

Zanett Lombardier, Ltd. v Maslow

2004 NY Slip Op 30011(U)

July 9, 2004

Supreme Court, New York County

Docket Number: 0107522/2003

Judge: Charles E. Ramos

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SCANNED ON 7/19/2004
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos
Justice

PART 33m

Zanett Lombardier

INDEX NO. 107522/03

- v -

MOTION DATE _____

Marvin Maslow

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED
JUL 19 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/9/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
ZANETT LOMBARDIER, LTD., ZANETT
LOMBARDIER MASTER FUND 11, L.P.,

Plaintiffs,

Index No.
107522/03

-against-

MARVIN MASLOW and MARTIN HOLLERAN,

Defendants.
-----X

Charles Edward REIT', J.S.C.:

Plaintiffs move by order to show cause for an order, pursuant to CPLR 306-b, granting them an additional 120 days in which to serve process upon the defendants.

The instant action was commenced on April 23, 2003, with the filing of the summons and complaint with the Clerk of the County of New York. Pursuant to CPLR 306-b, plaintiffs were required to serve defendants within 120 days of the filing. Plaintiffs acknowledge that defendants were not served within the requisite time period.

In support of plaintiffs' request for an extension to serve defendants, pursuant to CPLR 306-b, Daniel A. Schnapp, Esq., an associate from the law firm representing plaintiffs, alleges that, through conversations and correspondence between the parties, he was led to believe that defendants' counsel had agreed to accept service of process on behalf of defendants. Malcolm S. Taub, Esq., plaintiff's counsel, also maintains that defendants had notice of the claims asserted herein, and would not suffer any prejudice as a result of an extension, because:

(1) defendants were previously served in a prior action in the

United States District Court for the Southern District of New York, concerning the same facts and causes of action asserted in the instant complaint; (2) the federal action was discontinued as to plaintiffs' claims, with the understanding that plaintiff would commence an action in this court, and (3) defendants' counsel **was** sent two copies of the summons and complaint in this action within eight days of the filing in this court.

In opposition, Donald S. Zakarin, Esq., defendants' counsel, disputes that the law firm **agreed** to accept service of process. However, he also states that, "as [he] indicated in his letter [dated July 24, 2003], it was [his] understanding that we would agree to acknowledge service in accordance with the provisions of CPLR 312 (a) [sic]" (Zakarin's undated affirmation). He also disputes the merits of plaintiffs' action.

CPLR 306-b provides that "[i]f service is not made upon a defendant within the time provided in this section, 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 interest of justice standard requires a careful judicial analysis of the factual setting of the **case** and a balancing of competing interests presented by the parties" (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105 [2001]). In determining whether relief is warranted pursuant to CPLR 306-b, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute

of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of 'time, and prejudice to defendant" (id. at 105-106).

A review of the record discloses that, in support of their respective arguments regarding whether defendants' counsel agreed to accept service of process on behalf of their clients, the parties rely on two letters (Plaintiffs' Exhibit B & C, Correspondence dated May 6, 2003 [the 5/6/03 correspondence], and July 24, 2003 [the 7/24/03 correspondence], respectively) sent by defendants' counsel to plaintiffs' counsel regarding whether defendants' counsel agreed to accept service of process on behalf of their clients. A review of the 5/6/03 correspondence discloses that, while defendants' counsel indicated that he would "inquire [as to] whether [defendant] would authorize [him] to accept service of process on their behalf," he also stated that he had "no reason to believe [his] clients will not authorize [him]" (Plaintiffs' Exhibit B, correspondence dated May 6, 2003). In the 7/24/03 correspondence, defendants' counsel stated that "it is my understanding that the complaint has not yet been served (although Ben [an associate at the law firm representing defendants] advised Dan [an associate at the law firm representing plaintiffs] that we would acknowledge service on behalf of our clients of papers served pursuant to CPLR 312-a" (Plaintiffs' Exhibit C, correspondence dated July 24, 2003). [Pursuant to CPLR 312-a, service of process may be made by

mailing, by first class mail, postage prepaid, a copy of the summons and complaint, together with copies of a statement of service by mail and acknowledgment of receipt, with a return envelope, postage prepaid, addressed to defendant's counsel]. Thus, it appears reasonable that plaintiffs' counsel believed that defendants' counsel would accept service on behalf of his clients.

Additionally, the interest of justice standard is intended to accommodate "late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant" (Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105 [citation omitted]). While it appears that the pleadings sent to defendants' counsel did not include the acknowledgment of receipt in accordance with CPLR 312-a, defendants fail to show any prejudice arising from plaintiffs' oversight, or from the granting of an extension herein. It is undisputed that defendants were aware that an action would be commenced in this court after the discontinuance of the federal action, and that: defendants' counsel received copies of the pleadings within two weeks from the filing of the summons and complaint with the County Clerk. The record is devoid of any indication from defendants that they were unaware of their counsel's receipt of said pleadings.

Further, plaintiffs sufficiently allege a potentially meritorious action, based on fraud and breach of fiduciary duty, against defendants, as former officers and directors of

Projectavision, Inc., arising out of misrepresentations made to plaintiffs, which allegedly induced them to invest in the corporation.

Therefore, based on the totality of the circumstances, including plaintiffs' purported service of **the** pleadings on defendants' counel within two weeks of the filing of the instant action with the Clerk, plaintiffs' reasonable belief that defendants' counsel would accept service of **the** pleadings, defendants' failure to show any prejudice, and **the** potentially meritorious claims, plaintiffs' delay in requesting an extension under CPLR 306-b is excusable (see Goldstein v Columbia Presbyterian Medical Center, 1 AD3d 188 [1st Dept 2003]).

Accordingly, it is

ORDERED that plaintiffs' motion for an order, pursuant to CPLR 306-b, granting them an additional 120 days from the entry of this order to effectuate service on **the** defendants is granted.

Dated: July 9, 2004



J.S.C.

CHARLES E. RAMOS

FILED

JUL 19 2004

COUNTY CLERK'S OFFICE
NEW YORK