

McLeod v Yearwood
2019 NY Slip Op 32556(U)
August 19, 2019
Supreme Court, Kings County
Docket Number: 514872/2018
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 514872/2018
Motion Date: 7-29-19
Mot. Cal. No.: 43-44

-----x
CLIFFORD McLEOD,

Plaintiff,

-against-

DECISION/ORDER

SHONNETTE YEARWOOD,

Defendant,
-----x

The following papers numbered 1 to 5 were read on these motions:

Papers:	Numbered:
Notices of Motion/Cross-Motion	
Affidavits/Affirmations/Exhibits.....	1-2
Answering Affirmations/Affidavits/Exhibits.....	3-4
Reply Affirmations/Affidavits/Exhibits.....	5
Other.....	

Upon the foregoing papers, the motions are decided as follows:

In this action to recover damage for personal injuries arising out of a motor vehicle accident, the defendant, SHONNETTE YEARWOOD, moves for an order, *inter alia*, dismissing the action on the ground that the court plaintiff failed to file timely serve her with the summons and complaint. The plaintiff, CLIFFORD McLEOD, cross-moves for an order pursuant to CPLR § 306-b, *inter alia*, extending his time to file proof of service and deeming proof of the purported service of the summons and complaint on the defendant on November 17, 2018 and March 4, 2019 filed *nun pro tunc*.

The accident which gives rise to this action occurred on July 19, 2015. Plaintiff commenced the action by filing the summons and complaint on July 19, 2018, just prior to the

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expiration of the statute of limitations. On November 17, 2018, days before the 120 day period in which proof of service had to be filed with the Court (CPLR 306-b), plaintiff attempted to effect service by "nail and mail" pursuant to CPLR 308[4] at 917 Lafayette Avenue, Apt. 2, Brooklyn, New York, the address listed for the defendant in the police report that was prepared regarding the accident.

In support of her motion dated January 11, 2019, defendant submitted her own affidavit stating that she moved out of the 917 Lafayette Avenue address sometime in 2015. She further stated that since September of 2015, her New York State driver's license reflects that she has been living at a different address.

In opposition to the motion and in support of the cross-motion, plaintiff submitted a print out from the Department of Motor Vehicle (DMV), dated March 4, 2019, reflecting that plaintiff's current address is 575 Hancock Street, Apt. 3C, Brooklyn, New York. The print out did not indicate when DMV was notified of defendant's change in address. Plaintiff's counsel maintains that upon receiving plaintiff's moving papers, he arranged to have defendant served with a copy of the summon and complaint. Service was purportedly effected on March 4, 2019 by hand delivery. Plaintiff's counsel annexed a copy of the affidavit of service to plaintiff's moving papers.

Plaintiff also submitted excerpts from a deposition given by the defendant on September 18, 2017 in connection with an action she had commenced against the plaintiff arising out of the accident. Defendant testified that she had been living at the Hancock address for three years.

Plaintiff's cross-motion will be addressed first. Vehicle and Traffic Law § 505(5) requires that every motor vehicle licensee notify the Commissioner of Motor Vehicles of any change in

residence within 10 days of the change. Courts have generally held that a party who fails to comply with this provision is estopped from challenging the propriety of service made to the former address (see, *Pumarejo-Garcia v. McDonough*, 242 A.D.2d 374, 662 N.Y.S.2d 66; *Burke v. Zorba Diner*, 213 A.D.2d 577, 623 N.Y.S.2d 932; *Sherrill v. Pettiford*, 172 A.D.2d 512, 567 N.Y.S.2d 859; *McCleaver v. VanFossen*, 276 A.D.2d 603, 604, 714 N.Y.S.2d 138, 139; *Traore v. Nelson*, 277 A.D.2d 443, 449, 716 N.Y.S.2d 701, 702; *Sherrill v. Pettiford*, 172 A.D.2d 512, 567 N.Y.S.2d 859). Plaintiff contends that defendant's deposition transcript demonstrated that the defendant did not notify DMV of her change in address within 10 days of moving from the Lafayette Street address. For this reason, plaintiff maintains that the defendant should be estopped from asserting that service at her former address was improper.

First, plaintiff submitted no concrete proof that the defendant failed to comply with Vehicle and Traffic Law § 505(5). The Court does not view defendant's deposition testimony as dispositive of the issue. More importantly, plaintiff averred that her current address has been on file with the DMV since September of 2015. Assuming plaintiff did not timely comply with Vehicle and Traffic Law § 505(5), the Court holds that since her current address has been on file with the DMV well more than three years before plaintiff had attempted to serve her at her former address, she should not be estopped from challenging the propriety of service. In the Court's view, a party should not be estopped from challenging the propriety of service made to a former address where DMV was notified of the change in address at least 10 days prior to service. Plaintiff's estoppel argument based on Vehicle and Traffic Law § 505(5) is therefore without merit.

Turning to plaintiff's motion pursuant to CPLR § 306-b for an order extending his time

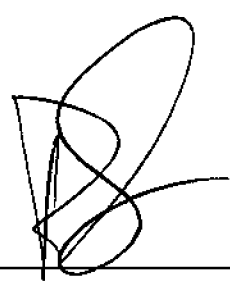
to file proof of service for good cause and in the interests of justice, the record demonstrates that plaintiff did not commence the action until just prior to the expiration of the Statute of Limitations and did attempt to serve the summons and complaint until the 120 day period set forth in CPLR § 306-b had almost run. Even if the plaintiff effected service on March 4, 2019, service was made well past the 120 day deadline set forth in CPLR § 306-b. The record also demonstrates a lack of diligence in properly effecting service, the failure to promptly and properly move for an extension of time and a complete failure to demonstrate the existence of a meritorious action (*see, Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 736 N.Y.S.2d 291, 761 N.E.2d 1018; *Carbonaro v. Maimonides Med. Ctr.*, 289 A.D.2d 437, 735 N.Y.S.2d 162). For all of the above reasons, plaintiff's motion pursuant to CPLR § 306-b to extend his time to file proof of service is denied, despite the expiration of the Statute of Limitations.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion is **DENIED** and defendant's motion is in all respects **GRANTED**.

This constitutes the decision and order of the Court.

Dated: August 19, 2019



PETER P. SWEENEY, J.S.C.
HON. PETER P. SWEENEY, J.S.C.

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