SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102844/2006
Motion No.:002

NICOLA COLANDREA and
AUDREY COLANDREA

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

JOHN ZAWISNY,
ABS OWNER and/or
LANDLORD CORP. I-X (said names being fictitious true names unknown),
RST PROPERTY OWNERS I-X (said names being fictitious true names unknown),
GHI PROPERTY MANAGERS I-X (said names being fictitious true names unknown),
XWZ JOHN DOE I-X (said names being fictitious true names unknown,
R&R PLUMBING & HEATING, INC., a/k/a
PRESTIGE PLUMBING & HEATING an/or
DEF PLUMBING & HEATING COMPANY I-X (said names being fictitious true names unknown,

Defendants

The following items were considered in the review of this motion to reargue.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Defendant John Zawisny's motion to reargue pursuant to *CPLR* § 2221(a) and (d) is denied in its entirety. The oral decision of this court articulated on April 13, 2007 and subsequently reduced to a written order on October 1, 2007 remains unchanged.

Facts

Plaintiffs commenced this action on September 18, 2006 by filing a summons and complaint. This case is based on alleged serious burn injuries plaintiff, Nicola Colandrea sustained as a result of being blasted with steam from a boiler. Thereafter, plaintiffs had one-hundred twenty days to serve defendants pursuant to *CPLR* 306-b. In this case, plaintiffs' time to serve defendants expired on January 16, 2007. Admittedly, plaintiffs failed to serve defendants in the statutorily prescribed time period. On March 9, 2007 plaintiffs served defendant John Zawisny ("Zawisny") with a motion to extend their time to answer nunc pro tunc. Subsequently, plaintiffs served Zawisny with a Summons and Complaint on March 26, 2007. Contrary to Zawisny's counsel's assertion, this court entertained plaintiffs' motion to extend their time to answer on April 13, 2007 and granted the same orally. On May 1, 2007, plaintiffs filed an amended summons and complaint that was served on Zawisny on May 31, 2007. Plaintiffs served defendant, R&R Plumbing and Heating, Inc. and Prestige Plumbing & Heating, Inc. via the Secretary of State on May 15, 2007 and June 8, 2007 respectively. This court issued a written Order that reduced its April 13, 2007 oral decision to writing on October 1, 2007.

Defendant Zawisny answered plaintiffs' amended summons and complaint on October 19, 2007. On that same date Zawisny's attorneys, Harvey Gladstein & Partners LLC, served plaintiffs with the following documents: a demand for a verified bill of particulars; a demand for parties appearing; notice declining service by electronic means; request for supplemental demand for relief; combined demands that encompassed statements obtained from defendants identification of witnesses, and demand for photographs; and a demand for expert witness information. On December 5, 2007 plaintiffs responded to the demands made by Zawisny's attorneys.

On January 22, 2008 after answering plaintiffs' amended complaint, serving demands for various pre-trial discovery items and receiving the same, defendant Zawisny's attorneys served plaintiffs with this motion to reargue that was originally returnable on February 18, 2008.

Defendant Zawisny seeks to reargue the October 1, 2007 written order of this court confirming its April 13, 2007 oral decision extending plaintiffs time to serve the summons and complaint. The court automatically adjourned this date to February 22, 2008 per the rules of DCM Part 3 that motions are heard on Fridays. Subsequently the parties adjourned this motion to March 7, 2008.

Discussion

This action commenced in the manner proscribed by *CPLR* § 304. The statutory language governing the commencement of an action read as follows "[a]n action is commenced by filing a summons and complaint or summons with notice." For statute of limitations purposes "[a]n action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement."[1]

In this case, Zawisny does not argue that plaintiffs failed to timely commence the present action. In fact, Zawinsy's attorneys assert time and again that plaintiffs filed their summons and complaint weeks before the statute of limitations expired. Zawisny's attorneys argue that a procedural technicality should be enforced with draconian zeal to prevent plaintiffs from asserting their claim against their client. Specifically, defendant Zawisny's motion seeks to have this court change its interpretation of *CPLR* § 306-b. This statute states in pertinent part that:

> [s]ervice 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.[2] (emphasis added)

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[1] *CPLR* § 201.

[2] *CPLR* § 306-b.

Zawisny's assert that this court " . . . exceeded its discretion in orally granting Plaintiff's motion to extend his [sic] time to serve his [sic] complaint."[3] Zawisny's attorneys further state that "[m]oreover, no explanation was forthcoming about why 'oral' grant of Plaintiffs' motion occurred on April 13, 2007 four days after the return date, or who was present at that time, raising serious due process issues."[4]

In short, Zawinsny's attorneys assert that this court failed to consider plaintiffs' attorneys lack of diligence to serve the summons and complaint within the one hundred twenty days prescribed by the statute. In addition Zawisny's attorneys believe that this court overlooked the prejudice Zawisny would experience in defending this case against plaintiffs.

In *Leader v. Maroney, Ponzini & Spencer* the Court of Appeals held that courts have two distinct choices in determining whether to extend the one hundred twenty day provision articulated in *CPLR* § 306-b. The Court of Appeals stated that:

> . . . it is clear that the amendment to CPLR 306-b, the Legislature gave the courts two separate standards by which to measure an application for an extension of time to serve. The two are stated separately, joined by the word 'or.' They cannot be defined by use of the same criteria; otherwise, one would have been sufficient. 'The view that diligence is an across-the-board requirement ... merges the two separate grounds for extension, because an exercise of reasonable diligence in attempting service would surely count as good cause.'[5]

First, a court may grant an extension of the one hundred twenty day provision by a showing of "good cause." Where a party moves for an extension of time pursuant to this

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[3] Defendant's Reply Memorandum of Law at page 2.

[4] Defendant's Reply Memorandum of Law at page 6. (Citations omitted)

[5] *Leader v. Moroney, Ponzini & Spencer*, 97 NY2d 95 [2001].

provision it is incumbent on the movant plaintiff to demonstrate that the party took reasonable diligent efforts to effectuate service within the statutory defined one hundred twenty day period. In the original motion before this court, plaintiff did not seek an extension of time based on this provision.

Second, a court may grant an extension of the one hundred twenty day provision by showing that it is "in the interest of justice." The Court of Appeals stated that

> Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, 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.[6]

Plaintiffs' attorney at all times contended that the premise of his for an extension was "in the interest of justice." As such, despite the claims of Zawisny's attorneys any showing of lack of diligence on the part of plaintiffs' attorney during the initial one hundred twenty day period is not dispositive under the "in the interest of justice" extension. However, this court fully considered this fact in conjunction with the other factors as outlined by the Court of Appeals.

Defendant, Zawisny, admittedly accepts that this action commenced in a timely manner prior to the extension of the statute of limitations. If this court acted as the Zawisny's attorneys argue a seriously injured person would be denied his day in court based on a procedural technicality. Next, plaintiffs' attorney demonstrated and continues to demonstrate that his clients have a meritorious action against Zawisny.

Pursuant to the statute plaintiffs were to serve Zawisny on January 16, 2007 with a

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[6] *Id.*

summons and complaint. Plaintiffs served Zawisny on March 26, 2007, sixty-nine days after the expiration of the one hundred twenty day standard. Furthermore, plaintiffs moved for an extension of time to serve the summons and complaint on March 9, 2007, forty-two days after the expiration of the statutory period. Plaintiffs' attorney adds that he was not in the office for a substantial period of time during the original one hundred twenty day period due to the illness and eventual death of his mother.

While Zawisny's attorneys now argue that the delay of sixty-nine days has unduly prejudiced their client this court resolutely believes otherwise. In point of fact, Zawisny answered plaintiffs' complaint and began the discovery process before even bringing this motion to reargue the April 13, 2007 order of this court. Even more striking is the fact that Zawisny himself failed to seek legal counsel until October 1, 2007 nearly nine months after first being served with a summons and complaint.

On balance this court affirms its prior finding that it is in the interest of justice to extend plaintiffs' time to extend their time to serve their summons and complaint *nunc pro tunc*. To do otherwise would be a gross abuse of discretion that places form over substance. To take such a position is exactly what the legislature sought to protect litigants against when it enacted *CPLR* § 306-b.

Furthermore, plaintiffs were well within in their rights to amend their complaint. The governing statute states:

> A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.[7]

Zawinsy did not answer the complaint served on him on March 26, 2007. Plaintiffs' filed

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[7] *CPLR* § 3025(a).

their amended summons and complaint on May 1, 2007 and served it on Zawisny on May 31, 2007. Zawisny did not answer until October 22, 2007. Zawisny waived his right to object to the amended complaint. His retention of the document and subsequent answer extinguished his right to dispute its propriety.[8]

Conclusion

Plaintiffs more than adequately demonstrated that the extension of the one hundred twenty day service provision of *CPLR* § 306-b is in the interest of justice. Contrary to the assertions of Zawinsy's counsel, this court did not exceed its discretion in granting this motion, nor were there any actions that impinged on their client's due process rights.

Accordingly, it is hereby:

ORDERED, that defendant's motion is denied in its entirety; it is further

ORDERED, that this court's oral decision dated April 13, 2007 and subsequently reduced to a written order dated October 1, 2007 remains unchanged; and it is further

ORDERED, that all parties return to **DCM Part 3 at 9:30 A.M. on May 7, 2008** for a status conference.

ENTER,

DATED: April 4, 2008

Joseph J. Maltese
Justice of the Supreme Court

[8] *Jordan v. Aviles*, 289 AD2d 532 [2d Dep't. 2001).

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