

**Olsen v Warshaw Burstein Cohen Schlesinger &
Kuh, LLP**

2007 NY Slip Op 32645(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0110299/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Justica

Index Number : 110299/2006

OLSEN, REY

INDEX NO. _____

vs

WARSHAW BURSTEIN COHEN

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

AUG 23 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/15/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
REY OLSEN,

Plaintiff,

-against-

WARSHAW BURSTEIN COHEN SCHLESINGER
& KUH, LLP, BACKENROTH, FRANKEL &
KRINSKY, LLP, BRUCE H. WIENER, GLENN
SPIEGEL, ABRAHAM BACKENROTH and
MARK FRANKEL,

Defendants.
-----X

Decision/Order

Index No.: 110299/06

Seq. No. : 001

Present:

Hon. Judith J. Gische
J.S.C.

FILED
AUG 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Def's motion [dismiss] w/SH affid in support w/exhs	1
Pltf's opp. and affid (RO)	2
Def's reply affirm (SH) w/exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, *pro se*, brought this action alleging fraud, intentional misconduct and gross negligence. Before the court is defendants' motion to dismiss this action for failure to timely serve the complaint. CPLR § 3012(b).

Background

Defendants are Warsaw Burstein Cohen Schlesinger & Kuh, LLP (the "Warsaw Firm"), Bruce H. Wiener ("Wiener"), and Glenn Spiegel ("Speigel"), and defendants Backenroth, Frankel & Krinsky LLP (the "Backenroth Firm"), Abraham Backenroth ("Backenroth"), and Mark Frankel ("Frankel"). The Warsaw Firm

represented 419 Apartment Corp. in litigation involving plaintiff before the Civil Court of the City of New York, Housing Part, Index No. L&T 64513/00 and the United States Bankruptcy Court, Case No. 04-B-41105 (JMP) (collectively herein referred to as the "prior litigation"). Wiener and Spiegel are now, or at one time were, members of the Warshaw Firm. The Backenroth Firm was retained as special counsel for the Cooperative in the Bankruptcy Court proceeding. Backenroth and Frankel are members of the Backenroth Firm.

Plaintiff commenced this action on July 24, 2006. On October 20, 2006, the defendants acknowledged service of the Summons with Notice and made a demand, pursuant to CPLR § 3012(b), for service of the complaint. It is undisputed that plaintiff failed to serve the complaint within twenty days after service of the demand.

The defendants now move to dismiss this action for plaintiff's failure to timely serve the complaint. CPLR § 3012(b). They claim that plaintiff cannot demonstrate a reasonable excuse for his default as plaintiff still had not served defendants.

On the summons, plaintiff stated that the nature of the action is that "[d]efendants made deceitful statements in the Bankruptcy Court, S.D.N.Y., which were intended to and were relied upon by that Court thereby caused Plaintiff monetary and other damages." Defendants argue that there is no such cognizable cause of action upon which plaintiff may seek relief in New York and therefore, plaintiff cannot demonstrate a meritorious cause of action. Defendants has also provided various transcripts and decisions from the prior litigation.

In opposition to the instant motion, plaintiff claims that "[l]eave to sue [the defendants] for fraud, intentional misconduct and gross negligence was not granted by

the U.S. Bankruptcy Court until January 5, 2007 as set forth on page 30 of the Memorandum Decision.” Plaintiff herein is referring to the Bankruptcy Court’s order dated January 5, 2007 (Peck, J.) (the “Bankruptcy Court order”). Plaintiff does not otherwise claim any other impediment to effectuating timely service of the complaint. As to the merits of the complaint, plaintiff “respectfully assert[s] that [his] causes of action are meritorious ... for reasons set forth in detail in the... Verified Complaint.”

The Bankruptcy Court order resolved issues pertaining to a general release in an oral settlement agreement between plaintiff, his wife, the Cooperative and the defendants. In that order, the Hon. James M. Peck held that the general release “provided that the release of agents and attorneys [consequently the defendants in this action] includes an exception for fraud, intentional misconduct and gross negligence.”

At some point after the filing of this motion, plaintiff did serve the complaint on all defendants, although untimely and without leave of court.

In reply, defendants contend that dismissal is warranted as plaintiff has failed to demonstrate either a reasonable excuse for his delay in serving the complaint and a meritorious cause of action. Defendants argue that the Bankruptcy Court did not grant plaintiff leave to sue them on January 5, 2007 and that this excuse is merely “a desperate attempt to stave off dismissal of this meritless and untimely action.”

Defendants also claim that plaintiff has failed to demonstrate a meritorious action. Defendants state that plaintiff’s two-page affidavit in opposition does not constitute an “affidavit of merit” as it is “devoid of the type of detailed showing required.” Defendants also claim that plaintiff is merely seeking to relitigate the same claims he previously made in the prior litigation.

Under CPLR § 3012(b), a plaintiff who has commenced an action by service of a summons without complaint, and upon whom a demand has been made for service of the complaint, has 20 days to comply with that demand. A plaintiff who wishes to serve a complaint after the 20 days has expired must demonstrate the merits of the cause of action as well as a reasonable excuse for the delay. Wess v. Olympia and York Realty Corp., 201 A.D.2d 365 (1st Dept. 1994), see also Jee Foo Realty Corp. v. Lemle, 259 A.D.2d 401 (1st Dept. 1999).

Here, plaintiff has failed to satisfy his burden. In its most favorable view, plaintiff's affidavit does not constitute an affidavit of merit. Even if the court were to accept plaintiff's assertion that the verified complaint adequately establishes the merits of the underlying action, the court finds that plaintiff has failed to demonstrate a reasonable excuse for the delay in serving the complaint. The court rejects plaintiff's assertion that the Bankruptcy Court order in any way extended plaintiff's time serve the complaint. Plaintiff's failure to comply with the CPLR mandates dismissal of this otherwise meritless action. Accordingly, the defendants' motion to dismiss this action in its entirety is hereby granted in all respects. The complaint is hereby dismissed without prejudice.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 15, 2007

So Ordered:


HON. JUDITH J. GISCHE, J.S. CLERK

FILED
AUG 23 2007
NEW YORK
COUNTY CLERK'S OFFICE