Vyrtle Trucking Corp. v Browne
2016 NY Slip Op 32851(U)
February 16, 2016
Supreme Court, Westchester County
Docket Number: 15075/2010
Judge: Sam D. Walker
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[* 1]

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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VYRTLE TRUCKING CORP.

Plaintiff

DECISION AND ORDER
Index No. 15075/2010
Motion Sequence 2

-against-

JAMES M. BROWNE a/k/a JAMES BROWNE

Defendant.

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The following papers were considered on the plaintiff's motion seeking renewal.

PAPERS	NUMBERED
Notice of Motion/Affirmation/Exhibits 1-9	1-11
Memorandum of Law in Support of Motion	12
Affirmation in Opposition to Motion to Renew	13
Reply Affirmation	14

Plaintiff moves for an Order pursuant to CPLR § 2221 (c) seeking leave to renew the December 21, 2010 Order of the Supreme Court, Westchester County, as same was reversed by the March 13, 2012 Order of the Supreme Court, Appellate Division, Second Department, and upon renewal, denying the Defendants motion.

On June 11, 2010, Plaintiff commenced an action against the defendant to recover for property damage resulting from an accident which occurred on March 19, 2010 on Boston Post Road in Pelham Manor, New York. On June 20, 2010, issue was joined by the defendant serving a verified answer. Along with the answer, the defendant also served discovery demands to include demand for bill of particulars. On or about August 4, 2010, the plaintiff responded to the defendant's discovery demands.

On September 2, 2010, the defendant moved for summary judgment. In support of his motion, the defendant submitted his affidavit, an uncertified police report and two(2) uncertified amended reports. Plaintiff opposed the motion and his opposition included four(4) eyewitnesses who stated under oath that at the scene of the accident they saw the keys in the ignition of the defendant's automobile. On November 17, 2010, the defendant served a reply.

On December 21, 2010, the Supreme Court (J. Murphy) issued an Order denying the defendant's motion. Defendant appealed the Decision to the Appellate Division, Second Department. Defendant alleges that at the time of the oral arguments, the plaintiff attempted to bring information that was not a part of the record which was not permitted. On March 13, 2012, Supreme Court, Appellate Division, Second Department, reversed the Supreme Court, and granted the defendant's motion. On April 26, 2012, the plaintiff served a Motion to reargue the Second Department's Decision which was denied on July 19, 2012.

The case remained dormant from July 19, 2012 until January 2014. Plaintiff's counsel alleges that in reviewing the file in January 2014, it became apparent that the attorney who handled the file obtained an affidavit from Arkady Levin sometime near the end of January 2014, wherein Levin avers that a review of a clear photograph produced by the defendant in discovery on January 16, 2012 shows a key in the ignition which belongs to a Toyota, which was the type of vehicle being operated at the time.

In the interim, plaintiff's counsel's office relocated and the original attorney who handled the file left the firm in May 2014. The new attorney handling the file stated in his affidavit that in reviewing the file to look for original documents to return to the client in preparation for archiving he discovered the photograph and the affidavit of Levin. Counsel further averred that at that point he realized that the plaintiff has grounds to make a motion to renew.

A motion for leave to renew pursuant to CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]; *Gonzalez v. Vigo Const. Corp.*, 69 A.D.3d 565, 892 N.Y.S.2d 194 (2d Dept.2010). "The requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion if the

movant offers a reasonable excuse for the failure to present those facts on the prior motion." *Gonzalez*, 69 A.D.3d at 566, 892 N.Y.S.2d 194, citing *Matter of Surdo v. Levittown Pub. School Dist.*, 41 A.D.3d 486, 837 N.Y.S.2d 315 (2007); *Heaven v. McGowan*, 40 A.D.3d 583, 586, 835 N.Y.S.2d 641 (2007).

A renewal motion is not "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation," *Sobin v. Tylutki*, 59 A.D.3d 701, 702, 873 N.Y.S.2d 743 (2d Dept. 2009). "The motion should be denied if the movant fails to proffer a reasonable excuse for not presenting the allegedly new facts on the initial motions," *Illinois Nat'l. Ins. Co. v. Zurich Am. Ins. Co.*, 107 A.D.3d 608, 609–10, 969 N.Y.S.2d 11 (1st Dept. 2013).

To determine whether or not the Court will exercise its discretion, the Court will first review the facts in light of the prior Decisions of the Supreme Court and the Appellate Division, Second Department. In the Supreme Court's Decision (Murphy J.), the Court opined that "[w]here competent evidence is introduced 'suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury.'" The Court went further to conclude that the plaintiff has proffered evidence to show that keys of the defendant's vehicle were in the ignition at the accident scene which raises a triable issue of fact suggesting implausibility, collusion or implied permissive use sufficient to defeat the defendant's motion for summary judgment.

The Appellate Division, Second Department reversed and went further than the trial court and concluded that the record below supports that the plaintiff's vehicle had

been stolen and involved in a high speed-chase with the police prior to the accident with the plaintiff's vehicle, and that the unknown driver of the defendant's car fled the scene on foot. The Appellate Court not only considered keys being in the ignition, which was already established in the record, but also the fact that the vehicle was in a high speed-chase with the police prior to the accident and that the unknown driver fled the scene on foot. For these reasons, the Appellate Court then concluded that the defendant demonstrated his prima facie entitlement to judgment as a matter of law.

"Although a party seeking renewal should offer a reasonable justification for failing to present any new facts on the prior motion," *Matter of Pasanella v. Quinn*, 126 AD3d 504, 505 (1st Dep't 20150; CPLR 2221 [e][3]), courts can relax the requirement in the interests of justice, *Meija v. Nanni*, 307 A.D.2d 870, 871 (1st Dep't 2003), "such as where liberality is warranted as a matter of judicial policy," *Henry v. Peguero*, 72 A.D.3d 600, 602 (1st Dep't 2010) . Therefore, the Court will continue its analysis and determine whether the affidavit of Arkady Levin, in fact, changes the prior outcome, *Vega v. Restani Constr. Corp.*, 98 AD3d 425, 426 (1st Dep't 2012).

In reviewing the facts, it was always the plaintiff's contention that the defendant was the operator of the vehicle at the time of the accident. Plaintiff always argued that a key was in the ignition. The Supreme Court in its Decision and Order specifically acknowledged the plaintiff's argument regarding the presence of a key in the ignition and even cited the four (4) affidavits of eye witnesses provided by the plaintiff. After

reviewing the record of the lower court which included the four (4) affidavits, the Appellate Division, Second Department ruled that the record below established that the car was stolen and that the defendant had demonstrated his prima facie entitlement to a judgment.

Plaintiff's motion to renew presents for this Court's consideration, substantially the same issues based upon substantially the same record evidence as was presented to the trial court and the Appellate Division, Second Department, *Vega v. Restani Construction Corp.,98 A.D.3d 425, 949 N.Y.S.2d 661, 2012 N.Y. Slip Op. 05943* (1st Dept. 2012) . The introduction of this new affidavit to show that a key was in the ignition is simply an attempt to bolster the record and offers nothing new.

Therefore, the plaintiff's motion to renew is DENIED.

To the extent any relief requested in Motion Sequence 2 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
February 16, 2016

HON. SAM D. WALKER, J.S.C.