

Farokhi v Guardian Life Ins. Co. of Am.

2007 NY Slip Op 32381(U)

July 26, 2007

Supreme Court, New York County

Docket Number: 0114121/2005

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Farokhi, F

INDEX NO. 114121/05

- v -

MOTION DATE _____

Guardian Life

MOTION SEQ. NO. 01

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 ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the attached decision
and order.

FILED
JUL 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 26, 2007



MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
FATMEH FAROKHI,

Plaintiff,

-against-

THE GUARDIAN LIFE INSURANCE COMPANY
OF AMERICA and DANIEL SOLICITO,

Defendants.
-----X

Index No. 114121/05

DECISION/ORDER

FILED
JUL 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MARTIN SHULMAN, J.S.C.:

Defendant Daniel Solicito ("defendant" or "Solcито") moves for an order vacating an ex parte order of this court (Davis, J.) dated August 2, 2006 (the "ex parte order") which granted plaintiff Fatmeh Farokhi's ("plaintiff" or "Farokhi") application for an extension of time to serve the summons and complaint on Solicito pursuant to CPLR §§ 306-b, 2004, 3012(d) and/or 2005 (Exh. E to motion), and upon vacating the ex parte order, dismissing the complaint with prejudice pursuant to CPLR 3211(a)(1), (5), (7) and 3016(b). Plaintiff opposes the motion.

Background

Plaintiff commenced this action by filing a summons and complaint on October 7, 2005 against defendants The Guardian Life Insurance Company of America ("Guardian") and Solicito (collectively "defendants") alleging four causes of action for fraudulent misrepresentations (first cause of action); deceptive acts and practices in violation of General Business Law ("GBL") §349(h) (second cause of action); violation of Insurance Law §2123 (third cause of action); and violation of Insurance Law §4226 (fourth cause of action). Exh. C to motion.

The complaint *inter alia* sets forth the following factual averments: 1) plaintiff was employed by the New York City Board of Education ("NYCBE") for over 20 years (complaint ¶4); 2) as a benefit of her employment with NYCBE, plaintiff participated in a retirement plan pursuant to Internal Revenue Code §403(b) whereby retirement contributions consisting of 17% of plaintiff's salary were deducted pre-tax (complaint ¶5); 3) as a further benefit of her employment, Farokhi purchased a term life insurance policy with a face value of \$250,000.00 (complaint ¶6); 4) in or about October 2002, Solicito, an insurance agent employed by Guardian, contacted plaintiff to offer her a "better 'retirement plan'" (complaint ¶¶3, 7); 5) as a result of defendants' representations, Farokhi elected to cancel contributions to her NYCBE retirement plan and her \$250,000.00 term life insurance policy and purchased what she believed to be a retirement plan from Guardian (complaint ¶8); 6) "[i]n or about April 2004, Plaintiff discovered that the 'retirement plan' that Defendants had sold her was nothing more than a \$750,000.00 whole-life insurance policy/contract . . ." and automatic deductions from her checking account from the period October 2002 to 2004 were not contributions to a retirement plan but rather were premiums (complaint ¶¶8, 9); and 7) Farokhi was damaged in that she incurred greater tax liability (complaint ¶12).

The Ex Parte Order

Plaintiff timely effectuated service upon Guardian and issue was joined upon Guardian's service of its answer. Farokhi's application for the ex parte order (Exh. D to motion) alleged that she attempted to serve Solicito at Guardian's office (his last known address) on or about October 18, 2005, a date within 120 days of filing the complaint as

mandated by CPLR §306-b, only to learn that Solicito no longer worked for Guardian. Thereafter, plaintiff discovered a new address for Solicito on or about April 27, 2006 through discovery obtained from Guardian.

CPLR §306-b provides in relevant part:

Service of the summons and complaint . . . shall be made within one hundred twenty days after the filing of the summons and complaint . . . If 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.

Defendant argues that the ex parte order should be vacated¹ on the grounds that: 1) pursuant to CPLR §306-b, Farokhi had until February 4, 2006 to serve Solicito, yet waited nine months after filing the complaint and three months after learning of Solicito's correct address before seeking an extension of time; 2) the ex parte order should not have been granted since the statute of limitations ran on the second through fourth causes of action; 3) plaintiff failed to use diligence in attempting service; and 4) plaintiff failed to establish good cause sufficient to warrant an extension of time for service.

In opposition, plaintiff counters that Justice Davis granted the ex parte order in the interest of justice as permitted by CPLR §306-b and defendant has not been prejudiced by the extension being granted. To the contrary, plaintiff contends she would have been prejudiced if no extension of time to serve defendant had been

¹ Solicito moves to vacate the ex parte order pursuant to CPLR §5015(a)(5) which is inapplicable. The motion is appropriately before this court pursuant to CPLR §2221(a)(2) and the court deems the motion as having been brought in accordance therewith.

granted since it is conceded that the statute of limitations has run on the second through fourth causes of action. The ex parte order itself does not indicate whether the court granted Farokhi's ex parte application for good cause shown or in the interest of justice.

Solicito's motion is granted to the extent that the ex parte order is vacated and the complaint is dismissed without prejudice as to Solicito. Whether "good cause" has been established is "'measured against the plaintiff's reasonable efforts to effect service and the prejudice to the defendant from the delay' (citation omitted)." *Leader v. Maroney, Ponzini & Spencer*, 276 A.D.2d 194, 199, 718 N.Y.S.2d 374 (2nd Dept., 2000), *aff'd* 97 N.Y.2d 95, 736 N.Y.S.2d 291 (2001). Here, plaintiff made only one attempt to serve Solicito during the 120 day period from filing the complaint. Plaintiff makes no claim that she attempted any other means of ascertaining defendant's address for service during this time. See *Busler v. Corbett*, 259 A.D.2d 13, 15, 696 N.Y.S.2d 615 (4th Dept., 1999)(good cause to extend time to serve complaint not established where *inter alia* process server failed to utilize several methods to locate defendant, such as a Department of Motor Vehicles search). Rather, plaintiff inexplicably waited to obtain Solicito's address during discovery between plaintiff and Guardian. Under these circumstances, the court agrees that Farokhi failed to show good cause to warrant granting an extension of time to serve Solicito.

In determining whether an extension of time to serve a complaint should be granted in the interest of justice, factors to be considered are whether the statute of limitations has run, the merits of plaintiff's case and prejudice to the defendant. See,

e.g., *Leader v. Maroney, Ponzini & Spencer, supra*, 276 A.D.2d at 200; *Busler v. Corbett, supra*. Where the statute of limitations has run, extensions of time should be liberally granted where the plaintiff has been reasonably diligent in attempting service and in seeking the extension of time. *Hafkin v. North Shore Univ. Hosp.*, 279 A.D.2d 86, 89, 718 N.Y.S.2d 379, 382 (2nd Dept., 2000)(interest of justice would not be served by rewarding plaintiff's "unexplained and unexcused complete lack of diligence"). However, the court will not automatically grant an extension of time because the statute of limitations has expired. *Estate of Jervis v. Teachers Ins. & Annuity Association*, 181 Misc.2d 971, 974, 696 N.Y.S.2d 378 (Sup. Ct., NY Co., 1999), *aff'd* 279 A.D.2d 367, 720 N.Y.S.2d 21 (1st Dept., 2001).

The case at bar is distinguishable from *Busler v. Corbett*, where the court found that an extension of time should have been granted in the interest of justice. In *Busler* and in the instant case, the plaintiff's claim would have been extinguished without the extension because the statute of limitations expired. However, unlike Farokhi, the plaintiff in *Busler* served the defendant only 28 days after expiration of the 120 day period and immediately moved to extend the time for service *nunc pro tunc*. 259 A.D.2d at 17. As previously stated, the plaintiff here waited nine months after filing the complaint and three months after learning Solicito's correct address before seeking an extension of time to serve him.

The instant case is also distinguishable from *Leader v. Maroney, Ponzini & Spencer, supra*, where an extension to serve was granted in the interest of justice based upon plaintiff's counsel's lack of awareness of the recent amendment of CPLR

§306-b. The court therein further noted that although the statute of limitations had expired, the plaintiff had a “potentially meritorious cause of action and the defendant made no showing of prejudice . . .” Here, plaintiff also has not tendered any competent evidence to substantiate the merits of her causes of action other than mere reiterations of the complaint’s allegations. See *Meusa v. BMW Financial Services*, 32 A.D.3d 830, 831, 821 N.Y.S.2d 108, 109 (2nd Dept., 2006)(ex parte order extending service vacated and complaint dismissed where plaintiff waited two and a half years to move for extension of time to serve and offered conclusory allegation of law office failure with no evidence as to merits of the case).

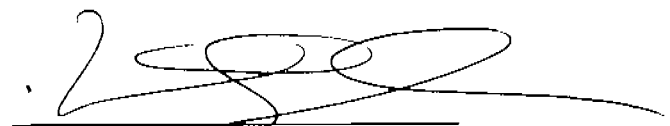
For the foregoing reasons, the ex parte order should be vacated and the complaint dismissed without prejudice. Solicito argues the case should be dismissed with prejudice upon vacating the ex parte order since it fails to state a cause of action and a defense is founded upon documentary evidence. However, CPLR §306-b expressly provides that where a complaint is dismissed based upon the failure to serve it within 120 days of filing, such dismissal is without prejudice. Accordingly, it is

ORDERED that defendant Solicito’s motion is granted to the extent that the ex parte order dated August 2, 2006 is hereby vacated and the complaint is dismissed without prejudice as to defendant Solicito, and is otherwise denied.

The foregoing constitutes this court’s Decision and Order. Copies of this Decision and Order have been sent to counsel for plaintiff and defendants.

Dated: New York, New York
July 26, 2007

FILED
JUL 31 2007
NEW YORK
COUNTY CLERK’S OFFICE


Hon. Martin Shulman, J.S.C.