PUBLISH

INDEX NO. 11894-1993

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 002 MG
003MotD

Present:
Hon. SANDRA L. SGROI

CASEDISPOSED

Adj'd Date: 5-3-07
Return Date: 9-28-06

FRANK MATONTI and RONALD MATONTI,
Plaintiffs,

-against-

PATRICK A. DELUCA and GAETANA DELUCA,
Defendants.

IRA BIERMAN, ESQ.
Attorney for Plaintiff
485 Underhill Blvd, Suite 201
Syosset, New York 11791

MARSCHHAUSEN & FITZPATRICK P.C.
Attorney for Defendant
500 Old Country Road, Suite 103
Garden City, New York 11530

Upon the following papers numbered 1 to 18 read on these Motions: Notice of Motion and supporting papers 1-9; Notice of Cross Motion and supporting papers 10-15; Affirmation in support of motion and supporting papers 16-18; it is,

ORDERED that the motion of the Defendants to dismiss is granted; and it is further

ORDERED that the cross motion of the Plaintiffs is denied; and it is further

ORDERED that the Defendants are directed to enter a judgment reflecting that this matter has been dismissed.

The Parties have failed to comply with an order issued on or about February 10, 2006 directing that the Parties complete discovery within six months. This action arises out of an alleged physical assault upon the Plaintiffs Frank Matonti and Ronald Matonti by the Defendants Patrick A. DeLuca and Gaetana DeLuca that occurred in Staten Island on May 23, 1992. The Plaintiffs commenced this action by filing the summons and complaint

on May 21, 1993. There is no indication that the Plaintiffs Frank Matonti and Ronald Matonti suffered any permanent injury from the alleged intentional assault. Although Frank Matonti and Ronald Matonti are Plaintiffs in this civil action, they were also criminal Defendants in an action in Staten Island Criminal Court arising out of the May 23, 1993 altercation. That criminal action was dismissed by the Criminal Court on September 16, 1992 and the companion criminal action lodged against Patrick DeLuca was adjourned in contemplation of dismissal on November 10, 1992.

When the commencement by filing system replaced the previous law in New York in 1992, proof of service was required to be served within 120 days of filing and no later than 15 days after the date that the relevant statute of limitations expired. An action or proceeding was "deemed dismissed" if proof of service was not timely filed (see former ***CPLR*** 306-b(a); ***Practice Commentaries 306-b,*** C306-b:2). When the Defendants served their answer, they raised the defense of lack of jurisdiction. On this motion, the Defendants have submitted a computer generated record that indicates that no affidavit of service has been filed by the Plaintiffs.

In response, the Plaintiffs have cross moved for an order pursuant to CPLR § 306 extending the time for Plaintiffs to serve the Summons and Complaint.

On September 3, 2005, the attorneys for the Parties appeared before the Differentiated Case Management Part in Riverhead and entered into a stipulation that provided for dates for all discovery including depositions. Although the case had been pending for 12 years, the attorneys and the parties ignored every agreed upon date and no discovery of substance was conducted. On or about February 10, 2006, after this case was reassigned to this Part, this Court issued an order directing that the Parties complete discovery within six months. This Court stated:

> Plaintiffs and Defendants are directed to comply with the order and stipulation entered into between the parties and a failure to comply with that order will result in sanctions including, if appropriate, dismissal of the complaint, striking the answer or imposition of monetary sanctions.

After the order dated February 2006 was issued, this Court scheduled seven conferences in an attempt to obtain compliance with it directives. It is clear that both Parties have failed to timely complete discovery in this matter and now, at this late date, when the Plaintiffs finally have become aware that they have not complied with CPLR § 306-b, they seek additional time to serve a summons and complaint on the Defendants.

However, the Court notes that the Defendants not only allege that they were not properly served, but they also allege that the Plaintiffs never filed proof of service. In 1993, the time this action was commenced, the failure to file proof of service would result in automatic dismissal. In opposition to this motion, the Plaintiffs do not dispute their failure to file proof of service.

In 1992, the method of commencing an action in New York Supreme and County Courts was changed by the Legislature from a commencement-by-service to a commencement-by-filing system making the payment of a filing fee and filing of the initiatory papers the acts that commence an action (see, ***Gershel v. Porr,*** 89

N.Y.2d 327,

The law as it existed in 1993, required that the Plaintiffs serve the Defendants with the summons and complaint in a civil action and file proof of service of process with the clerk of the Court "not later than fifteen days after the date on which the applicable statute of limitations expires"(see former ***CPLR*** 306-b(a); ***Practice Commentaries 306-b,*** C306-b:2). Under former ***CPLR*** 306-b enacted in 1992, the relevant section to this analysis, the filing of proof of service became for a while not only a jurisdictional requirement, but "a rigid and malevolent one", requiring the filing of proof of service within 120 days after the filing of the summons and complaint and resulting in a dismissal if the deadline was missed. While this somewhat draconian result has been altered by amendments to the ***CPLR***, the current version of ***CPLR*** 306-b may not be applied retroactively (see, ***Bloomer v. Altman***, 264 A.D.2d 795, 695 N.Y.S.2d 398; ***Gold v. Noori,*** 261 A.D.2d 208, 690 N.Y.S.2d 37, *lv. denied* 94 N.Y.2d 858, 704 N.Y.S.2d 533, 725 N.E.2d 1095; ***Matter of Goshen Shopping Assocs. v. Assessor of Town of Goshen,*** 260 A.D.2d 481, 688 N.Y.S.2d 590; ***Matter of Blue Hill Plaza Assocs. v. Assessor of Town of Orangetown,*** 260 A.D.2d 476, 688 N.Y.S.2d 569).

Pursuant to the former version of ***CPLR*** §306-b , since the Plaintiffs failed to file proof of service within 120 days of the date of filing of the summons and complaint, and since the Defendants did not file an answer with the County Clerk within that time, dismissal of the complaint is automatic and self-executing (see, ***Maudsley-Marino v. Navas***, 259 A.D.2d 739, 740, 687 N.Y.S.2d 415; ***Nam Jin Chung v. M & S Deli,*** 256 A.D.2d 317, 681 N.Y.S.2d 328; ***Long v. Quinn,*** 234 A.D.2d 520, 651 N.Y.S.2d 196). "There is no express statutory authority to vacate this automatic dismissal***" (***Maudsley-Marino v. Navas***, supra, at 740, 687 N.Y.S.2d 415). Therefore, the motion of the Defendants is granted.

Dated: 5/11/07

SANDRA L. SGROI, J. S. C.