

Pavasaris v Incorporated Vil. of Saltaire

2016 NY Slip Op 31864(U)

July 25, 2016

Supreme Court, Suffolk County

Docket Number: 12927-2014

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

P R E S E N T :

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-16-14
ADJ. DATE 3-15-16
Mot. Seq. # 003 - MG; 004 - MD; 005 - MG; 006 - MD; 007 - MG; 008 -RRH

PRE-SANCTIONS HEARING CONFERENCE SCHEDULED FOR AUGUST 25, 2016

-----X			
RICHARD PAVASARIS,	:	Schupback, Williams & Pavone, LLP	
	:	Attorneys for Plaintiff	
	:	1010 Franklin Avenue, Suite 404	
Plaintiff(s),	:	Garden City, New York 11530	
	:		
- against -	:	Joseph W. Prokop PLLC	
	:	Attorneys for Defendant	
	:	267 Carleton Avenue	
INCORPORATED VILLAGE OF SALTAIRE, and	:	Central Islip, New York 11722	
"JOHN DOE" and "JANE DOE" NOS. 1. through	:		
10., the last ten names being fictitious, the real	:	Shah & Associates, P.C.	
names being unknown to the plaintiff, the parties	:	Attorney for Interpleader Plaintiff	
interested those persons having or claiming to have	:	241 Forsgate Drive, Suite 104	
an interest in the premises described in the	:	Monroe, New Jersey 08831	
complaint,	:		
	:		
Defendant(s).	:		
-----X			

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated November 25, 2014 , and supporting papers; (2) Affirmation in Opposition by the defendant, dated December 16, 2014, and supporting papers; (3) Request for Default by the Interpleader plaintiff, dated August 28, 2015, and supporting papers; (4) Notice of Cross-Motion by the plaintiff, dated November 10, 2015, and supporting papers; (6) Notice of Cross-Motion by the Interpleader Plaintiff, dated December 22, 2015, and supporting papers; (7) Notice of Cross-Motion by the defendant, dated March 8, 2016, and supporting papers; (8) Reply of plaintiff to cross-motion of Driscoll, dated March 10, 2016, and supporting papers; (9) Notice of Cross-Motion by defendant, dated March 8, 2016, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. #003) by the plaintiff, which seeks an order modifying this Court's October 1, 2014 Order so as to extend the time for plaintiff's service of process by publication upon the "Doe" defendants pursuant to CPLR 306-b, permitting said publication to be made in a paper other than the Fire Island News, and permitting *nunc pro tunc* the amendment of the summons to add the Office of Comptroller of the State of New York as a defendant pursuant to CPLR 305(c), is hereby granted to the extent set forth herein; and it is further

ORDERED that the application (seq. #004) by Espy Driscoll ("Drscoll"), a purported interpleader plaintiff, which is designated by Driscoll's counsel as a "Request for Default," is hereby denied; and it is further

ORDERED that the cross-motion (seq. #005) by plaintiff, which seeks an order dismissing Driscoll's purported interpleader complaint pursuant to CPLR 1006 and 3211(a)(7) and (8), is hereby granted; and it is further

ORDERED that the cross-motion (seq. #006) by Driscoll permitting Driscoll to intervene in this action and amending the caption to add Driscoll as an intervening or interpleading plaintiff pursuant to CPLR 1012(a)(2) and 1013, is hereby denied; and it is further

ORDERED that the cross-motion (seq. #007) by defendant Village of Saltire ("the Village"), which essentially seeks an order denying Driscoll's "Request for Default" and dismissing any alleged interpleader complaint as fatally defective, is hereby granted; and it is further

ORDERED that the cross-motion (seq. #008) by the Village, which seeks an order denying Driscoll's cross-motion for intervener plaintiff status and granting the Village legal fees, costs and disbursements against Driscoll, is hereby granted, and a **Pre-Sanctions Hearing Conference shall be held on August 25, 2016 at 9:30 a.m.**, for the purpose of scheduling a Sanctions Hearing to determine what sanctions should be imposed upon Driscoll and/or counsel for Driscoll; and it is further

ORDERED that counsel for plaintiff shall promptly serve a copy of this Order upon counsel for all parties, as well as upon Driscoll's counsel, via First Class Mail, and shall promptly thereafter file the affidavit(s) of such service with the Suffolk County Clerk.

This action involves title to a disputed parcel of real estate located in the Village of Saltaire, Town of Islip, New York. At issue is a strip of land in the Village known as "Pennant Walk," which lies directly to the east of plaintiff's land located at 33 Bay Promenade, Saltire. Plaintiff also owns an additional parcel located to the east of Pennant Walk. The purported interpleader plaintiff, Espy Driscoll, is the owner of premises known as 32 Bay Promenade, which is located immediately to the west of plaintiff's parcel. There is a wood walkway located to the west side of the Driscoll residence which continues south of the Driscoll parcel and provides access to the property located to the south of the Driscoll parcel. Such access is perpetuated by means of a recorded easement. Seeking party status in this action, Driscoll's counsel merely mailed a purported interpleader complaint to counsel for plaintiff and counsel for the Village.

Plaintiff has moved (003) for an extension of time within which to serve the “Doe” defendants by publication. Driscoll has submitted a “Request for Default” (004) against plaintiff and the Village, which is presumed to be a cross-motion for a default for their alleged failure to answer the purported interpleader complaint. Driscoll has also cross-moved (006) for an order granting Driscoll intervener or interpleader status. In response, plaintiff and the Village have opposed Driscoll’s motions and have cross-moved (005, 007, and 008) for dismissal of any purported interpleader complaint. The Village’s motion (008) also seeks an order granting the Village legal fees, costs and disbursements against Driscoll for frivolous conduct in this proceeding.

Plaintiff’s Motion to Extend Time for Service (seq. #003)

Pursuant to CPLR §306-b, if service of process is not made within the time required by the statute, “the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.” The determination of whether to grant the extension in the interest of justice is within in the discretion of the motion court (see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 736 NYS2d 291 [2001]; *Owens v Chhabra*, 72 AD3d 664, 897 NYS2d 912 [2d Dept 2010]; *Rosenzweig v 600 North Street, LLC*, 35 AD3d 705, 826 NYS2d 680 [2d Dept 2006]).

Based upon the foregoing, the Court finds in its discretion that plaintiff’s motion papers establish that it is in the interest of justice to extend plaintiff’s time for service. Therefore, this Court’s October 1, 2014 Order is modified to the extent that plaintiff is granted leave to complete service of process of the summons and complaint upon the defendants within one hundred-twenty (120) days from the date of this Order in the following publications: *Newsday* (Suffolk County Edition) and *Long Island Advance*. The branch of plaintiff’s motion, however, which seeks an order permitting *nunc pro tunc* amendment of the summons to add the Office of Comptroller of the State of New York as a defendant pursuant to CPLR 305(c), is denied.

Driscoll’s Purported “Request for Default” (seq. #004)

Even if Driscoll’s purported interpleader complaint was, *arguendo*, procedurally and jurisdictionally proper, and the issue of default in answering was properly before the Court, Driscoll’s request for a default judgment would, nevertheless require denial, since Driscoll has: (1) failed to submit proof of service of the summons and complaint, as required by CPLR 308 and CPLR 3215(f); (2) failed to submit an affidavit of non-military status as required by 50 USCS §521[b]); (3) failed to submit evidentiary proof of compliance with CPLR §3215(f), including but not limited to a proper affidavit of facts by the plaintiff [or by the plaintiff’s agent, provided there is proper evidentiary proof of such agency relationship], which sets forth the facts constituting the claim, the default and the amount due, or a complaint verified by the plaintiff and not merely by an attorney with no personal knowledge; and (4) failed to present *prima facie* proof of a valid cause of action upon which the court may grant a judgment by default pursuant to CPLR §3215.

Based upon the foregoing, Driscoll’s “Request for Default” (004) is denied.

**Plaintiff's Cross-motion to Dismiss Driscoll's Purported Interpleader (seq. #005);
Driscoll's Cross-motion for Status as an Intervening or Impleading Plaintiff (seq. 006); and
Village's Cross-motion for Denial of Default and Dismissal of Interpleader (seq. #007)**

In the purported interpleader complaint, Driscoll seeks mandatory injunctive relief against the plaintiff and the Village compelling the Village to restore Pennant Walk and requiring the plaintiff to remove any encroaching structures from it. Notably, Driscoll does not own property that abuts Pennant Walk.

In support of Driscoll's motion, Driscoll merely submits an affidavit of service of the purported interpleader complaint pursuant to CPLR 2103(b), which generally deals with service of papers upon a party's attorney in a pending action. Contrary to Driscoll's apparent perception, however, such service does not confer jurisdiction over the plaintiff or the Village (see CPLR 308, 311). It is axiomatic that service of papers under CPLR 2103(b) is proper only after jurisdiction has been acquired. After jurisdiction has been obtained, interlocutory or intermediary papers may be served on the appearing attorney by regular mail pursuant to CPLR 2103(b). Such mailing, however, can not be utilized as a basis for the acquisition of jurisdiction, absent consent thereto by the attorney for the party being served. There is no evidence of such consent in the instant matter. Even if the Court were to treat Driscoll's purported pleading as a third-party complaint, dismissal would be warranted because Driscoll is not a defendant and third-party practice is permitted only by a defendant in an existing action (see CPLR §1007).

Based upon the foregoing, the plaintiff's cross-motion (seq. #005) for an order dismissing Driscoll's purported interpleader complaint pursuant to CPLR 1006 and 3211(a)(7) and (8), is granted; and Driscoll's cross-motion (seq. #006) for an order permitting Driscoll to intervene in this action and for amendment of the caption to add Driscoll as an intervening or interpleading plaintiff pursuant to CPLR 1012(a)(2) and 1013, is denied; and the Village's cross-motion (seq. #007) for an order denying Driscoll's "Request for Default" and dismissing any alleged interpleader complaint as fatally defective, is granted.

Village's Cross-motion for Denial of Driscoll's Intervention and for Sanctions (008)

As set forth in relevant part in 22 NYCRR §130-1.1(a), "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part..." Pursuant to 22 NYCRR §130-1.1(b), the Court is empowered to "make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership [or] firm . . ."

Notably, 22 NYCRR §130-1.1A(b) states that "[b]y signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c)..." In relevant part, 22 NYCRR §130-1.1(c) states that:

[C]onduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Numerous conferences were held in this matter during which Driscoll's counsel was informed that there is no provision of the CPLR which permits service of process by the mere mailing of a pleading. Also, although Driscoll's counsel filed a "Request for Default," he failed to submit proof of service of the purported summons and complaint, as required by CPLR 308 and CPLR 3215(f). In this regard, plaintiff's counsel's affirmation reveals that he "repeatedly asked [Driscoll's counsel] for copies of any proof of service . . . but [Driscoll's counsel] has ignored those requests."

Although neither plaintiff nor the Village were never properly served with Driscoll's purported interpleader complaint, Driscoll's counsel began attending court conferences as a purported party to this action. While Driscoll's counsel was informed at those conferences that neither the plaintiff nor the Village had been served with Driscoll's purported interpleader complaint and that, therefore, Driscoll had not established jurisdiction over plaintiff or the Village, Driscoll nevertheless sought a default judgment against both of those parties. Furthermore, the Village's counsel affirms that he has "personally requested Driscoll's attorney on several occasions to withdraw the defective pleading and the defective Request for Default that is based on the defective pleading that was never served and he has refused to do so, resulting in extensive costs and expenditure of public resources by the Village to address this attempt by Driscoll to improperly interfere with this proceeding to protect a public right of way for unrelated personal reasons that are not before the Court in this proceeding."

Despite the information provided to Driscoll's counsel regarding the improper pleading, lack of jurisdiction and meritless motion practice, and despite the requests by plaintiff's counsel and the Village's counsel for Driscoll to withdraw the defective pleading and improper motion, Driscoll's counsel ignored those requests. This Court finds that the conduct exhibited by Driscoll's counsel's constitutes frivolous conduct as defined by 22 NYCRR 130-1.

Pavasaris v Inc. Village of Saltaire
Index No. 12927-2014
Page 6

Based upon the foregoing, the Village's motion (seq. #008) for an order denying Driscoll's cross-motion for intervener plaintiff status and granting the Village legal fees, costs and disbursements against Driscoll, is hereby granted, and a Sanctions Hearing shall be held on a date and time to be scheduled at the Pre-Sanctions Hearing Conference.

Unless specifically granted herein, all other requested relief is denied.

This constitutes the Decision and Order of the Court.

Dated: July 25, 2016


PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION