

**Finnegan v Molitor**

2008 NY Slip Op 31432(U)

May 9, 2008

Supreme Court, Nassau County

Docket Number: 0923-07/

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

EAMMON FINNEGAN,  
  
Plaintiff,  
  
- against -  
  
MICHELE MOLITOR,  
  
Defendant.

TRIAL / IAS PART 32  
NASSAU COUNTY  
  
Index No. 20923/07  
  
Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant moves for an order pursuant to CPLR 3012 (b) dismissing this action on the ground the plaintiff has failed to serve a complaint as required by CPLR 3012 (b) despite being served with a summons with notice and demand on November 26, 2007. The plaintiff opposes the motion on the ground there no prejudice has been shown by the defendant. The defendant replies the plaintiff has not shown a reason excuse for the failure to comply with the CPLR service requirement nor a meritorious cause of action. The nature of the underlying action is damages based upon fraudulent conveyance.

The attorney for the defendant states, in a supporting affirmation dated February 27, 2008, the defense position in detail. The attorney for the plaintiff states, in an opposing affirmation dated March 12, 2008, the defense position in detail, and a reply affirmation dated

March 13, 2008, in further support of the motion, and in reply to the plaintiff's opposition.

This Court has carefully reviewed and considered all of the parties' papers regarding this motion. CPLR 3012 (b) provides:

If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

The Second Department states:

Commencement of an action with a summons and complaint is preferable to commencement with a summons with notice (*see* Siegel, N.Y. Prac. § 60, at 81-82 [3d ed.]). If a complaint is inadequate, it may be amended (*see* CPLR 3025). However, if a summons without a complaint contains an inadequate notice of the nature of the action and the relief demanded, the inadequate notice is grounds to dismiss the action (*see Scaringi v. Elizabeth Broome Realty Corp.*, 191 A.D.2d 223, 594 N.Y.S.2d 242; *Drummer v. Valeron Corp.*, 154 A.D.2d 897, 546 N.Y.S.2d 52). A summons dismissed for failure to comply with the notice requirements of CPLR 305 (b) is "jurisdictionally defective" and cannot be amended (*Wells v. Mount Sinai Hosp. & Med. Ctr.*, 196 A.D.2d 749, 602 N.Y.S.2d 45; *see Kaplan v. Manoli*, 64 N.Y.2d 849, 487 N.Y.S.2d 323, 476 N.E.2d 649; *Frerk v. Mercy Hosp.*, 63 N.Y.2d 635, 479 N.Y.S.2d 519, 468 N.E.2d 701; *Wilber Nat. Bank v. F & A Inc.*, 301 A.D.2d 706, 753 N.Y.S.2d 209). Further, if the plaintiff's summons is dismissed for failure to comply with CPLR 305 (b) the six-month extension for commencement of a new action pursuant to CPLR 205 (a) is not available (*see Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316; *Farkas v. Tarrytown Lbr.*, 133 A.D.2d 251, 519 N.Y.S.2d 49)

*Micro-Spy, Inc. v. Small*, 9 A.D.3d 122, 125-126, 778 N.Y.S.2d 86 [2<sup>nd</sup> Dept., 2004]. The Second Department held, in an analogous matter:

Appellant's first motion to dismiss was made about six months after his

demand for a complaint. That motion was never decided on the merits but, after numerous adjournments, was stricken from the calendar more than six months later. Plaintiffs thereafter served a complaint which was promptly returned by appellant, who thereafter again moved to dismiss the action, pursuant to CPLR 3012 (subd. [b]), for failure to timely serve a complaint in response to his demand therefor. Special Term denied the motion "in the interest of justice", commenting that there was laches by all parties concerned. We find such a conclusion wholly unsupported by the instant record. Plaintiffs have failed to demonstrate an adequate excuse for the inordinate delay in serving a complaint in response to appellant's demand therefor and, also, have failed to submit an affidavit of merits. Under such circumstances, we deem it to have been an improvident exercise of Special Term's discretion to deny appellant's motion (*O'Halloran v. Eller*, 43 A D 2d 955; *Hellner v. Mannow*, 41 A D 2d 525; *Wilkening v. Fogarty*, 40 A D 2d 1031; *Melfi v. Nash*, 40 A D 2d 1017; *Scala v. Fuller*, 39 A D 2d 767). Nor does the fact that a complaint was served, and promptly rejected, after the first motion to dismiss was marked off the calendar affect the validity of the instant motion to dismiss (*Wilkening v. Fogarty*, *supra*; *see, also, Boardman v. Glissando Enterprises of N. J.*, 41 A D 2d 523)

*Sakvarelidze v. Epstein*, 45 A.D.2d 864, 358 N.Y.S.2d 549 [2<sup>nd</sup> Dept., 1974]; *see also Ferreri v. Winston Mall, Inc.*, 54 A.D.2d 970, 388 N.Y.S.2d 675 [2<sup>nd</sup> Dept., 1976]; *Imperiale v. Prezioso*, 4 Misc.3d 716, 781 N.Y.S.2d 580 (Bronx County Supreme Court 2004).

The plaintiff commenced this action by filing summons with notice dated November 5, 2007, but no complaint. The defense counsel accepted service of that summons with notice at an appearance by counsel of all of the parties before another Justice of the Supreme Court on November 26, 2007, in conjunction with an order to show cause brought by the plaintiff seeking a pre-judgment attachment of the defendant's assets together with expedited discovery. The defense counsel contends that application sought to assist the plaintiff in framing a complaint. The defense counsel asserts on November 26, 2007, a notice of appearance demanding service of the complaint within 20 days was served upon the plaintiff's counsel. The opposition papers address the issue of no prejudice to the defendant

in denying the instant motion, and indicate the plaintiff between 2003 and 2005 invested approximately \$192,000.00 with a hedge fund commenced by the defendant's husband, who subsequently died in an unrelated motor vehicle. But, the defense attorney, in the reply, points out the first cause of action in the proposed complaint does not specify, as required by law, a fraud claim, to wit what was transferred, when the transfers occurred, nor any other information identifying the challenged transfers. The defense attorney notes the second proposed cause of action alleges a constructive trust without pleading required elements, to wit a confidential relationship between the parties, a promise made by one party to the other, a transfer made in reliance on the promise, and an unjust enrichment. The defense attorney maintains the third proposed cause of action, alleged on information and belief as with the other claims of the plaintiff, is for conversion of funds by the defendant from the hedge operated by her late husband, but the plaintiff has no standing to assert such claims since such averments would have to be asserted by the Fund or derivatively by its shareholders. The defense attorney also points to the an affidavit presented in the opposition papers offered with respect an arrest warrant against the defendant's late spouse, and the plaintiff paying the deceased unspecified funds for unsuccessful trading, but ascribes no involvement by the defendant.

This Court finds the plaintiff has failed to show a reasonable excuse for the delay from December 17, 2007, the CPLR 3012 (b) requirement for service of the complaint, until after March 14, 2008, the date for this instant motion to be heard before the Court, and a meritorious claim. So, this Court is constrained to find for the defendant based upon CPLR §3012 (b) and the applicable case law.

The defense attorney requests the Court consider the plaintiff's failure to certify pursuant to 22 NYCRR 130-1.1, to wit whether the allegations in the proposed amended complaint are based on reasonable inquiry, and are not frivolous. The defense attorney submits the contentions advanced on the plaintiff's earlier motion to obtain pre-complaint discovery in order to frame a complaint establishes the proposed complaint was made without inquiry, and the plaintiff and plaintiff's counsel cannot certify as to the possible legitimacy of such claims. The defense attorney indicates the plaintiff should be relegated to asserting, and establishing a claim against the estate of the late spouse, to wit the individual the plaintiff alleged wronged him, and the plaintiff should not be permitted to continue to pursue litigation against this defendant where the Court previously found no merit to these claims.

22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

Under 22 NYCRR § 130-1.1 [c], conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

This Court has considered the circumstances under which the conduct here took place, including the time available for investigating the legal or factual basis of the conduct. The

plaintiff's conduct continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of plaintiff's counsel. The plaintiff's conduct was undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure the defendant and defense counsel, and asserts material factual statements that are false. This Court determines the plaintiff's conduct was frivolous as set forth in 22 NYCRR § 130-1.1.

Accordingly, the motion is granted.

So ordered.

Dated: May 9, 2008

ENTER:



J. S. C.

HON. ANTONIO L. BRANDVEEN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

**ENTERED**

MAY 14 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**