

Kim v Gregg

2022 NY Slip Op 30145(U)

January 10, 2022

Supreme Court, Kings County

Docket Number: Index No. 504625/2019

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of January 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
P R E S E N T: HON. INGRID JOSEPH, J.S.C

-----X
Brandon Namjung Kim

Index No.: 504625/2019

Plaintiff,

-against-

Decision/Order

Sean Gregg

Defendants.

-----X
Sean Gregg

-against-

Third-Party Plaintiff,

Shota Laitadze

Third-Party Defendant

-----X

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of the Motion(s):

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits/Affirmations Annexed.....	1, 2
Answering Papers.....	3
Reply.....	4

This action arises out of a motor vehicle collision that occurred on January 29, 2019. Plaintiff, Brandon Namjung Kim, (“Plaintiff”) who was a passenger, commenced this action by the filing of a summons and complaint on March 4, 2019. Issue was joined on April 19, 2019. Defendant, Sean Gregg (“Defendant Gregg”) who was the driver of the vehicle involved in the collision, filed a third-party summons and complaint on April 23, 2019 against third-party defendant, Shota Laitadze, (“Defendant Laitadze”) who was the driver of the vehicle in which

Plaintiff was a passenger. Issue was joined in the third-party complaint on March 6, 2020. At the preliminary conference hearing conducted on November 14, 2019 the court issued an order requiring the parties to respond to outstanding discovery demands by December 13, 2019. The original Note of Issue (NOI) was filed with the court on July 29, 2020. On July 31, 2020 the court issued another compliance order directing the plaintiff to provide all outstanding discovery that was required by the preliminary conference order and delineated in defendant Gregg's reply papers on or before September 2, 2020. On September 9, 2020, J. Knipel granted defendant Gregg's motion seeking to vacate the NOI to complete discovery. J. Knipel issued a conditional order which provided that Plaintiff's EBT be held by November 13, 2020, Defendant Gregg's EBT be held by November 20, 2020 and Defendant Laitadze's EBT to be held by December 4, 2020 and that Plaintiff's IME to be held by February 12, 2021 and reports exchanged within thirty days of the exam. Plaintiff then filed a new NOI on March 30, 2021.

The defendant and third-party plaintiff Sean Gregg, ("Defendant Gregg") now moves (mot.seq. 3) for an order enforcing the preclusion language of the September 9, 2020 dated order and (2) dismissing Plaintiff's Brandon Namjung Kim ("Plaintiff") complaint on the grounds that he will be unable to make out a prima facie case or in the alternative an order vacating plaintiff's note of issue, striking this case from the trial calendar on the ground that all discovery in this matter is not complete or staying this matter so that discovery can be completed.

Third-party defendant Shota Laitadze (Defendant Laitadze) also moves (mot.seq. 4) for (1) an order enforcing the preclusion language in the September 9, 2020 dated court order (2) dismissing the complaint of Plaintiff and third-party plaintiff's complaint on the ground that both parties are precluded from offering evidence essential to establishing their claims or in the alternative (3) striking Plaintiff's complaint for his willful and contumacious conduct in refusing to submit to an EBT or (4) vacating the Plaintiff's note of issue (5) compelling Plaintiff to submit to an examination before trial ("EBT") and independent medical examination (6) compelling Plaintiff Kim to provide to third-party defendant all the same discovery already provided to defendant/third-party plaintiff in this action and (7) compelling Defendant/third-party plaintiff to provide to third-party defendant response to combined demands dated March 6, 2020.

Plaintiff also moves (mot.seq.5) for an order excusing Plaintiff's failure to timely comply with a conditional order of preclusion dated September 9, 2020 and vacating the conditional

preclusion order dated September 9, 2020 on the ground that he has a reasonable excuse and meritorious defense.

Defendant Gregg through his attorney's affirmation argues that Plaintiff's complaint should be dismissed since he failed to comply with the conditional order which precludes him from offering evidence at trial. Defendant Gregg claims that since plaintiff cannot introduce any evidence at trial, he cannot make out a *prima facie* case as to his injuries or defendant's negligence. Alternatively, Defendant Gregg claims that if the court should not dismiss Plaintiff's complaint then the court should strike the note of issue or stay the matter for further discovery, namely, EBT of the Plaintiff.

Defendant Laitadze state that Plaintiff's complaint should be dismissed based on the arguments set forth by Defendant Gregg. Defendant Laitadze also alleges that Defendant Gregg's third-party complaint should be dismissed too since that same September 9, 2020 order precludes Defendant Gregg from offering evidence at trial. Defendant Laitadze claims that the note of issue should be vacated since discovery is not yet complete, specifically, the deposition of Plaintiff.

Plaintiff opposes both Defendant Gregg's motion and third-party Defendant Laitadze's cross-motion and states that the September 9, 2020, conditional order should not be enforced since Defendant Gregg failed to show a good faith effort to arrange the Plaintiff's EBT. Plaintiff alleges that the office of Defendant's counsel refused to proceed with Plaintiff's EBT that was rescheduled for June 7, 2021. Plaintiff maintains that there is no pattern of willful or contumacious behavior since the first deposition scheduled for March 15, 2020 was rescheduled due to Covid-19 and then once again on November 13, 2020 and none of the parties reached out to arrange the EBT. Plaintiff states that the parties agreed to conduct the EBT on June 7, 2021 but subsequently Defendant Gregg's counsel refused to proceed with the EBT. Plaintiff states that his complaint should not be dismissed because he has a reasonable excuse and meritorious cause of action against the defendants. Plaintiff's counsel emphasizes that he attempted to produce his client for EBT by reaching out to the parties on August 25, 2020 and April 7, 2021. Plaintiff claims that he has a meritorious cause of action against the defendants since he was a passenger in third-party Defendant Laitadze's vehicle when the collision occurred with Defendant Gregg.

Defendant Gregg opposes Plaintiff’s motion and alleges that it is untimely since Plaintiff’s filed his motion one month after the set July 1, 2021 deadline indicated in the parties briefing schedule. Defendant Gregg states that the email correspondence provided by Plaintiff is self-serving and incomplete since it only shows dates from April 27, 2021, which is over six months past the deadline set forth in the September 9, 2020 order.

A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order *McIntosh v New York City Partnership Dev. Fund Co., Inc.*, 165 AD3d 1251, 1252 [2d Dept 2018]. If the party fails to produce the discovery by the specified date, the conditional order becomes absolute (*Id*). To be relieved of the adverse impact of the conditional order of preclusion, a party is required to demonstrate a reasonable excuse for the failure to comply with the order and the existence of a potentially meritorious cause of action (*Id*). A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a “material fact” within the meaning of 22 NYCRR 202.21(e), and where that statement is incorrect, the note of issue should be vacated (*Jablonsky v Nerlich*, 189 AD3d 1561, 1563 [2d Dept 2020]).

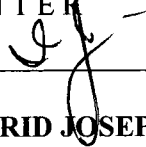
After oral argument and a review of the documents submitted the court finds that Plaintiff demonstrated a reasonable excuse and a potentially meritorious defense since he showed that he tried in good faith to schedule a deposition date and that he was a passenger in third-party defendant Laitadze’s vehicle when the collision occurred. Defendant Gregg and third-party defendant Laitadze’s motions are granted to the extent that the note of issue is vacated, and Plaintiff shall complete his EBT on or before February 18, 2022. Plaintiff shall comply with any outstanding discovery demands on or before February 18, 2022. The note of issue shall be re-filed on or before March 18, 2022.

All other contentions are either moot or without merit.

This constitutes the decision and order of the court.

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ENTER



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**