

**Njie v Oliveras**

2019 NY Slip Op 32212(U)

March 11, 2019

Supreme Court, Bronx County

Docket Number: 31646/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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FAKEBBA NJIE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31646/2018E

HECTOR OLIVERAS, WILLIS OF ARIZONA, INC.  
a/k/a WILLIS TOWERS WATSON, EQ HOLDING  
COMPANY, EQ HOLDINGS, INC., EQ HOLDING CO.,  
INC., "JOHN/JANE DOE" and/or ABC CORP., names  
being fictitious for unknown owner of OLIVERAS  
vehicle,

Defendants.

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John R. Higgitt, J.

Upon the order to show cause signed February 8, 2019 and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; plaintiff's motion for leave to amend the complaint to add Allstate Power Vac Inc. (Allstate) as a party defendant, and for an extension of time to serve Allstate, is granted.

In this action emanating from an October 16, 2015 motor vehicle accident, the complaint alleges that defendant Oliveras operated the offending vehicle with the owner's knowledge and consent. The complaint alleges that various defendants, including defendant "ABC Corp." (intended to designate an entity whose identity was unknown), owned the vehicle driven by defendant Oliveras.

Plaintiff seeks leave pursuant to CPLR 203, 305 and 1024 to amend the summons and complaint to substitute Allstate for the ABC Corp. defendant, or to deem the claims against Allstate to relate back to the claims against defendant Oliveras, with whom Allstate is claimed to be united in interest. Plaintiff further seeks additional time to serve a supplemental summons and amended complaint on Allstate.

Pursuant to CPLR 1024, “[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.”

“A condition for commencing an action against an unknown party ... is that the plaintiff demonstrate he or she made a genuine effort to ascertain, in a timely manner, the identity of the defendants prior to expiration of the statute of limitations” (*Opiela v May Indus. Corp.*, 10 A.D.3d 340, 341 [1st Dept 2004]). Furthermore, plaintiff may be permitted to amend a complaint to reflect the true name of a John Doe defendant “only where such parties were fairly apprised that they are the intended defendants and are not prejudiced thereby” (*id.*; see CPLR 203[f] [“A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading”]). “A summons served in a ‘John Doe’ form is jurisdictionally sufficient only if the actual defendants are adequately described and would have known, from the description in the complaint, that they were the intended defendants” (*Lebowitz v Fieldston Travel Bureau, Inc.*, 181 AD2d 481, 482 [1st Dept 1992] [quotation marks and citation omitted]). A summons and complaint that fairly apprises the intended defendant of the claim against him or her “tolls” the statute of limitations for 120 days after commencement of the action by filing (see *Tucker v Lorieo*, 291 AD2d 261 [1st Dept 2002]; see also *Opiela, supra*).

The court’s primary concerns are thus the timeliness and quality of plaintiff’s efforts to ascertain Allstate’s identity, and the content and timeliness of the complaint.

Here, the accident occurred on October 16, 2015, and the statute of limitations expired on October 16, 2018 (*see* CPLR 214[5]); General Construction Law § 58). Plaintiff commenced the action on October 11, 2018, and the CPLR 306-b period expired on February 8, 2019 (*see* General Construction Law §§ 20, 25-a[1]). Plaintiff submitted this order to show cause on January 17, 2019, and served the order to show cause on Allstate on February 12, 2019, as directed by the court (*see* CPLR 2211).

Plaintiff demonstrated that his inability to timely identify the vehicle's owner was not due to a lack of diligence on his part. The police officer who responded to the accident listed defendant Willis of Arizona (Willis) as the offending vehicle's registrant, but omitted that entity's PO Box number from its address and omitted the insurance code for the vehicle. When, in May 2018, plaintiff requested insurance information for the offending vehicle from the New Jersey Motor Vehicle Commission (the offending vehicle bore a New Jersey license plate), the Commission responded that it had no relevant information on file for the license plate number appearing in the police accident report. A search of the offending vehicle's vehicle identification number ("VIN"), while it yielded a vehicle owned by Allstate, yielded a vehicle with a different license plate number whose registration was issued nearly one year after the accident. After plaintiff commenced the action and served the summons and complaint, counsel for defendant Willis provided plaintiff with the New Jersey Apportioned Cab Card (*see* N.J.A.C. §§ 13:18-2.1, 13:18-2.10) for the offending vehicle. The Cab Card showed that Allstate registered the offending vehicle two weeks prior to the accident. The Cab Card, incidentally, reveals that the police officer who responded to the scene of the accident also failed to accurately transcribe the offending vehicle's license plate number. Plaintiff demonstrated diligent, timely efforts to ascertain Allstate's identity (*see Henderson-Jones v City of N.Y.*, 87 AD3d 498 [1st Dept 2011]).

The complaint identified ABC Corp. as the owner of the vehicle operated by defendant Oliveras, and identified the vehicle by both New Jersey license plate number and VIN. Plaintiff timely served the complaint upon defendants Oliveras, Willis and the EQ Holdings entities. The complaint's omission of the final letter in the license plate number, although accurate with respect to the plate as it appeared in the accident report, was not so significant as to deprive Allstate of notice that it was the intended defendant as owner of the vehicle, particularly where the complaint accurately recited the VIN (*cf. Lebowitz, supra*). Furthermore, defendant Oliveras admitted in his answer that he operated the vehicle with the consent and knowledge of its owner.

Plaintiff having satisfied CPLR 203(f) and 1024, the amendment is permitted (*cf. Small v City of N.Y.*, 160 AD3d 471 [1st Dept 2018]).

Pursuant to CPLR 306-b, “[i]f service is not made upon a defendant within [one hundred twenty days after the filing of the summons and complaint], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.” Reasonable diligence must be established under the “good cause” standard, which is not intended to accommodate conduct usually characterized as law office failure (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-5 [2001], *citing* Mem of NYSBA Rules Comm, Bill Jacket, L 1997, ch 476, at 14).

Under the interest of justice standard, however, “a showing of reasonable diligence in attempting to effect service is not a ‘gatekeeper.’ It is simply one of many relevant factors to be considered by the court” (*id.* at 104). “[T]he court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*id.* at

and it is further

ORDERED, that within 30 days after entry of this decision and order, plaintiff shall file and serve a supplemental summons and amended complaint in the form as annexed to the moving papers as Exhibit A; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 407, at 2:00 p.m. on **May 17, 2019** for a preliminary conference.

This constitutes the decision and order of the court.

Dated: March 11, 2019

  
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John R. Higgitt, A.J.S.C.