

Catello v Farber

2019 NY Slip Op 33288(U)

September 19, 2019

Supreme Court, Richmond County

Docket Number: 150475/2016

Judge: Kim Dollard

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
CARYN CATELLO

Plaintiff,

-against-

GERMAN FARBER and ACT AMBULETTE, INC.

Defendant
-----X

RONALD A. RAMIREZ,

Plaintiff,

-against-

GERMAN FARBER and ACT AMBULETTE, INC.,
DIMINICK CATELLO and LIVE WIRE ELECTRIC
1 LLC,

Defendants
-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ~~KINGS~~ Richmond

-----X
JOANNE TRINGAS,

Plaintiff,

-against-

ACT AMBULETTE, INC., GERMAN FARBER, LIVE
WIRE ELECTRIC LLC, DIMINICK CATELLO,
DANGELO CORP., AND RONALD A. RAMIREZ,

Defendants
-----X

The following papers were fully submitted on the 19th day of July, 2019:

DCM PART 4
Present:
Hon. Kim Dollard

DECISION AND ORDER

Index No. 150475/2016
Action 1

Motion No. 5

Index No. 750016/2017
Action 2

750022/2018
Index No. ~~517587/2016~~
Action 3

motion 005

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Motion to Reargue/Renew by Plaintiff Tringas with Supporting Papers and Exhibits
(Dated: April 12, 2019).....1

Affirmation in Opposition by Defendants German Farber with Supporting Papers and Exhibits
(Dated: May 22, 2019).....2

Plaintiff’s Reply Affirmation and Amendment to Motion with Supporting Papers and Exhibits
(Dated: May 31, 2019).....3

Affirmation in Opposition by Defendant Act Ambulette with Supporting Papers and Exhibits
(Dated: July 1, 2019).....4

Plaintiff’s Reply to Defendant Act Ambulette’s Opposition with Supporting Papers and Exhibits
(Dated: July 11, 2019).....5

This consolidated action stems from a motor vehicle accident that occurred on May 17, 2015 on the east bound lanes of the Belt Parkway near Bedford Avenue, in Brooklyn, New York. This multi-car accident occurred when defendant, German Farber (hereinafter “Farber”) while operating an Act Ambulette (hereinafter “ACT”), rear-ended the defendant, Dominick Catello. The Catello vehicle then struck the vehicle of plaintiff, Ronald Ramirez in the rear. The Ramirez vehicle then struck the rear of the motor vehicle in which the plaintiff, Joanne Tringas, was a passenger in. The Act Ambulette was driven by Farber, who worked for ACT. The police accident report states that the collision resulted from a chain reaction stemming from Farber accelerating and striking the rear of the Catello vehicle. Farber was arrested at the scene and charged with driving while intoxicated.

The current motion is on behalf of plaintiff in action number 3, Tringas, who moves to renew and reargue this Court’s decision dated March 15, 2019, which denied her motion for a default judgment against defendants, ACT and Farber, and which granted the cross-motions of defendants ACT and Farber to dismiss.

The plaintiff , Tringas, brought an action in Kings County by purchasing index number 517587/2016 on October 6, 2016. The defendant, ACT was served on November 9, 2016 through the New York Secretary of State. The defendant, Farber, was not served, but an affidavit of due diligence was filed on January 11, 2017.

By Notice of Motion dated March 6, 2018, the Tringas plaintiff moved for a default judgment against defendants, ACT and Farber. Defendant, ACT, cross moved to dismiss based on the plaintiff's failure to move for a default judgment within one year. The Tringas case was transferred to Richmond County and joined for trial with the above captioned related cases. No decision was ever rendered on the motions in Kings County and they came before this Court. Once transferred, and by Notice of Cross-Motion dated December 17, 2018, the defendant, Farber, moved to dismiss on the basis that Farber was never properly served.

On March 15, 2019, this Court denied plaintiff's motion for a default judgment against defendants, ACT and Farber, and granted the cross-motions of ACT and Farber to dismiss.

The plaintiff, Tringas, now moves to renew and reargue the March 15, 2019 decision of this Court. The court, in its discretion, grants the plaintiff's motion and, upon renewal, reinstates the complaint against ACT and adheres to its decision to dismiss the case as against Farber.

A Plaintiff who fails to seek a default judgment within one year, is required to demonstrate the merits of the cause of action and an excuse for the delay *see; Monzon v Sony Motor, Inc.*, 115 AD2d 714, 714 (2d Dept 1985) *,see also; Grosso v Hauck*, 99 AD2d 750; *Winkelman v H & S Beer & Soda Discounts*, 91 AD2d 660).

Plaintiff's counsel establishes a reasonable excuse for the failure to move for a default judgment within one year as against ACT and has shown proof of a meritorious claim sufficient to excuse their failure to move for a default judgment within one year. Counsel for plaintiff asserts that he has been in settlement negotiations from November of 2016 to December of 2017 with the adjuster for ACT from American Country Insurance Company. He further attests that \$10,000 was offered and rejected by Ms. Tringas, and that he had no intention of abandoning the action. The plaintiff also sent medical records to the insurance carrier in an attempt to settle the case. Plaintiff's counsel further contacted the claims adjuster and advised that ACT did not answer the complaint, whereupon she indicated that the complaint would be answered and another copy of the complaint was provided. The attorney for plaintiff moved for a default judgment in Kings County, where the case was initially pending, shortly after a year had passed from service upon ACT, and then renewed the motion in Richmond County, also evidencing that there was no intent to abandon the case. Moreover, the Court finds no prejudice to the defendant, ACT, who was aware of this case prior to the making of the default judgment motion.

Plaintiff has further shown that a meritorious claim exists, since the Tringas vehicle was struck in the rear.

Based upon the foregoing, the court grants plaintiff's motion to renew and reargue and reinstates the complaint against defendant, ACT Ambulette, Inc.

The defendant, Farber, asserts that defendant, Farber, was never served with a copy of the summons and complaint and that the plaintiff merely attached an affidavit of due diligence stating the attempts made and that the process server unable to effectuate service of process upon defendant, Farber. An affidavit of non-military service does not cure this defect in service.

Accordingly, because the defendant, Farber, was never served with the summons and complaint, the court grants the plaintiff's motion to renew/reargue and adheres to its original decision with respect to defendant, Farber.


Accordingly, it is

ORDERED that Plaintiff's motion to renew/reargue is granted; and it is further,

ORDERED that the complaint against defendant, ACT Ambulette, Inc., is reinstated and the complaint against defendant, Farber, is dismissed; and it is further,

ORDERED, that the case is to be restored to the active calendar for October 2, 2019.

ENTER,



Hon. Kim Dollard

Acting Supreme Court Justice

Dated: 9/19/19