

Greaves v Peralta

2020 NY Slip Op 32433(U)

July 24, 2020

Supreme Court, Kings County

Docket Number: 507907/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

X

LYSTRA GREAVES and JENNIFER PHILLIPS,

Plaintiffs,

-against-

FAUSTO PERALTA,

Defendant.

X

DECISION / ORDER

Index No. 507907/2019
Motion Seq. No. 1 & 2
Date Submitted: 7/9/20

FAUSTO PERALTA,

Third-Party Plaintiff,

-against-

ID CHUKWUMA OGUAGHA
and NYC TRANSIT AUTHORITY,

Third-Party Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant/third-party plaintiff's motion to vacate an order dated December 2, 2019 and plaintiffs' motion for leave to amend the complaint to add the third-party defendants as direct defendants

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>24-30</u>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>16-22</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>35-37</u>
Reply Affirmation and Exhibits Annexed.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This case arises out of a motor vehicle accident which occurred on April 2, 2019. Plaintiffs were passengers in a taxi owned and driven by defendant Peralta, which collided with a box truck owned by third-party defendant New York City Transit Authority and driven

by third-party defendant Oguagha. Defendant Peralta was apparently turning right at the time, onto Sixth Street from Prospect Park West, in the County of Kings, City and State of New York. The police report, dated on the date of the accident (NYSCEF Doc. 7) indicates the responding officer spoke to both drivers. Peralta told the officer that Oguagha rear-ended him. Oguagha told the officer that Peralta “merged into his lane.” Plaintiffs filed this action on April 9, 2019, a week later, but named only defendant Peralta as a party defendant.

On May 17, 2019, defendant answered the complaint and e-filed a third-party summons and complaint naming the owner and driver of the truck as third-party defendants pursuant to CPLR 1007, which permits a defendant to implead a party who is or may be liable to that defendant for all or part of a plaintiff's claim against such defendant. The affidavit of service (NYSCEF Doc. 8) indicates the third-party summons and complaint was served on May 29, 2019.

The third-party defendants answered on August 1, 2019 with counterclaims against plaintiffs (passengers), not against third-party plaintiff/defendant Peralta, for negligence. Third-party defendants also served discovery demands simultaneously, demanding that plaintiffs provide, *inter alia*, a Bill of Particulars as to their injuries and damages. Nothing in the discovery demands e-filed with the answer to the third-party complaint mentions defendant Peralta. Plaintiffs e-filed their Bill of Particulars on August 13, 2019 (NYSCEF Doc. 13-14), along with other responses to defendant Peralta's demands. Plaintiffs filed an RJI on August 14, 2019. The Preliminary Conference was scheduled for September 24, 2019 and was adjourned to November 4, 2019.

On November 4, 2019, a Preliminary Conference Order was issued, signed by

J.H.O. Schneier. It states that plaintiffs' attorney, defendant's attorney and third-party defendants' attorney were all present, and at the top it is written "both plaintiffs (Phillips and Peralta) [sic] to serve defendant NYCTA with bill of particulars by 12/2/19 or it will be administratively [sic] dismissed" (NYSCEF Doc. 15). It is not known what was said to the attorneys, but in the court's computer, that Preliminary Conference was entered as "adjourned to December 2, 2019." The Order provides for an ADR date, a Compliance Conference date, and a Note of Issue date. It does not mention December 2, 2019 except in the handwritten entry described above. The Order also provides, on Page 2, that "Plaintiff Peralta to serve defendant NYCTA will [sic] a bill of particulars within 30 days (12/4/19)." This Order was uploaded to E-File on November 6, 2019. There is no indication on it of any adjournment.

On December 2, 2019, counsel for defendant Peralta failed to appear for the "adjourned" Preliminary Conference and an Order was issued that states that as he had "failed to serve a Bill of Particulars on 3rd Party Defendants, . . . the third party action is dismissed. . . Defendant/3rd Party plaintiff has failed to appear today" (NYSCEF Doc. 23). This Order was entered and uploaded to the E-file system on December 10, 2019.

These motions were e-filed on December 12, 2019. In Motion 001, movant, defendant Peralta, claims he missed the December 2, 2019 appearance due to law office failure, mixing up the appearance date with the ADR date, which was also in December. He asks the court to excuse his default. Plaintiffs sent the court a courtesy copy of an affirmation "in response" which states that "plaintiff [sic] does not oppose" the motion. Annexed to this document is a Confirmation Notice for e-filed document number 34, but that document in the E-filing system is an affidavit of service (see NYSCEF Doc. 34). The

court has thus changed the name of that document entry to “Affidavit of Service.” The outcome of this motion does not rely on plaintiffs’ position, so it is not necessary to e-file the correct document at this juncture.

The third-party defendants oppose the motion. Counsel states that had Peralta provided a bill of particulars, he would not have needed to appear on December 2, 2019, nor would Peralta’s counsel, as the next court date was not until the scheduled Compliance Conference.

The court finds this whole situation procedurally untenable and grants the motion to vacate the defendant’s “default,” such as it was (MS 01). First, dismissal of a complaint, even a third-party complaint, is a sanction disproportionate to the offense of not serving a Bill of Particulars so early in the action. Second, the third-party defendants’ Demand for a Bill of Particulars is only addressed to the plaintiffs herein, and even if you read “plaintiffs” to include the third-party plaintiff, it is not clear what injuries or damages he was supposed to disclose. Third, as the courts were closed for part of the last few months due to Covid-19, and the accident was less than a year ago, no prejudice will result by granting the motion and restoring the parties to where they were in December 2019.

Turning to the plaintiffs’ motion to amend the complaint to add the third-party defendants as direct defendants (MS 02), the motion must be denied. A suit against the Transit Authority statutorily requires¹ a Notice of Claim (within 90 days). This notice is a prerequisite to suit and confers subject matter jurisdiction. The plaintiffs do not aver they served a timely Notice of Claim. Thus, the court cannot grant the motion even though it was not opposed. The only proper motion to add these parties as direct defendants would

¹ General Municipal Law §§ 50-e, 50-i.

be one for leave to file a late notice of claim. If such a motion is granted, the court then has the discretion to determine whether the date for computing the statute of limitations should relate back to the date of filing of the third-party complaint (*see Duffy v Horton Memorial Hosp.*, 66 NY2d 473 [1985]; *Cazassus v Bayview Owners Corp.*, 19 Misc 3d 1110[A], 2008 NY Slip Op 50633[U], *4 [Sup Ct, Kings County 2008]).

A cause of action for common law indemnification or contribution, such as that set forth by Peralta in the third-party action against the Transit Authority, does not accrue until the third-party plaintiff is obligated to pay the plaintiff. It is well settled that because of this fact, the notice requirements for the commencement of a primary action are inapplicable to the maintenance of a third party action (*see Matter of Valstrey Serv. Corp. v Board of Elections*, 2 NY2d 413 [1957]; *DeLeonibus v Scognamilio*, 183 AD2d 697 [2d Dept 1992]; *San Marco Constr. Corp. v Aetna Cas. & Surety Co.*, 162 AD2d 514 [2d Dept 1990]; *Dutton v Mitek Realty Corp.*, 95 AD2d 769 [2d Dept 1893]; *Zillman v Meadowbrook Hosp. Co., Inc.*, 45 AD2d 267 [2d Dept 1974]). Nonetheless, plaintiffs may not make them direct defendants.

Accordingly, it is

ORDERED that defendant/third-party plaintiff Peralta's motion to vacate his default and to vacate the order issued on December 2, 2019 is granted in its entirety (Motion Sequence Number 001); it is further

ORDERED that the dismissal of the third-party action is vacated; and it is further

ORDERED that third-party defendants' counsel shall serve Peralta's counsel within twenty (20) days with a revised Demand for a Bill of Particulars which makes it clear that it is addressed to him; and it is further

ORDERED that Motion Sequence Number 002 is denied.

This constitutes the Decision and Order of the Court.

Dated: July 24, 2020

ENTER:



Hon. Debra Silber, J.S.C.