Body v Lorenzo
2017 NY Slip Op 30765(U)
March 21, 2017
Supreme Court, Bronx County
Docket Number: 304052/11
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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DAVID BODY,

Plaintiff(s),

- against -

LUIS LORENZO, JR., CITY OF NEW YORK, COUNTY OF BRONX, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, THE METROPOLITAN TRANSPORTATION AUTHORITY, MTA NEW YORK CITY TRANSIT, MTA NEW YORK CITY BUS, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND MICHAEL WILLIAMS,

Defendant(s).
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DECISION AND ORDER

Index No: 304052/11

In this action for negligence in the operation of motor vehicles, defendants NEW YORK CITY TRANSIT AUTHORITY (NYCTA), METROPOLITAN TRANSPORTATION AUTHORITY (MTA), MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY (MABSTOA), and MTA BUS COMPANY (MTA BUS) move seeking an order pursuant to CPLR § 3215(c), dismissing this action against defendant LUIS LORENZO, JR. (Lorenzo) on grounds that more than a year has elapsed since Lorenzo defaulted by failing to interpose an answer and plaintiff has never moved for a default judgment. Plaintiff opposes the instant motion asserting that dismissal is unwarranted because he was misled into believing that movants would defend Lorenzo. Plaintiff also cross-moves seeking an order compelling Lorenzo to appear for another deposition. Movants oppose plaintiff's cross-

motion on grounds that Lorenzo was produced, deposed by plaintiff, and no cognizable reason is proffered warranting another deposition.

For the reasons that follow hereinafter, NYCTA, MTA, MABSTOA, and MTA Bus' motion is granted and plaintiff's cross-motion is denied.

The instant action is for personal injuries as a result of negligence in the operation of motor vehicles. The complaint alleges that on May 4, 2010 at or near 1831 Webster Avenue, Bronx, NY, plaintiff was involved in an accident when his vehicle came into contact with a vehicle operated by Lorenzo and owned by NYCTA, MTA, MABSTOA, and MTA Bus with a vehicle owned and operated by defendant MICHAEL WILLIAMS. It is alleged that defendants were negligent in the operation of their respective vehicles, such negligence causing the accident and injuries resulting therefrom.

NYCTA, MTA, MABSTOA, and MTA Bus' Motion to Dismiss

NYCTA, MTA, MABSTOA, and MTA Bus' motion seeking dismissal of the complaint, as against Lorenzo, pursuant to CPLR § 3215(c) is granted. The record establishes that more than a year has elapsed since Lorenzo defaulted by failing to interpose an answer to the complaint duly served upon him. As such, the complaint must be dismissed. CPLR §3215(c) states that

> [i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Thus, a party who fails to take a default within a year after said default could have been taken, has abandoned his case and the remedy is dismissal (*Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624, 625 [2d Dept 2005]; *Geraghty v Elmhurst Hosp. Center of New York City Health and Hospitals Corp.*, 305 AD2d 634, 634 [2d Dept 2003]). In order to avoid dismissal under this section, the plaintiff must offer a reasonable excuse for the failure to timely move for a default and must also demonstrate the merits of the action (*Truong v All Pro Air Delivery, Inc.*, 278 AD2d 45, 45 [1st Dept 2000]; *LaValle v Astoria Construction & Paving Corp.*, 266 AD2d 28, 28 [1st Dept 1999]; *State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]). That a court has the power to dismiss an action when a plaintiff fails to take a timely default judgment is well established (*Perricone v City of New York*, 62 NY2d 661, 563 [1984]; *Winkelman v H & S Beer and Soda Discounts, Inc.*, 91 AD2d 660, 661 [2d Dept 1982]).

In support of their motion, NYCTA, MTA, MABSTOA, and MTA Bus

submit an affidavit of service establishing that Lorenzo was served with the summons and complaint in this action on June 13, 2011. Movants also contend that to date almost six years later, Lorenzo has never interposed an answer nor has plaintiff moved for a default judgment against Lorenzo. Thus, because a party who fails to take a default within a year after said default could have been taken, has abandoned his case giving rise to dismissal against the non-appearing party (*Kay Waterproofing Corp.* at 625; *Geraghty* at 634), here, the action against Lorenzo must be dismissed. While plaintiff contends that dismissal is not warranted because he was led to believe that movants would defend Lorenzo, this is not a legally cognizable reason precluding dismissal. Indeed, in order to avoid dismissal under this CPLR §3215(c), the plaintiff must offer a reasonable excuse for the failure to timely move for a default and must also demonstrate the merits of the action (*Truong* at 45; *LaValle* at 28; *State Farm Mutual Automobile Insurance Company* at 663). Here the reason proffered by plaintiff for his failure to take a timely default is meritless. Significantly, it is hard to fathom - as urged - how movants' failure to correct the pleadings at a time when Lorenzo had yet been not granted dismissal of this action lulled plaintiff into believing that movants would defend.

Plaintiff's Cross-Motion for a Further Deposition

Plaintiff's cross-motion seeking another deposition of Lorenzo is denied insofar as having filed his note of issue, plaintiff waived further discovery.

It is well settled that once a party files a note of issue that party waives further discovery (*Think Pink, Inc. v Rim, Inc.*, 19 AD3d 331, 331 [1st Dept 2005] ["In any event, by filing several notes of issue and certificates of readiness it waived further discovery."]; *Abbott v Mem. Sloan Kettering Cancer Ctr.*, 295 AD2d 136, 136 [1st Dept 2002] ["By filing a note of issue, in which he certified that all discovery had been completed, plaintiff waived his right to conduct further depositions."]; *Stephano v News Group Publications, Inc.*, 64 NY2d 174, 186 [1984] ["However, as noted, the plaintiff waived his right to discovery and certified that the case was ready for trial."]).

However, "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings (22 NYCRR § 202.21[d]). Thus, when it is demonstrated that unusual and unanticipated circumstances merit post-note of issue discovery, the court has the discretion to order the same

(*Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005] ["The other method of obtaining post-note of issue disclosure is found in 22 NYCRR 202.21 (d). This section permits the court to authorize additional discovery '[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness' that would otherwise cause 'substantial prejudice.' Because this section requires both unusual and unanticipated circumstances and substantial prejudice, it has been described as the 'more stringent standard.']; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 140 [2d Dept 2000] ["Applying the above rules to the facts of this case, it is undisputed that the defendant did not move to vacate the note of issue within 20 days of its filing. Accordingly, the defendant was required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which required additional discovery to prevent substantial prejudice."]). The foregoing is equally applicable to non-party discovery and can form the basis for the grant of motion seeking to quash a subpoena on grounds that post-note of issue discovery is unwarranted (*Maron v Magnetic Const. Group Corp.*, 128 AD3d 426, 427 [1st Dept 20015]; *White v Bronx Lebanon Hosp. Ctr.*, 240 AD2d 212, 212 [1st Dept 1997]).

Here, the cross-motion must be denied because plaintiff filed his note of issue on March 17, 2014 and thus waived the right to

conduct further discovery. Moreover, plaintiff never asserts that there exist unusual or unanticipated circumstance warranting post-note of issue discovery let alone demonstrate the existence of the same. It is hereby

ORDERED that the complaint as against Lorenzo be dismissed. It is further

ORDERED that NYCTA, MTA, MABSTOA, and MTA Bus serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : March 21, 2017
Bronx, New York

Ben Barbato, JSC