

Turner v Taxifleet Mgt. LLC

2024 NY Slip Op 33863(U)

October 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 8956/2015

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of October, 2024.

P R E S E N T :
HON. WAVNY TOUSSAINT
Justice.

VALERIE TURNER,

Plaintiff,

-against -

TAXIFLEET MANAGEMENT LLC, GEORGE
SIMMONS and NESAR AHMED,

Defendants.

Index No.: 8956/2015

ORDER

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

Papers Numbered
02-12; 15-17; 19-21; 24
22; 28-29; 30-31
26-27
18

Upon the foregoing papers, defendant George Simmons (Simmons) moves (Seq. 04) for an order, pursuant to CPLR § 3216, dismissing the complaint for failure to prosecute. Defendant Taxifleet Management LLC (Taxifleet) cross-moves (Seq. 05) for the same relief. Plaintiff opposed Motion Seq. 04 but not Motion Seq. 05. Plaintiff separately moves (Seq. 06) by Order to Show Cause for an order, pursuant to CPLR §§

3404 and 2004, restoring the case to the active calendar and upon restoration, permitting plaintiff to extend the filing of a Note of Issue

Background

This is an action for personal injuries allegedly sustained by plaintiff arising from a December 24, 2013 motor vehicle accident occurring at approximately 6:15am on the Brooklyn Bridge, in Brooklyn, New York. Plaintiff was a passenger in the vehicle driven by Simmons (and owned by Taxifleet). Plaintiff alleges that while heading towards the FDR Drive Northbound ramp, Simmons lost control of the vehicle causing it to strike the left-lane median multiple times before coming to a stop. Plaintiff alleges she was violently jerked and bounced around as a result of the crash into the median, causing her to sustain serious personal injuries. This action was initiated by Summons and Complaint filed on July 16, 2015.

Discussion

Motion Seq. 04 and Seq. 06

Simmons moves (Seq. 04) for an order, pursuant to CPLR § 3216, dismissing the complaint for failure to prosecute. On March 22, 2023 and June 12, 2023, respectively, Simmons served 90-day demands for plaintiff to resume prosecution of the matter. There is no indication in the record that plaintiff resumed prosecution, moved to vacate either of the two demands, or sought to extend the 90-day period for either demand. Even allotting plaintiff the additional time benefit based on the second 90-day demand, plaintiff still did

not resume prosecution of the matter by the default date of September 13, 2023. Plaintiff has not filed a Note of Issue in this matter.¹

“Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216 (b) (3), that plaintiff must comply with the demand by filing a note of issue or by moving, before the default date, either to vacate the demand or to extend the 90-day period” (*Pavilion Park Slope Cinemas 9, LLC v Pro Century Corp.*, 186 AD3d 1389, 1390 [2d Dept 2020] *citing Deutsche Bank Natl. Trust Co. v. Inga*, 156 AD3d 760, 760-761 [2d Dept 2017]). To avoid the default, plaintiff was required to demonstrate a justifiable excuse, as well as state a potentially meritorious cause of action (*id.*).

Plaintiff filed the Order to Show Cause (Seq. 06) on March 26, 2024, 270-days after service of the second 90-day demand. The Order to Show Cause sought restoration of the case to the active calendar, while also indirectly addressing the default. The proof submitted asserted that the delayed prosecution should be excused due to “unfortunate circumstances”, settlement discussions, and outstanding discovery. These assertions were unsubstantiated by plaintiff and in any event, fail to demonstrate a justifiable excuse. “As the plaintiff did not provide a justifiable excuse, there is no need to determine whether the plaintiff established the existence of a potentially meritorious cause of action” (*id.*). Plaintiff’s Order to Show Cause (Seq. 06) is granted to the extent of restoring the case to the active calendar. For the foregoing reasons, Simmons’ motion (Seq. 04) is granted.

¹ Plaintiff attempted to file a Note of Issue on March 20, 2024, but same was returned with the Clerk’s Office notation stating: “CASE DISMISSED ON 5/25/22 FOR FAILURE TO FILE NOI. NOI DUE DATE WAS 11/15/19. AN ORDER TO RESTORE TO THE ACTIVE STATUS AND TO EXTEND TIME TO FILE IS REQUIRED” (see note to NYSCEF Doc. No. 18).

Motion Seq. 05

Like Simmons, Taxifleet also moves (Seq. 05) for an order, pursuant to CPLR § 3216, dismissing the complaint for failure to prosecute. However, unlike Simmons, Taxifleet never served a 90-day demand on plaintiff. It is well settled that where a “plaintiff was not served with a valid 90-day demand to file a note of issue pursuant to CPLR 3216 (b) (3), the court [has] no authority to dismiss the complaint based on the failure to timely file a note of issue” (*Moreau v Cayton*, 203 AD3d 818, 818 [2d Dept 2022], citing *Cadichon v Facelle*, 18 NY3d 230, 235 [2011]; *Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; and *Chase v Scavuzzo*, 87 NY2d 228, 233 [1995]; see also *Rezk v New York Presbyt. Hosp./N.Y. Weill Cornell Ctr.*, 175 AD3d 738, 739 [2d Dept 2019]).

Here, it is undisputed Taxifleet never served the requisite 90-day demand on plaintiff. For this reason, Taxifleet’s motion (Seq. 05) is denied.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff’s Order to Show Cause (Seq. 06) is granted only to the extent the matter is restored to the active calendar, and it is further

ORDERED that George Simmons’ motion (Seq. 04) is granted and the complaint is dismissed as to him, and it is further

ORDERED that Taxifleet Management LLC’s motion (Seq. 05) is denied.

The action is severed as to defendants Taxifleet Management LLC and Nesar Ahmed and the caption is amended to read as follows:

VALERIE TURNER,

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Plaintiff,

-against -

TAXIFLEET MANAGEMENT LLC and
NESAR AHMED,

Defendants.

All remaining arguments raised on the motions, and evidence submitted by the parties in connection thereto, have been considered by this Court, and are denied.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

Hon. Wavny Toussaint
J.S.C.

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KINGS COUNTY CLERK
FILED