

**Konadu v Hertz Vehs., LLC**

2020 NY Slip Op 32042(U)

May 21, 2020

Supreme Court, Bronx County

Docket Number: 31262/2019E

Judge: Kenneth L. Thompson, Jr.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X

DERRICK KONADU,

Index No: **31262/2019E**

Plaintiff,

-against-

**DECISION AND ORDER**

HERTZ VEHICLES, LLC, DTG  
OPERATIONS, INC., d/b/a DOLLAR RENT  
A-CAR, and DOLLAR RENT A CAR, INC.,

**Present:**  
**HON. KENNETH L. THOMPSON, JR.**

Defendants.

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The following papers numbered 1 to read on this **motion to dismiss**

No	On Calendar of <b>March 6, 2020</b>	PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed		<b>NYSCEF Motion Sequence #2</b>
Answering Affidavit and Exhibits-----		<b>NYSCEF Motion Sequence #2</b>
Replying Affidavit and Exhibits-----		<b>NYSCEF Motion Sequence #2</b>
Memorandum of Law-----		<b>NYSCEF Motion Sequence #2</b>

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Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint. Plaintiff cross-moves pursuant to CPLR 3015(b), to amend the amended complaint. Plaintiff brought this action seeking damages for public accommodation discrimination on the basis of race, color and national origin and for retaliation. Plaintiff sought to rent a vehicle from defendants and was turned away allegedly because his credit card did not have heightened security measures.

Defendants oppose plaintiff’s motion to amend on the basis that this is the second amendment of the complaint in response to a motion to dismiss. However, the video submitted by defendants on this motion indicate that at the time of the alleged discrimination, it was asserted that a white customer of defendant did not have the same level of scrutiny of his credit card. Namely, while plaintiff, a black man from Ghana, had his credit card passed under an ultra violet light to determine

if the heightened security measures were present, while the immediately preceding white customer did not have his credit card scanned for the presence of the heightened security measure. The gravamen of the changes in the second amended complaint is to include this critical allegation of discrimination. Defendants submitted evidence in the form of a videotape, that this allegation of discrimination was asserted at the time of the alleged discrimination and therefore, this allegation of discrimination was not a contrived allegation for purposes of avoiding dismissal.

Defendants argue that plaintiff's cross-motion is procedurally defective as plaintiff did not provide a marked or redlined copy of the second amended complaint. CPLR 3025(b) merely requires the amended pleading be submitted "clearly showing the changes or additions to be made to the pleading." Plaintiff indicated in his memorandum of law in support of the cross-motion, the paragraphs that were added in the second amended complaint.<sup>1</sup> While defendants argue that there were two changes not identified by plaintiff, defendants perceived those minor changes and therefore are not prejudiced by plaintiff's style in showing the "changes or additions made to the pleading." CPLR 3025(b).

Defendants also argue that they are entitled to make an election as to whether their motion to dismiss is directed to plaintiff's amended complaint or second amended complaint, citing to *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35 [1<sup>st</sup> Dept 1998]. However, in *Sage* the First Department holds: "we prefer the rule set forth in *Sholom*." *Id.* at 38 [1<sup>st</sup> Dept 1998]). The Supreme

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<sup>1</sup> Page 15 footnote # 1 indicates that "Plaintiff added paragraphs 17, 18, 21,25, 46, 48, 50, 52-61, 63, 72-74."

Court held, in pertinent part, as follows in *Sholom*:

The real question is the effect the amended pleading has on the pending motion. It has been held that the motion “abates,” that is, that it must automatically be denied as moot since it refers to a pleading which has been superseded. (*Lipary v. Posner, supra*, 96 Misc.2d 578, 409 N.Y.S.2d 363) This approach, which only invites additional motion practice, should be restricted to those situations where the amendments make a significant change in the nature of the action.

(*Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Grp., Inc.*, 138 Misc. 2d 799, 801 [Sup. Ct. 1988]).

The holding in *Sholom* is also consistent with the Second Department. With respect to defendants’ motion to dismiss, “the original complaint was superseded by the amended complaint, the defendants’ challenge to the original complaint has been rendered academic.” *Elegante Leasing, Ltd. V Cross Trans Svc, Inc.*, 11 AD3d 650 (2<sup>nd</sup> Dept 2004).

It is clear that the inclusion of a factual allegation of discrimination in the second amended complaint that was absent in the amended complaint is a “significant change,” and therefore, defendants’ motion to dismiss, abates.

Accordingly, defendants’ motion to dismiss is denied and it is hereby:

ORDERED that plaintiff’s motion for leave to amend the amended complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within 20 days from the date of said service.

The foregoing constitutes the decision and order of the Court.

Dated: May 21, 2020

  
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**KENNETH L. THOMPSON JR. J.S.C.**