

**Watson v Colwell**

2008 NY Slip Op 30006(U)

January 3, 2008

Supreme Court, Schuyler County

Docket Number: 0000251/2007

Judge: Elizabeth A Garry

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At a Term of the Supreme Court of the State of New York held for the County of Schuyler in Ithaca, New York on the 2<sup>nd</sup> day of November, 2007.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF SCHUYLER

PRESENT: HON. ELIZABETH GARRY  
SUPREME COURT JUSTICE

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SANDY E. (PARROTT) WATSON,  
MARCUS E. PARROTT ESTATE,

Plaintiffs,

vs.

**DECISION AND ORDER**

RJI No.: 2007-0129-M  
Index No.: 07-251

RICHARD B. COLWELL, VIRGINIA R. GABORIAULT, SCHUYLER/CHEMUNG CO. REAL PROPERTY TAX OFFICE, THOMAS BLOODGOOD, and as director for RONALD SHETLER In Chemung County, and WEILER MAPPING, INC., JOHN TRIMBER, (now or formerly) and WEILER ASSOCIATES, ERIC GABRIELSON, (now nor formerly),

Defendants.  
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Defendants Weiler Mapping, Inc., and John Trimber (Movants) move to dismiss a *pro se* complaint filed against them and others by Plaintiff Sandy E. (Parrott) Watson and the Marcus E. Parrott Estate (hereinafter referred to jointly as Plaintiffs). Plaintiffs cross-move for dismissal of the motion to dismiss the complaint and for an order permitting them to personally serve the Movants.

Plaintiff Sandy E. (Parrott) Watson (hereinafter referred to as Watson) allegedly owns about seven acres of forested land located in the Town of Cayuta in Schuyler County and depicted on tax map number 115-1-20. Watson asserts that she owns the property by virtue of a deed dated June 20, 2001, to herself personally from herself as Administrator of the Marcus E. Parrott Estate. The deed allegedly describes the property, in part, as “a strip of land

approximately (330') feet wide as measured from the present Schuyler-Chemung County line and shown as parcel 115-1-20 on the Schuyler County Tax-map.” (Affidavit of John Trimber, Exh. A, para. 18). The Complaint alleges that the Movants and other Defendants “did cause to be created plaintiff’s parcel of land” (Trimber Affidavit Ex. A, para. 6) by misrepresenting the location of the boundary line between Chemung and Schuyler Counties on tax maps. Plaintiffs assert that in so doing, the Movants and other Defendants committed fraud and subjected Plaintiffs to economic loss and improper taxation. The Complaint also raises a timber harvesting claim against Defendant Richard Colwell.

John Trimber asserts that he is the President of Weiler Mapping, Inc., which works for several counties, including Schuyler and Chemung, with respect to updating county tax maps. Trimber asserts that Weiler Mapping, Inc., has previously been named as defendant or third-party defendant in several previous actions that make similar allegations arising out of the alleged mislocation of the Chemung/Schuyler County line, all of which have been dismissed as baseless. Movants assert that the same persons, one Leander Morgan and one William Covert, have instigated or have been involved in all of these actions. (Neither Morgan nor Covert is a party to the present action, but William Covert signed Plaintiffs’ Affidavit of Service of Mailing. [Notice of Motion Ex. D.]) Movants assert that if Plaintiffs’ Complaint against them in this action is not dismissed, they intend to file a counter claim for costs for a frivolous claim under CPLR 8303-a. (Affidavit of Matthew D. Gumaer, Esq., paras. 30-33.)

The Movants seek dismissal of the Complaint for lack of personal jurisdiction. They allege that they were never personally served with either the Summons or the Complaint and that they received the Summons and Complaint by mail in an envelope that was addressed to them both and postmarked August 8, 2007. (Trimber Affidavit, paras. 3-5; Exh. B.) They provide a copy of the previously-mentioned Affidavit of Service by Mail, allegedly the only affidavit of service on file at the clerk’s office at the time this Motion was filed, indicating that the Summons and Verified Complaint was mailed to the Movants on August 8, 2007. (Notice of Motion Ex.

D.) Movants also seek dismissal of the Complaint for failure to state a cause of action, claiming that tax maps do not create, modify, or destroy the ownership of real property and that the tax maps in question carry a notation explicitly warning that tax maps are prepared for tax purposes only and are not to be reproduced or used for surveying or conveyancing. (Trimber Affidavit, Ex. C.) Movants also assert that the Complaint fails to allege fraud against the Movants with the specificity required by CPLR 3016 [b], that the action is time-barred, and that Plaintiffs have failed to exhaust their administrative remedies.

Watson's Affidavit in support of her Cross-Motion does not dispute the Movants' claim that they were not personally served. Instead, she seeks an order permitting her to make personal service on Defendants. She contends that the action should not be dismissed on statute of limitations grounds because the location of the county line is a matter of public interest. Watson also alleges that the Notice of Motion served upon her did not include a return date, time, or place and that a letter to her from Movants' Counsel dated October 24, 2007, advised her of the motion's return date and of the place of argument, but did not include a time. (Notice of Cross-Motion, Ex. A.)

#### Legal Analysis

When it is undisputed that a plaintiff has failed to serve process upon a defendant within the statutory limitations period, the Supreme Court lacks personal jurisdiction over the defendant. (Ross v. Lan Chile Airlines, 14 AD3d 602, 604 [2d Dep't 2005]). This result is not altered when the defendant has actual notice of the action, because "[n]otice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court." (Macchia v Russo, 67 NY2d 592, 595 [1986]). Service on a defendant by mail alone is not one of the authorized methods of service upon a natural person set out in CPLR § 308 or upon a corporation in CPLR § 311.

The papers submitted to the court in this action do not indicate the date on which the action was commenced. However, the Summons and Complaint are both dated August 2, 2007,

and Plaintiffs do not dispute that they did not make service of the Summons and Complaint upon either of the Movants by any method other than the mailing on August 8, 2007, that is described in the Affidavit of Service by Mail. Assuming that 120 days have elapsed since the date on which the action was filed, the Complaint is subject to dismissal for lack of jurisdiction over the person of the Movants pursuant to CPLR 3211 [a][8]. (Gleizer v. American Airlines, Inc., 30 AD3d 376 [2d Dep't 2006]; see also Necrason v. Avery 183 A.D.2d 1015 [3d Dep't 1992]).

Plaintiffs' cross motion for permission to make personal service upon the Movants may be treated as a motion under CPLR § 306-b for permission to extend the time for service. Such an extension may be granted for good cause shown or in the interest of justice, not only where no service at all was made, but also where, as here, service is made in a defective manner. (Murphy v. Hoppenstein, 279AD2d 410 [1<sup>st</sup> Dep't 2001]). In this case, however, neither good cause to extend the time for service nor a reason to extend the time in the interest of justice has been shown.

Good cause under § 306-b is generally found only in exceptional circumstances where a plaintiff's failure to serve process in a timely manner is the result of circumstances beyond its control. (Sella v. Sella, 185 Misc 2d 549 [2000]). A plaintiff who fails to make diligent attempts to make service or to utilize available methods that would have been successful fails to establish good cause for an extension of time to make service. (Busler v. Corbett, 259 AD2d 13 [4<sup>th</sup> Dep't 1999]). Plaintiffs have not claimed that they made diligent efforts to make personal service upon Movants or that circumstances beyond their control prevented them from doing so, nor have they offered any explanation for the defective service. The court therefore has no basis on which to find that good cause for an extension of time has been shown. (See Lipschitz v. McCann, 13 AD3d 417 [2d Dep't 2004]).

The interest of justice standard for allowing an extension is broader than the good cause standard and permits the court to consider many factors, including the meritorious nature of the action, the expiration of the statute of limitations, the length of delay in service, plaintiff's

diligence, the promptness of the request for an extension, and prejudice to the defendant. (Mead v. Singleman, 24 AD3d 1142 [3d Dep't 2005]). The determination requires analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. ( Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95 [2001]). In this case, Movants had actual notice of the action and would not be prejudiced by an extension of time. However, Plaintiffs have not established that any of the other factors favor an extension.

Most importantly, Plaintiffs have not shown that the action is meritorious. The essence of Plaintiffs' claim against the Movants is that Watson's property interests were damaged when Movants allegedly drew an erroneous boundary line on the tax maps. As Movants point out, tax maps do not create, alter, or destroy the ownership of real property, and the maps in question carry an explicit warning that they are prepared for tax purposes only and are not to be used for surveying or conveyancing. Real Property Tax Law § 503 [5] states that "the preparation of tax maps in accordance with the provisions of this section shall not be deemed to be the practice of land surveying within the meaning and intent of article one hundred forty-five of the education law." A tax map constitutes "nothing more than some evidence of the location of [a] property" (Boons v. Martocci, 268 AD2d 616, 620 [3d Dep't 2000]) and the location of a property as shown on a tax map does not raise a triable issue of fact as to the property's true location (Morganteen v. Brenner, 28 AD3d 725 [2d Dep't 2006]). Thus, even if Plaintiffs are ultimately able to establish that the boundary line on the tax map in question was improperly drawn, no effect on Plaintiffs' title to the underlying parcel of land would result.

Furthermore, the Complaint fails to allege the elements of fraud with the specificity required by CPLR 3016 [b]. To state a cause of action in fraud, a plaintiff must show that the defendant "knowingly misrepresented a material fact, upon which the plaintiff justifiably relied, resulting in an injury." (Mann v. Rusk, 14 AD3d 909, 910 [3d Dep't 2005]). The Complaint does not allege that the Movants made any misrepresentation to Plaintiffs. Instead, the allegations of fraud in the Complaint appear to be based on actions taken by the Chemung County Real

Property Tax Office, a former Real Property Tax Director in Chemung County, on a 1992 Chemung County assessment roll, and on resolutions of the Chemung County Legislature numbered 95-310 and 99-41. In addition, to the extent that Plaintiffs allege that the property description in the deed by which Watson took ownership of the property in question was created in reliance on lines shown on the tax map, the Complaint does not allege that such reliance was justifiable, especially in view of the provisions of Real Property Tax Law § 503 [5] and the explicit warning on the maps against their use for such purposes.

Finally, Plaintiffs' claims against Movants are time-barred. The statute of limitations for fraud is six years from the date on which the fraud in question was committed or two years from the date on which it was discovered or, with the exercise of reasonable diligence, should have been discovered. (Animal Protective Foundation of Schenectady, Inc., v. Bast Hatfield, Inc., 306 AD2d 683 [3d Dep't. 2003]). All of the actions described in the Complaint are alleged to have taken place before Watson took ownership of the property in question and more than six years ago. Therefore, no reason to extend Plaintiffs' time for service in the interest of justice has been shown.

#### Conclusion

The Complaint was not properly served on the Movants within the statutory limitations period and is therefore subject to dismissal for lack of personal jurisdiction under CPLR § 3211 [a] [8]. The Movants' motion for dismissal of the Complaint against them is granted.


Plaintiffs have not established that an extension in the time of service should be granted under CPLR § 306-b for good cause or in the interest of justice. Their cross motion for permission to serve the Movants is therefore denied.

This constitutes the Decision and Order of the Court.

Dated: January 3, 2008

Norwich, New York

ENTER

  
Hon. Elizabeth A. Garry

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Schuyler County Supreme and County Court Chief Clerk, original Decision and Order, with Notice of Motion dated September 25, 2007, Affidavit of Matthew D. Gumaer, Esq., sworn to on September 25, 2007, and Exhibits A through D; Affidavit of John Trimber, sworn to on September 19, 2007, with attached Exhibits A through C; Notice of Cross-Motion dated October 29, 2007, Affidavit of Sandy E. Watson, sworn to on October 30, 2007, with attached Exhibit A; and Answering Affidavit of Timothy J. Perry, Esq., sworn to on November 1, 2007, with attached Exhibit A.