

Abramyuk v New York City Dept. of Educ.
2020 NY Slip Op 34367(U)
November 5, 2020
Supreme Court, Richmond County
Docket Number: 152519/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

-----X
VASYL ABRAMYUK and GANNA ABRAMYUK,

Plaintiffs,

HON. THOMAS P. ALIOTTA

-against -

DECISION AND ORDER

Motion Seq. No. 001

THE NEW YORK CITY DEPARTMENT OF
EDUCATION and THE CITY OF NEW YORK,

Index No: 152519/2019

Defendants.

-----X

Recitation as required by CPLR 2219(a) of the following papers numbered "1" to "4"
were fully submitted on the 2nd day of September 2020:

	Papers Numbered
Defendants' Notice of Motion to Dismiss (Affirmation in Support with Supporting Exhibits) (Dated: May 5, 2020).....	1
Plaintiffs' Affirmation in Opposition with Supporting Exhibits (Dated: June 23, 2020).....	2
Reply Affirmation (Dated: July 7, 2020).....	3

Upon the foregoing papers, the motion of defendants, the New York City Department of Education and the City of New York (hereinafter collectively, the "City") to dismiss the action pursuant to CPLR 3012(b) is denied.

Plaintiff Vasyl Abramyuk claims to have suffered extensive personal injuries on August 7, 2018, while working at a construction site at Tottenville High School in Staten Island, New York. Specifically, plaintiff, a bricklayer, alleges that he was caused to suffer a stroke on August

7, 2018 (one day after his last workday at the site) due to his exposure to excessive heat, inadequate fluids and inadequate breaks during the workday.

A Notice of Claim dated October 29, 2018 was timely served upon defendants on November 2, 2018 (*see* NYSCEF Doc. No.6), and one year later, on October 29, 2019, plaintiff testified at a mandatory hearing brought pursuant to §50-h of the General Municipal Law (*see* NYSCEF Doc. No. 7).

Plaintiffs commenced this action on October 30, 2019 with the filing of a summons with notice sounding in personal injuries sustained at defendants' worksite (*see* NYSCEF Doc. No. 1), followed by personal service of the summons with notice on January 24, 2020 (*see* Plaintiffs' Affirmation in Opposition to the motion, reflecting an apparently incorrect service date of January 24, 2019; NYSCEF Doc. No. 16). Defendants served a notice of appearance by e-file on February 28, 2020 (*see* NYSCEF Doc. Nos. 2, 3).

Defendants' motion *sub judice*, to dismiss plaintiffs' action for failure to serve a complaint within 20 days of defendants' notice of appearance (*see* CPLR 3012[b]) was served by e-file on May 5, 2020 (*see* NYSCEF Doc. No. 4). In apparent response to the motion, plaintiffs e-filed their complaint, sounding in labor law, on May 19, 2020 (*see* NYSCEF Doc. No. 12). Defendants e-filed a "notice of rejection" of the complaint on May 27, 2020 (*see* NYSCEF Doc. No. 13). The parties conducted a preliminary conference on July 7, 2020 (*see* NYSCEF Doc. No. 20).

CPLR 3012(b) "**Service of complaint where summons served without complaint**" provides in relevant part:

"If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance...**[i]f no demand is made, the complaint shall be served within twenty days after service of the notice of appearance.** The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision...." (emphasis supplied).

In support of the motion, defendants maintain that plaintiffs had until March 17, 2020 (*i.e.*, within 20 days of the City's February 28, 2020 notice of appearance) to serve their complaint and having failed to do so, must demonstrate a reasonable excuse for that delay and a potentially meritorious cause of action. In this regard, the City argues that plaintiffs' delay was unwarranted despite the recent COVID-19 health crisis, because the court system was fully operational on March 17, 2020. Likewise, plaintiff's meritorious cause of action is belied by the City's medical expert, who concluded that plaintiff's August 7, 2018 "thromboembolic stroke at the distal basilar artery" was not associated with the heat exhaustion¹ allegedly suffered on August 6, 2018 (*see* City's Exhibit E; NYSCEF Doc. No. 10).

In opposition to the motion, plaintiffs argue that the City's (1) failure to obtain plaintiffs' consent to e-filing² renders their notice of appearance a nullity, tolling plaintiffs' time to serve the complaint, and (2) the COVID-19 health crisis caused plaintiffs' counsel to work remotely as of March 16, 2020 "as per the Governor's Executive Order" (*see* June 23, 2020 Affirmation in Opposition; NYSCEF Doc. No. 16), which likewise tolled plaintiffs' time to serve the complaint.

Plaintiffs are referring to Executive Order No. 202.8, issued on March 20, 2020, which provided that "[i]n accordance with the directive of the Chief Judge of the State to limit court

¹ A purported hospital admission record reflects that plaintiff was not suffering from dehydration when he arrived by ambulance at the hospital on the morning of August 7, 2018.

² Uniform Rule 202.5-b, specifically subsection (b)(2)(i) and (ii) provides, in pertinent part as follows: "(i) **Consent of the parties required.** After commencement of an action wherein e-filing is authorized, documents may be electronically filed and served, but only by, and electronic service shall be made only upon, a party or parties who have consented thereto...[a] party who has not consented to participation shall file documents with the court and the County Clerk, and serve and be served with documents, in hard copy. When an e-filing party serves a document in hard copy on a nonparticipating part, the document served shall bear full signatures of all signatories and proof of such service shall be filed electronically.

(ii) **Consent to e-filing; how obtained...**A party who has commenced an action electronically shall serve upon the other parties together with the initiating documents a notice of e-filing in a form approved by the Chief Administrator..." (emphasis supplied).

operations to essential matters during the pendency of the COVID-19 health crisis...**any specific time limit for the commencement, filing, or service** of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to...the civil practice law and rules...or by any other statute, local law, ordinance, order, rule or regulation...**is hereby tolled until April 19, 2020,**” later amended to May 4, 2020. (emphasis supplied).

It is well settled that dismissal under CPLR 3012(b) is permissive and left to judicial discretion (*see McKenzie v. Jack D. Weiler Hosp.*, 171 AD3d 615 [1st Dept 2019]; *Hernandez v. Chaparrao*, 95 AD3d 745 [1st Dept. 2012]; CPLR 3012[b]). “[T]o avoid dismissal for failure to serve a complaint...pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a [potentially] meritorious cause of action” (*Splinters, Inc. v. Greenfield*, 63 AD3d 717, 719 [2d Dept. 2009]). “The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court” (*Pristavec v. Galligan*, 32 AD3d 834, 834-835 [2d Dept. 2006]; *see also Low Surgical & Med. Supply v. McAfee*, 15 AD3d 547 [2d Dept. 2005]; *Carnazza v. Shoprite of Staten Is.*, 12 AD3d 393 [2d Dept. 2004]; *Adams v. Alexander*, 291 AD2d 467 [2d Dept. 2002]).

This Court is mindful of the strong policy in New York State favoring the resolution of lawsuits on the merits (*see Acosta v. State*, 270 AD2d 164 [1st Dept. 2000]) and declines to determine, at this stage and on this record, that plaintiffs’ cause of action is without merit. Moreover, plaintiffs have demonstrated a reasonable excuse for their delay in serving the complaint, given the unique circumstances where the COVID-19 crisis triggered a stay of non-essential matters on March 20, 2020—a *de minimis* three days after the complaint was due.

As for plaintiffs’ argument that the City’s “unconsented to” e-filed notice of appearance was a nullity—failing to trigger the time to serve the complaint--the Court notes that under the local rules for Richmond County: “e-filing is **mandatory in all types of cases** [with certain exceptions] **that are commenced ...on or after October 19, 2016**. All such cases must be commenced by filing with the County Clerk electronically through NYSCEF and all subsequent documents in such cases must be e-filed” (*see* Supreme Court, Civil Term Richmond County Protocol on Courthouse Procedures for Electronically Filed Cases; emphasis supplied; *cf. Howard B. Spivek Architect, P.C. v. Zilberman*, 59 AD3d 343 [1st Dept. 2009]). Although this argument is without merit, it is moot in light of the determination herein.

Accordingly, it is

ORDERED, that defendants’ motion to dismiss the action pursuant to CPLR 3012(b) is denied; and it is further

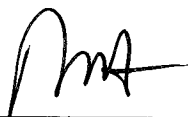
ORDERED, that leave is granted to plaintiffs to serve a complaint within 20 days of the filing of this order, and it is further

ORDERED, that failure to serve a complaint within that time may result in dismissal of this action.

This constitutes the decision and order of the Court.

Dated: ~~October~~ 5, 2020
November

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.