

<b>Mejia v Eliu</b>
2019 NY Slip Op 31854(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 159619/2018
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA PART IAS MOTION 22**

*Justice*

-----X INDEX NO. 159619/2018

ADALGISA MEJIA

MOTION DATE 02/15/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

IRIZARRY ELIU,

**DECISION AND ORDER**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that defendant Irizarry Eliu, Jr.'s motion to dismiss plaintiff Adalgisa Mejia's complaint in the above captioned action upon the ground that there is another action pending between the same parties for the same cause of action in Bronx County is denied and it is ORDERED that plaintiff's cross-motion to consolidate the above captioned action with the Bronx County Supreme Court lawsuit with index number 28522/2016E (the "Bronx Action") is granted. The present action stems from a motor vehicle accident which took place on October 23, 2015 at West 180<sup>th</sup> Street and Audubon Avenue in the County, City, and State of New York.

Pursuant to CPLR 3211 (a)(4) "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires."

Here, defendant avers that the Bronx Action includes defendant in this matter, Irizarry Eliu, as a named defendant. Defendant alleges that he was never served by plaintiff in the Bronx

Action and became aware of it upon initiation of the present New York County Supreme Court action. Defendant alleges that “[e]ven if service is not at issue, plaintiff failed to move for default within one year in the Bronx Action” (Mot, at ¶ 7). Pursuant to CPLR 3215(c), if a plaintiff fails to take proceedings for entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint.

Defendant alleges that the present action stems from the same October 23, 2015 accident at issue in the Bronx Action involving the above-mentioned parties and thus should be dismissed. Defendant posits that because plaintiff failed to move for default within the one-year statutory time frame in the Bronx Action, plaintiff filed the present action in an attempt to cure the procedural defects of the Bronx Action.

In opposition plaintiff claims that in the Bronx Action issue was seemingly joined by all defendants including Eliu, Jr., by service of defendants’ Answer dated January 10, 2017. Thereafter, defendants amended their answer to exclude defendant, Eliu, Jr., on whose behalf they had mistakenly answered (Aff in Opp, Exh C). Plaintiff avers that she attempted to serve the Summons and Complaint upon defendant Eliu, Jr. in the Bronx Action, but that service was never effectuated. Ultimately, plaintiff ascertained defendants address and filed the present action against him in New York County Supreme Court. Thus, plaintiff has demonstrated that defendant was not served and thus was not a party to any action but the instant one. Thus, defendant’s motion to dismiss is denied as he is not currently a party to the Bronx Action.

Plaintiff requests that the instant case be consolidated with the Bronx Action. Plaintiff seeks to change venue of this action to Bronx County, as the action currently pending in Bronx County was filed first in time. The Appellate Division, First Department, has held that “[w]here two actions involving identical issues are pending in separate counties, the actions should be

consolidated pursuant to CPLR 602 in the county where the first action was commenced absent special circumstances”. *Harrison v Harrison*, 16 AD3d 206, 207 (1<sup>st</sup> Dep’t 2005). Here, no special circumstances have been established. Thus, plaintiff’s cross-motion to consolidate is granted. The consolidated action shall be heard in the Supreme Court of Bronx County as the action in Bronx County was filed first in time. The branch of plaintiff’s motion for sanctions is denied. As such, defendant’s motion to dismiss is denied.

Accordingly, it is

ORDERED that defendant’s motion to dismiss is denied; and it is further

ORDERED that plaintiff’s cross-motion to consolidate is granted as indicated above; and it is further

ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Bronx, and upon service by plaintiff Adalgisa Mejia of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action under Index No. 159619/2018 to the Clerk of the Supreme Court, County of Bronx; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that plaintiff Adalgisa Mejia is directed to serve a copy of this order with notice of entry on the County Clerk of the Supreme Court, Bronx County, who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that plaintiff Adalgisa Mejia is directed to serve a copy of this order with

notice of entry upon the Clerk of the Trial Support Office of the Supreme Court, Bronx County, who is directed to mark the court's records to reflect the consolidation.

This constitutes the Decision/Order of the Court.

6/27/19  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  FIDUCIARY APPOINTMENT  REFERENCE

INCLUDES TRANSFER/REASSIGN