 AD3d 788 [2d Dept. 2007]), it is hereby,

ORDERED, that the defendant's motion to dismiss the action on the ground that the complaint was not timely served is denied, and it is further,

ORDERED, that the plaintiff's cross-motion for an order compelling the defendant to accept its late complaint is granted (see Gibbons v Court Officers' Benevolent Assn. of Nassau County, 78 A3d 654 [2d Dept. 2010]), and it is further,

ORDERED, that defendant shall serve an answer to the complaint within 45 days of service of a copy of this decision and order with notice of entry.

Dated: March 30, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.