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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARILYN SHAFER J.S.C. Justice

PART 36

Juan O. Garcia

- v -

Naviera, Del Pacifico

INDEX NO. 135728/94

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED APR 10 2002

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted pursuant to attached Rider

x motions denied @ moot

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/7/02

MARILYN SHAFER J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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JUAN O. GARCIA and NELLA GARCIA,

Plaintiffs,

- against - Index No. 135728/1994

NAVIERA DEL PACIFIC0 and ECUADORIAN LINE, INC., N.Y.,

Defendants

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MARILYN SHAFER, J.:

Defendants in this personal injury action move, in the alternative, for an order: (1) pursuant to CPLR 3216(e), dismissing the action for want of prosecution; (2) pursuant to CPLR 3126(3), dismissing the action on the ground that plaintiffs have wilfully failed to disclose information which ought to have been disclosed; or (3) pursuant to CPLR 3042(c), precluding plaintiffs from offering evidence or testimony at trial as to those particulars which were requested by defendants' demand for a bill of particulars, and, pursuant to CPLR 3124, compelling plaintiffs to respond *to* defendants' discovery demands.

Plaintiffs **cross-move,** in **two cross** motions, for orders: (1) pursuant to CPLR 3211(b) and (e), deeming defendants' affirmative defenses based upon jurisdiction to be waived, and dismissing those defenses; and (2) pursuant to CPLR 2001, 3025(c), and 3026, granting plaintiffs leave to amend their complaint.

FACTUAL ALLEGATIONS

.Plaintiff Juan Garcia ("Garcia") allegedly sustained severe personal injuries on September 8, 1993, when he fell from a ladder in a cargo hold of the Ciudad de Quito, a ship allegedly owned,

leased, operated, and/or controlled by defendants Naviera del Pacifico and Ecuadorian Line, Inc., N.Y. The vessel was moored at a pier in Brooklyn, New York when the accident occurred. Garcia was employed by Domino Sugar Corp., also in Brooklyn. The Workers' Compensation Board determined, in a decision issued in September 1994, that Garcia's accident occurred "during [his] lunch break off the employment premises," and did not arise out of, or in the course *of*, his employment *(see,* Horan Affirm. in Opp., ¶ 5 and Exh. A). However, the complaint, dated December 27, 1994, alleges that Garcia was performing duties in the course of his employment at the time of his injury.

The complaint asserts two causes of action, a claim for negligence, on behalf of Garcia, and a claim for loss of consortium, on behalf of his wife.

DISCUSSION

On June 30, 1997, defendants served plaintiffs with a notice, pursuant to CPLR 3216(b)(3), demanding that plaintiffs proceed with the prosecution of this action, and serve and file a note of issue within 90 days. Plaintiffs do not dispute that they received that notice, and that they failed to serve and file a note of issue within the 90-day period following receipt of the notice.

If a party is served with a 90-day demand pursuant to CPLR 3216(b)(3), and fails to serve and file a note of issue within the prescribed time period, the court may dismiss the party's claims, unless the party can demonstrate (1) a "justifiable excuse for the delay" and (2) a "good and meritorious cause of action" (CPLR

3216 [e] .

Plaintiffs maintain that their failure to respond to the 90-day notice was the result of their prior counsel's "law office failure," and that the law office failure constitutes a justifiable excuse for their delay. The law firm of Schneider, Kleinick, Weitz, Damashek & Shoot was substituted as plaintiffs' counsel in this action, on or about March 2, 2000, in place of plaintiffs' prior counsel, Tom Stickel. Stickel has submitted an affidavit, on plaintiffs' behalf, in which he states that a mail clerk at his firm, whose employment was later terminated for failing to file and distribute the firm's incoming mail properly, misfiled the 90-day notice in the wrong file, i.e., a file for a different client bearing the same last name as the plaintiffs in this action. Stickel claims that he did not discover the misfiled notice until June 2000, when his firm conducted a review of its files.

Law office failure may constitute a justifiable excuse, in certain instances, for a party's failure to file a note of issue in response to a 90-day demand served pursuant to CPLR 3216(b)(3) (see, *Public* Serv. *Mut. Ins. Co. v Zucker,* 225 AD2d 308, 309 [1st Dept 19961 ; see *also,* Miskiewicz *v Hartley Rest. Corp.,* 58 NY2d 963, 965 [1983]; *Flomenhaft v Baron,* 281 AD2d 389, 390 [2d Dept 20011). However, an attorney's misplacement of papers or a case file has generally been held not to constitute an acceptable excuse, where it was coupled with inordinate delay in the prosecution of an action (see, *e.g., Versatile Furniture Prods., Inc. v* 32-8 *Maujer Realty, Inc., 97* AD2d 463 [2d Dept 19831;

Miniotis v Dugan Bros., 40 AD2d 982 [2d Dept 19721; *Weeks v Jankowitz*, 23 AD2d 549 [1st Dept 19651). The Appellate Division, First Department has held that a plaintiff did not offer a justifiable excuse for her failure to respond to a 90-day demand, where the plaintiff's counsel: (1) claimed that "the 90 day notice was misfiled by the clerical personnel of ... [his] office and did not come to ... [his] attention within the period *of* the ninety days"; and (2) conceded that he had been less than diligent in prosecuting the action *(Ramos v Lapommeray*, 135 AD2d 439, 440 [1st Dept 19871).

Plaintiffs' prior counsel was clearly less than diligent in prosecuting this action. He apparently never responded to defendants' demands for a bill of particulars and for disclosure (which defendants allegedly served upon plaintiffs' prior counsel in January 1995), and, insofar as can be discerned, took no other action, after the service and filing of the original complaint, in an effort to prosecute this action. Although Stickel argues that plaintiffs' failure to respond to the 90-day notice should be excused, on the ground of law office failure, he has offered no explanation for his evident failure to prosecute this action during the period of more than five years between December 1994, when the action was commenced, and March 2000, when he was replaced by plaintiffs' present counsel.

Plaintiffs' present counsel claims to have received plaintiffs' file from Stickel on or about May 15, 2000. Presumably, plaintiffs' present counsel was also advised of the

existence of the 90-day notice at some time in or around June 2000, when Stickel claims to have found the misfiled notice. However, prior to the parties' submission and serving of papers in connection with the instant motions, plaintiffs' present counsel had apparently failed: (1) to respond to defendants' demands for a bill of particulars and for disclosure; (2) to seek leave to amend the complaint, as they do now in one of the instant motions, to modify or withdraw plaintiffs' allegations that Garcia was injured while performing duties in the course of his employment; (3) to respond, even belatedly, to the 90-day notice; or (4) according to defendants, to notify defendants, or their attorneys, of the substitution of plaintiffs' present counsel for plaintiffs' former counsel, as required by CPLR 321(b).

Plaintiffs' present attorneys contend that, since they obtained the case file from Stickel, they "have been undertaking all efforts to obtain the records and information necessary to respond to defendants' demands in this action" (Marber Affirm. in Opp., ¶ 2).[1] Yet the earliest of the documents which they have

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[1]As evidence of their diligence in prosecuting this action since their substitution for prior counsel, plaintiffs' present counsel has submitted copies of their responses to defendants' demands for a bill of particulars and for disclosure. The responses have presumably been served upon defendants together with plaintiffs' other papers on the instant motions. Curiously, although plaintiffs now seek leave to amend their complaint on the ground that the original complaint was based upon the "erroneous" premise that Garcia was performing duties in connection with his employment at the time when his accident occurred *(see,* Marber Affirm. [dated September 5, 2001], ¶ 3), plaintiffs' verified bill of particulars states, inter *alia,* that Garcia "was lawfully present upon the [Ciudad de Quito] during the course and scope of his employment" *(see,* Plaint. Verified Bill of Particulars [dated September 5, 20011, Marber Affirm. in Opp., ¶ 8 and Exh. 4, ¶¶ 9,

submitted in support of their contention appears to be dated April 3, 2001, almost 11 months after the date on which they concededly received plaintiffs' case file.

In determining whether a plaintiff's excuse for a delay in prosecuting an action is adequate, a court will consider any undue prejudice which may accrue to a defendant as a result of the delay (*see, Lichter v State of New York*, 198 AD2d 687, 688 [3d Dept 1993]). Defendants herein have submitted the affidavit of an individual who states: that he is has been a vice president of Ecuadorian Line, Inc. since 1985; that that company was the general agent for defendant Naviera del Pacifico, the owner of the Ciudad de Quito, at the time when Garcia's accident allegedly occurred; that the ship has been "scrapped and [that] the log books, crew lists and all other records from this vessel, including those from the subject voyage, are no longer available"; and that defendants "are unable to locate any information regarding the subject vessel or crew from when [the] alleged accident occurred and, therefore, will be severely prejudiced in defending [the] action," as a result of plaintiffs' delay (Schwarz Affid., Horan Reply Affirm., Exh. B, ¶ 1-3). Defendants' plausible assertions of prejudice, which are supported by affidavit, have not been specifically disputed by plaintiffs.[2]

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[2]In the papers submitted by defendants in support of their motion to dismiss, the argument that they will be prejudiced as a result of plaintiffs' delay is raised for the first time only in defendants' reply affirmation. Although that fact would ordinarily require the court to disregard the argument, the same argument and

For the aforementioned reasons, plaintiffs' excuse of law office failure is insufficient to justify the "pattern and length of [their] delays" in prosecuting this action (*Hoffman v Sno Haus Ski Shops of Huntington, Inc.*, 185 AD2d 874 [2d Dept 19921).

A court may possess discretion to deny a motion to dismiss even when a plaintiff tenders an unjustifiable excuse for delay (*Baczkowski v D.A. Collins Constr. Co.*, 89 NY2d 499, 504 [1997]). However, a "delayed action is an action suspect as to its merits," and, thus, "[t]he more slender the excuse for the delay, the greater the need [for a plaintiff] to establish" that he or she has a meritorious cause of action (*Sortino v Fisher*, 20 AD2d 25, 32 [1st Dept 19631). A plaintiff's "failure to offer a proper affidavit of merit on [a motion to dismiss pursuant to CPLR 3216(e)] may even deprive the court of discretion to overlook instances of law office failure which contributed to the delay" (*Public Serv. Mut. Ins. Co. v Zucker, supra*, 225 AD2d, at 309).

The affidavit of merit which is required in order to avoid a dismissal for unreasonable neglect to proceed with the prosecution of an action must "contain evidentiary facts establishing that [a] plaintiff has **a viable cause** of action," and "must be as good as the kind of affidavit which could defeat a motion for summary judgment on the ground that there is no issue of fact" (*Sortino v*

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supporting affidavit were submitted by defendants in opposition to plaintiffs' motion for leave to amend, and were not specifically disputed by plaintiffs in their subsequent reply affirmation on that motion. The danger of prejudice to plaintiffs resulting from the court's consideration of the argumeni has thus been obviated by the fact that plaintiffs were afforded an opportunity to respond to the argument (*see, Held v Kaufman*, 91 NY2d 425, 430 [1998]).

Fisher, ***supra,*** 20 AD2d, at 32)

Regarded in light of the foregoing principles, plaintiffs' affidavit of merit is wholly inadequate to demonstrate that they have a meritorious cause of action. The affidavit submitted by Garcia states, in relevant part:

> [] On September 8, 1993, while employed by Domino Sugar, I was invited aboard defendants' ship. While walking on the ship to meet an acquaintance for lunch and while descending a ladder upon that ship, I fell due to a defective and broken ladder. As a result of my fall, I sustained injuries including but not limited to: bilateral proximal tibia fractures and fractures to my left foot, arthritis and pain in both knees.
>
> [] I have been advised by my attorneys that I have a meritorious cause of action against [defendants] for their failure to maintain their ship in a reasonably safe condition.

(Garcia Affid. of Merit, ¶¶ 2, 3.) The affidavit does not set forth the name of the individual who invited Garcia on to the ship, the name of the acquaintance who he was meeting for lunch, the manner in which the allegedly broken and defective ladder was broken and defective, or how that purported defect caused Garcia to fall. The conclusory averments as to how the accident occurred, which are devoid of evidentiary detail, and do little more than paraphrase the vague allegations contained in the complaint, are insufficient to satisfy plaintiffs' burden of demonstrating the existence of a meritorious cause of action (*Smith v City* ***of New*** *York*, 237 AD2d 344, 345 [2d Dept 19971; *Billings* ***v*** *Berkshire Mut Ins.* ***Co.,*** 149 AD2d 895, 896-897 [3d Dept 1989]; ***Weeks v Jankowitz,*** *supra*, 23 AD2d, at 549).

In opposition to defendants' motion, plaintiffs argue that the

90-day notice should be deemed defective, because defendants have not offered evidence that the notice was served by registered or certified mail, as required by CPLR 3216(b)(3). However, defendants have submitted, with their reply affirmation, a copy of a return receipt for the delivery of the 90-day notice, and the receipt appears, on its face, to be regular and proper.

Plaintiffs also argue that "defendant[s] ... are guilty of laches ... in bringing the instant motion and, therefore, the doctrine of unclean hands should estop them from being awarded the severe relief of dismissal" (Marber Affirm. in Opp., ¶ 7). However, the mere fact that defendants may have waited a considerable period of time after the expiration of the statutorily prescribed 90-day period before moving to dismiss does not estop them from seeking dismissal *(see, Davies v Slotkin,* 251 AD2d 533, 533-534 [2d Dept 19981).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants' motion is granted, and the complaint is dismissed pursuant to CPLR 3216; and it is further

ORDERED that each of plaintiffs' two cross motions is denied in its entirety, as being moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/2/02

ENTER:

MARILYN SHAFER J.S.C.

J.S.C.