

**Khan v Duncan**

2020 NY Slip Op 34618(U)

May 28, 2020

Supreme Court, Queens County

Docket Number: Index Number 713461/2019

Judge: Leslie J. Purificacion

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

**FILED**

**5/28/2020**

**2:06 PM**

Present: HONORABLE Leslie J. Purificacion  
Justice

IA Part 39

**COUNTY CLERK  
QUEENS COUNTY**

KHAN, x  
Plaintiff,

Index  
Number 713461 2019

- against -

Motion  
Date January 16 2020

DUNCAN et al.,  
Defendants.

Motion Seq. No. 1

x

The following numbered papers read on the motion by defendants Cool Running Express LLC, (Cool Running), and Gene A. Duncan, (Duncan), seeking to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction, and CPLR 3212, pursuant to 49 U.S.C.A. 30106, and the cross motion by the plaintiff seeking an extension to serve summons and complaint upon the defendant Duncan, and for leave to amend his complaint to add Duncan's alleged employer, Reglobal LLC, (Reglobal), as a defendant.

	<u>Papers Numbered</u>
Notice of Motion - Affidavit - Exhibits .....	EF 15-25
Notice of Cross-Motion - Affidavit- Exhibits.....	EF 26-37
Reply Affidavits.....	EF 38

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff in an accident which occurred on November 7, 2017 on the southbound side of the Van Wyck Expressway near 73<sup>rd</sup> Avenue, in the County of Queens, State of New York. The defendant Cool Running asserts it is the lessor of the vehicle to Reglobal, Duncan's alleged employer. At the time of the incident, Duncan provided his address to the police, who included it in their report.

The Summons and Complaint were filed on August 6, 2019. Pursuant to Vehicle and Traffic Law (VTL) § 253, service of the summons and complaint was made on non-resident defendant Cool Running by service upon the Secretary of State, copies mailed by certified mail/return receipt requested, and the affidavit of service filed on September 11, 2019. Similarly, service was attempted upon non-resident codefendant Duncan, however, the certified mailing was returned as “Undeliverable at the address, Unable to forward.” The returned package was then mailed by ordinary mail to the address appearing on the police report for Duncan.

When the mailing is returned marked “address unknown,” “addressee moved—no forwarding address,” or “returned to sender—forwarding time expired,” the requirements of Vehicle and Traffic Law § 253 are not met and jurisdiction is not obtained. (*See Ross v Hudson*, 303 AD2d 393 [2d Dept 2003].) Here, the plaintiff has demonstrated reasonable efforts to effectuate timely service upon Duncan. Although the attempted service proved to be invalid, such efforts together with plaintiff’s timely demands upon the defendants seeking the last known residence address of each defendant, still unanswered after the 20 day time period had expired, provides an ample basis upon which to extend the time within which the plaintiff must serve the summons and complaint for 120 days after service of a copy of this order. It is noted that the codefendant Cool Running did not contest personal service, but in any event, service upon Cool Running is deemed valid. However, plaintiff’s request for alternative service is premature. It remains likely that plaintiff will be able to ascertain the last known residence of the defendant Duncan, once Reglobal is joined as a defendant within the time allowed. Alternate service will be an option upon a showing of futility after additional efforts are made.

In its motion, Cool Running submits a copy of the lease between it and Reglobal LLC, and alleges that defendant Duncan was Reglobal’s employee operating the vehicle involved in the accident. Based upon this information, the plaintiff has moved to seek leave to amend its complaint to include Reglobal LLC as a defendant in this action. At this early stage of the litigation, the plaintiff has demonstrated good cause and no prejudice to the other defendants. Therefore, that branch of plaintiff’s cross motion seeking leave to amend its complaint is granted.

Turning to the motion by defendant Cool Running’s, several issues remain unresolved regarding whether the Graves’ amendment defense is applicable. The Graves’ amendment applies when it is shown that the movant is in the business of leasing vehicles, and that the subject vehicle was one of the vehicles it leased to another party. (*See Casine v Wesner*, 165 AD3d 749 [2d Dept 2018]; *Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008].) Cool Running relies upon the affidavit of its owner, Pierre Cange. However there are no facts set forth in the affidavit upon which this court can rely. Mere conclusory statements, without additional evidence is insufficient to show that the Graves’ amendment defense applies. (*See Casine*,

165 AD3d 749; *see also Minto v Zipcar New York Inc.*, [Sup Ct Queens Cty 2010] 2010 WL7768841.) The lease does not state its rent amount, nor does it have a termination date. Furthermore, the police report identifies the subject vehicle by its licence plate number, but the lease identifies the vehicle by its Vehicle Identification Number (VIN). At this time, the evidence presented by the defendant Cool Running does not meet its prima facie burden. (*See Zuckerman v City of New York*, 49 NY2s 557 [1980].)

Accordingly, the plaintiff's cross motion seeking an extension of 120 days' time within which to serve the summons and complaint upon Duncan, and leave to add Reglobal LLC as a defendant is granted, however that branch of plaintiff's motion seeking alternate service is denied at this time without prejudice. The defendant's motion to dismiss plaintiff's complaint as to Duncan for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8), and its motion pursuant to CPLR 3212 for summary judgment pursuant to 49 U.S.C.A. 30106 are denied at this time, without prejudice. The plaintiff shall serve the amended complaint upon the defendant Cool Running within 20 days of the date of service of notice of entry, and within 120 days of service of a notice of entry upon defendant Duncan.

Dated: 5/28/20



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Hon. Leslie J. Purificacion, J.S.C.

**FILED**

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QUEENS COUNTY**