

Concepcion v Leesel Transp. Corp.
2022 NY Slip Op 31796(U)
June 8, 2022
Supreme Court, New York County
Docket Number: Index No. 150590/2022
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH **PART** **14**

Justice

-----X

SHERRY CONCEPCION,

Plaintiff,

- v -

LEESEL TRANSPORTATION CORP., SELBY
TRANSPORTATION CORP., WEBSTER DEVELOPMENT
CORP., INC.,

Defendant.

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INDEX NO. 150590/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 50, 51

were read on this motion to/for DISMISS.

The motion by defendants to dismiss this action on the grounds that there is a prior action pending and that the statute of limitations bars this action is denied.

Background

Previously, plaintiff commenced an action under index number 452219/2018 in which she sought damages arising out of trip and fall in a parking lot in December 2016. In the 2018 case, this Court dismissed the case after plaintiff ignored three consecutive conferences over the course of nearly six months despite multiple Court orders to move the case (NYSCEF Doc. No. 26). After the Court denied plaintiff’s motion to restore, plaintiff commenced this action. The matter was originally assigned to a different justice in this Court, who referred both the motion and the case it to the undersigned.¹

¹ Although the instant motion was not one to reargue, this Court will issue a decision in the interest of judicial efficiency.

Defendants contend that this case should be dismissed because the 2018 action remains pending due to plaintiff's appeal of this Court's order. They also argue that the statute of limitations prevents plaintiff from bringing this case because the accident occurred on December 1, 2016 and this case was commenced in 2022. They insist that the savings statute does not permit plaintiff to file this case because the previous matter was dismissed due to plaintiff's unwillingness to prosecute her claim.

In opposition, plaintiff emphasizes that no discovery orders were ever violated in the previous case and that the savings statute permits her to bring this case even though the accident took place in 2016.

In reply, defendants maintain that the savings statute does not apply and emphasizes the ways in which plaintiff neglected to pursue her case despite promptings from the Court.

Discussion

The Court denies the motion. As an initial matter, the Court observes that the 2018 matter is a disposed case and therefore cannot constitute a "prior action pending" for purposes of a motion to dismiss. That plaintiff may be pursuing an appeal of this Court's order is of no moment. That case is over.

With respect to the savings statute issue, the Court finds that the prior case was not dismissed on the merits and therefore plaintiff was entitled to bring a new action pursuant to CPLR 205(a). The First Department has found that a party may utilize CPLR 205(a) even where a plaintiff's previous case was dismissed for taking more than *four* years to bring a motion for a default judgment (*U.S. Bank N.A., Tr. to Bank of Am., N.A. v Kim*, 192 AD3d 612 [1st Dept 2021], appeal dismissed *sub nom. U.S. Bank N.A. v Kim*, 37 NY3d 932 [2021]). In *Kim*, a plaintiff's initial foreclosure action (brought in 2010) was dismissed pursuant to CPLR 3215(c)

for failure to take proceedings within a year of the borrower's default. Plaintiff recommenced an action within 6 months after the dismissal and the First Department concluded that plaintiff could rely upon CPLR 205(a) despite its failure to prosecute the initial foreclosure action. The 6-year statute of limitations did not bar the second action. Similarly, here, the previous action was dismissed because plaintiff ignored the case. However, as plaintiff points out, the formal rules for dismissing a case for want of prosecution pursuant to CPLR 3216 were not followed and so plaintiff is entitled to start the action once again, now more than six years after the trip and fall allegedly occurred.

Because there was no action pending, this matter did not relate to the 2018 index number as referenced on the RJJ (*see* NYSCEF Doc. No. 35). Therefore, the matter should be transferred back to Justice Kotler as that is where the action was randomly assigned when this action was commenced.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied; and it is further


ORDERED that this action is remitted to the General Clerk's Office for reassignment to the Hon. Lynn Kotler, who was initially assigned to handle this matter; and it is further

ORDERED that, within 7 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);] and it is further

ORDERED that upon receipt of the foregoing, the Clerk of the General Clerk’s Office shall immediately transfer this action to Justice Kotler.

<p><u>6/8/2022</u> DATE</p>		 <hr/> ARLENE BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE
APPLICATION: CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER <input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN			