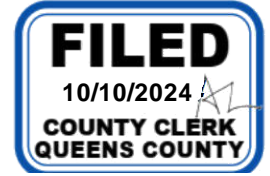


Morales v Yaohua Chen
2024 NY Slip Op 35028(U)
October 8, 2024
Supreme Court, Queens County
Docket Number: Index No. 719287/2021
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN



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ASHLEY MORALES,

IAS PART 20

Plaintiff,

Index No.: 719287/2021

-against-

Motion Seq. Nos.: 4 and 5

YAOHUA CHEN, ELI JOHN MORALES, JOHN
MORALES, KESHAV SUKUL and UBER
TECHNOLOGIES INC.

Motion Date: 6.26.2024

Defendants.

Motion Cal. Nos.: 55 and
56

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Presently before the Court are two related motions (seq. nos. 4 and 5), which are consolidated for disposition.

The defendant Uber Technologies Inc. (“Uber”) filed motion seq. no. 4 seeking an Order dismissing the amended complaint and all cross-claims on the ground of lack of personal jurisdiction. Here, Uber contends that it was never served with the amended complaint. The papers bearing NYSCEF Doc. Nos. 73-87, 103, 111-117 and 124-129 were read on said motion.

The plaintiff, Ashley Morales (the “Plaintiff”), has filed motion seq. no. 5 seeking an extension of time to serve Uber with the amended [sic] summons and amended complaint. NYSCEF Doc. Nos. 118-123, 125-128 and 133 were read on said motion.

For the following reasons, Uber’s motion and the Plaintiff’s motion are denied.

I. Factual Background

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on November 2, 2019 in Queens County, New York (the “Accident”).

The Plaintiff was a passenger in a vehicle operated by the defendant Yaohua Chen (“Chen”). The Plaintiff alleges, *inter alia*, that Chen was operating the subject vehicle while utilizing the “Uber application.” Two other vehicles were involved in the Accident, which were operated by the defendants Eli John Morales (“Eli Morales”) and Keshv Sukul (“Sukul”), respectively.

The Accident also gave rise to four other personal injury actions (the “Related Actions”). The Related Actions, which are now assigned to the undersigned and are joined for the purposes of discovery and trial, are pending under index numbers 719864/2019, 719288/2021, 714493/2021 and 723069/2022, respectively.

II. Uber’s Motion

Uber moves, pursuant to CPLR § 3211 [a] [8] to dismiss the amended complaint on the basis of lack of personal jurisdiction. “The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process. In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and void” (*Wang v Stony Brook Univ. Hosp. [SUNY]*, 198 AD3d 1013, 1013-1014 [2d Dept 2021]) [internal quotation marks and citations omitted]).

Pursuant to an Order issued by the Honorable Joseph J. Esposito, dated July 20, 2022 and filed on July 22, 2022 (“Justice Esposito’s Order”), the Plaintiff was granted leave to serve an amended [sic] summons and amended complaint naming Uber as a defendant within 60 days. The Plaintiff failed to comply with Justice Esposito’s Order because she never served Uber with the subject documents. Thus, Uber correctly argues that service of process was never properly effectuated upon it (*see id.*). However, as explained below, this is not the end of the inquiry.

The next issue is whether Uber has waived the defense of lack of personal jurisdiction by actively litigating this cause on the merits. “A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss. Absent a formal appearance by a defendant, a defendant may nevertheless appear in an action where his or her counsel communicates a clear intent to participate. A defendant may appear informally by actively litigating the action before the court. When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court’s jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court” (*HSBC Bank USA, National Association v Whitelock*, 214 AD3d 855, 856-857 [2d Dept 2023] [internal quotation marks, brackets and citations omitted]).

To determine whether Uber has actively litigated this cause on the merits, its conduct since the issuance of Justice Esposito’s Order dated July 20, 2022 must be considered. On December 15, 2022, almost five months after the subject Order, Uber moved to consolidate this cause for the purposes of joint trial and discovery with the Related Actions. Said motion was filed in the action entitled *Sukul v Uber Technologies*, which is pending under index number 723069/2022. In the affirmation in support, Uber’s counsel indicated as follows with respect to the cause at bar: “[a]n amended complaint was filed on October 7, 2022. An affidavit of service has not been filed and UBER ... has not formally appeared.” The motion was granted pursuant to this Court’s Order dated March 3, 2023, which Uber served with notice of entry on April 4, 2023.

When Uber moved for consolidation of all actions on December 15, 2022, it failed to move to dismiss this cause on jurisdictional grounds. When it filed the consolidation motion, Uber, as reflected by the affirmation in support, was aware that it had not been served with the amended [sic] summons and amended complaint in this cause. Furthermore, Uber was aware at the time of said filing that the deadline for service upon it of the amended [sic] summons and amended complaint, as per Justice Esposito's Order, had expired on or about September 20, 2022.

On December 5, 2023, Uber filed a stipulation adjourning two summary judgment motions that were filed in this cause by Chen and the Morales Defendants, respectively. These motions were grounded on the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5101 [d].

On December 6, 2023, Uber filed the present motion to dismiss based on lack of jurisdiction.

On December 13, 2023, seven days after filing the motion to dismiss on jurisdictional grounds, Uber filed a cross-motion under motion seq. no. 2 for summary judgment, contending that the Plaintiff did not sustain a serious injury.

On February 27, 2024, Uber produced a witness for a deposition in this cause and all Related Actions. Counsel for the Plaintiff questioned the Uber witness.

On this record, the Court concludes that Uber waived the defense of lack of personal jurisdiction in this cause through the following actions, which constitute an informal appearance: (1) moving to consolidate same for the purposes of joint trial and discovery with the Related Actions without simultaneously asserting an affirmative objection to jurisdiction; (2) stipulating to the adjournment of two summary judgment motions; (3) cross-moving for summary judgment; and (4) producing a witness for a deposition (*see U.S. Bank N.A. v Jong Shin*, 224 AD3d 88 [2d Dept 2024]; *HSBC Bank USA, N.A. v Whitelock*, 214 AD3d 855 [2d Dept 2023]; *JPMorgan Chase Bank, N.A. v Lee*, 186 AD3d 685 [2d Dept 2020]; *Taveras v City of New York*, 108 AD3d 614 [2d Dept 2017]).

In sum, “[w]hile th[e] Court recognizes that there appears to have been an issue with the service of process upon ... [Uber] in this action, such issue cannot be considered in light of the waiver” (*see JPMorgan Chase Bank, N.A. v Lee*, 186 AD3d 685, 687).

Uber's alternative argument that this cause should be dismissed pursuant to CPLR § 3215 [c] is also without merit. Through its informal appearance, Uber has waived the right to seek dismissal of this cause on the basis of CPLR § 3215 [c] (*Myers v Slutsky*, 139 AD2d 709 [2d dept 1988]; *see also Mortgage Elec. Registration Sys., Inc. v McVicar*, 203 AD3d 915 [2d Dept 2022]; *Bank of Am., N.A. v Rice*, 155 AD3d 593 [2d Dept 2017]).

II. The Plaintiff's Cross-Motion

The Plaintiff's cross-motion for an extension of time to serve "the amended [sic] summons and amended complaint" upon Uber is denied. The Court's determination that Uber has informally appeared in this cause renders this application academic.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that Uber's motion is denied; and it is further,

ORDERED, that the Plaintiff's cross-motion is denied; and it is further,

ORDERED, that Uber shall serve an answer within 20 days of the service of a copy of this Order with Notice; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon all defendants via NYSCEF by December 6, 2024; and it is further,

ORDERED, that the Clerk of the Court shall close motion sequence numbers 4 and 5.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
October 8, 2024



MOJGAN C. LANCMAN, J.S.C.

