

Heurtelou v Booker

2023 NY Slip Op 33009(U)

August 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 509964/2019

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 28th day of August 2023

HONORABLE FRANCOIS A. RIVERA

-----X
AMOS HEURTELOU and ALTIMAS HEURTELOU,

Plaintiff,

DECISION & ORDER

Index No.: 509964/2019

- against -

KATESHA BOOKER and KITTY S. BOOKER,

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on February 9, 2023, under motion sequence one, by defendants Katesha Booker and Kitty S. Booker (hereinafter the defendants) for an order, pursuant to CPLR 3404, dismissing the complaint of Amos Heurtelou and Altimas Heurtelou (hereinafter the plaintiffs) with prejudice for the plaintiffs' failure and neglect to prosecute the action. The plaintiffs oppose this motion.

- Notice of Motion
- Affirmation in Support
 - Exhibits A-F
- Affirmation in Opposition
 - Exhibits A-E

BACKGROUND

On May 3, 2019, the plaintiffs commenced the instant action by filing a summons and verified complaint with the Kings County Clerk 's office (KCCO). On July 12, 2019, the defendants joined issue by interposing and filing and answer with the KCCO.

The verified complaint alleges the following salient facts. On October 27, 2016, the plaintiff Amos Heurtelou was operating a 2005 Honda motor vehicle bearing a New York State license plate in the vicinity of Rockway Parkway at the intersection of Seaview Avenue, in the County of Kings, in State of New York. On the same date, time, and place defendant Katesha Booker was operating a 2005 Honda motor vehicle bearing a New York State license plate with the permission of the vehicle's owner Kitty S. Booker. The two vehicles collided due to Katesha Booker's negligent operation of her vehicle and the collision caused the plaintiff to sustain serious physical injury.

UNDISPUTED PROCEDURAL FACTS

On September 16, 2020, a Preliminary Conference was held. An Order was issued directing the plaintiffs to, among other things, file a Note of Issue by May 26, 2021. On November 12, 2021, a Compliance Conference was held, and an Order was issued again directing the plaintiff to, among other things, file a Note of Issue by May 6, 2022.

On March 22, 2022, a Final Pre-Note of Issue Conference was scheduled. At that time the case was marked off the calendar and the plaintiffs were to restore the action by a motion. On July 19, 2022, the parties filed a Stipulation to restore the case to the trial calendar. The Court rejected the stipulation and advised the plaintiffs to file a motion to restore the action. Prior to the filing of the instant motion, the plaintiffs did not make a motion to restore the action.

LAW AND APPLICATION

The defendants seek dismissal of the instant action as abandoned pursuant to CPLR 3404 based on the plaintiff's failure to file a note of issue. Pursuant to CPLR 3404, "a case ... marked off or struck from the calendar ... and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute" (*Carrero v Pena*, 217 AD3d 915, 916–17 [2d Dept 2023]). A plaintiff seeking to restore a case to the trial calendar more than one year after it has been marked 'off,' and after the case has been dismissed pursuant to CPLR 3404, must demonstrate a potentially meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant (*Id.*, citing *Clausell v Giambalvo*, 168 AD3d 810, 811 [2d Dept 2019]).

CPLR 3404, however, is inapplicable to pre-note of issue cases (*see Behren v Warren, Gorham & Lamont*, 301 AD2d 381, 382[1st Dept 2003]; *Lopez v Imperial Delivery Serv.*, 282 A.D.2d 190, 198–199 [2d Dept 2001]). In the absence of a 90–day notice pursuant to CPLR 3216, restoring a case marked "inactive" is automatic (*see Klevanskaya v Khanimova*, 21 AD3d 350 [2d Dept 2005]; *Bar-El v Key Food Stores Co.*, 11 AD3d 420 [2d Dept 2004]; *123X Corp. v McKenzie*, 7 AD3d 769, 769–770 [2d Dept 2004]). Thus, a motion to restore to active status in such circumstance should be granted (*see Badillo v Sheepshead Rest. Assoc.*, 296 AD2d 514, 515[2d Dept 2002]; *Jiles v New York City Tr. Auth.*, 290 AD2d 307 [2d Dept 2002]). The remedy for a defendant in a case such as this, pending in a pre-note status, is to serve a 90–day demand pursuant to

CPLR 3216 (*see Khaolaead v Leisure Video*, 18 AD3d 820, 821[2d Dept 2005]; *Burdick v Marcus*, 17 AD3d 388 [2d Dept 2005]).

There is no dispute that the instant action was marked of for failure to file a note of issue. There is also no dispute that the defendants did not serve a 90-day demand pursuant to CPLR 3216. The plaintiffs in opposition to the motion requested, among other things, that they be granted an extension of time to file a note of issue and proffered an excuse for their delay. Under these circumstances, there is no basis to dismiss the instant action or to deny a motion to restore the case to active status (*see Hemberger v Jamaica Hosp.*, 306 AD2d 244 [2d Dept 2003]).

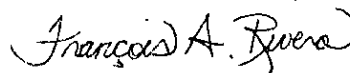
CONCLUSION

The motion of defendant Katesha Booker and Kitty S. Booker for an order pursuant to CPLR 3404, dismissing the complaint of Amos Heurtelou and Altimas Heurtelou) is denied.

The matter is restored to active status and the plaintiff is directed to file a note of issue on or before October 3, 2023.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.