

Kushner v Steinberg

2009 NY Slip Op 30715(U)

March 24, 2009

Supreme Court, New York County

Docket Number: 405129/07

Judge: Joan A. Madden

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

PRESENT: Hon. Joel A. Mudda
Justice

PART 11

Kushner, L.

INDEX NO. 405129/07

- v -

Steinberg, D.

MOTION DATE _____

MOTION SEQ. NO. 003

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached memorandum decision for the

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

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 24, 2009

[Signature]
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: IAS PART 11

-----X
LARRY J. KUSHNER, LARRY J. KUSHNER as
Assignee/Nominee of FORECLOSURE 911, LTD.,
IL KESEF OF PA, LLC (INVOLUNTARY PLAINTIFF),
IL KESEF OF DE, LLC (INVOLUNTARY PLAINTIFF),
IL KESEF OF OHIO, LLC (INVOLUNTARY PLAINTIFF),

Index No. 405129/07

Plaintiffs,

- against -

ISRAEL STEINBERG, STILLWATER CAPITAL
PARTNERS, JACK DOUCK, RICHARD RUDY,
STILLWATER-KESEF, LLC, WILLIAM SCHLITTLER,
ISAAC NASSER, I & I CONSULTING,
NICK MALEGRACA, 8 IN PROPERTIES, LLC,
IN PROPERTIES, LLC, and
IN PROPERTIES OF PA, LLC,

Defendants.
-----X

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN J.:

Defendants Israel Steinberg ("Steinberg") and his four limited-liability companies, I & I Consulting, LLC; 8 in Properties, LLC; In Properties, LLC; and In Properties of PA, LLC (together "the moving defendants"), move to dismiss the complaint against them, pursuant to CPLR 306-b (failure to timely serve the complaint), or CPLR 3211(a)(8) (lack of long-arm jurisdiction). Plaintiff Larry J. Kushner ("Kushner"), appearing pro se, cross-moves (1) for an extension of time to serve the complaint and for an order directing Steinberg to appear for a deposition, and (2) for an order setting this matter down for a hearing or traverse on the issue of jurisdiction. For the reasons below, the motion to dismiss pursuant to CPLR 306-b is granted, the cross motion is denied, and the court need not reach whether there is long-arm jurisdiction

over the moving defendants.

The verified complaint alleges the following. Steinberg introduced Kushner to Jack Douck (“Douck”) and Rick Rudy (“Rudy”), who together operate Stillwater Capital Partners (“Stillwater”). Douck, Rudy, and Stillwater are also defendants. Stillwater, Kushner, and Steinberg formed Stillwater-Kesef, LLC, also a defendant, as a vehicle through which to buy distressed real property, fix it, and sell it for a profit. Stillwater was to receive 50% of the profits of Stillwater-Kesef, and Kushner and Steinberg were to receive 25% each. Stillwater-Kesef contracted with William Schlittler (“Schlittler”). Steinberg and Kushner also formed four limited-liability companies, and the caption refers to these companies as “involuntary plaintiffs.”

Stillwater allegedly loaned money to these “involuntary plaintiffs” to purchase real property. Steinberg allegedly transferred the properties that the involuntary plaintiffs purchased to his own limited liability companies. He allegedly caused the employees, agents, and contractors of the involuntary plaintiffs to work for his own companies. Stillwater allegedly paid Steinberg monies that should have gone to the involuntary plaintiffs. On February 26, 2006, Kushner and Steinberg allegedly made an agreement that Steinberg would receive certain properties, and would pay Kushner for his interest in those properties; Steinberg then allegedly did not pay. Kushner further alleges that Schlittler “conspired” with Steinberg to transfer other properties from Kushner without consideration. The complaint contains causes of action for an accounting, the imposition of a constructive trust, breach of contract, conversion, fraud, tortious interference with contract.

The moving defendants seek dismissal pursuant to CPLR 306-b, which provides that “[s]ervice . . . shall be made within one hundred twenty days after the filing of the summons and

complaint . . .” Kushner filed the summons and complaint on July 2, 2007, and served on the moving defendants 157 days later, on December 6, 2007. The other named defendants have not been served.¹

In opposition, Kushner argues that he should be given an extension of the time for service in the “interests of justice” since the statute of limitations has not expired and the moving defendants have not been prejudiced by the 37-day delay.

Under CPLR 306-b, a plaintiff has 120 days after commencement of an action to serve a defendant. If service is not made during that time period, “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.” See CPLR 306-b. To demonstrate “good cause” under the statute a plaintiff must make a threshold showing that he made reasonably diligent attempts at service. Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 104 (2001). In this case, Kushner does not argue that he can demonstrate that he made reasonably diligent efforts at timely service so as to provide a basis for an extension for good cause shown.

However, a plaintiff can also obtain an extension of service “in the interest of justice” which “requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties.” Id., at 105. Unlike an extension based on good cause, “a plaintiff need not establish reasonable diligence as a threshold matter.” Id. Instead, “the court may consider diligence, or the lack thereof, along with any other relevant factors... including the expiration of the Statute of Limitations, the meritorious nature of the cause of

¹There is no proof service in the file for the other named defendants or any answers from them.

action, the length of delay in service, the promptness of a plaintiff's request for the extension of time and prejudice to the defendant...[and] [n]o one factor is determinative" Id., at 105-106.

Here, after considering the various relevant factors, the court finds that Kushner has failed to establish that an extension would be in the interest of justice. Not only has Kushner failed to show that he made a reasonably diligent effort to timely serve process, he has not provided any explanation for the delay in service. See Leader, 97 N.Y.2d at 107 (considering the plaintiffs' lack of an explanation as a factor disfavoring them); Davis v. McDougall, 2007 N.Y. Slip Op. 33393(U), 2007 WL 3128391 (Sup. Ct. N.Y. Co. 2007) (holding that an extension would not serve the interests of justice when plaintiff failed to provide an explanation for the 12-day late service); Fiel v. Schneyer, 33 A.D.3d 852, 852 (2d Dep't 2006)(holding that plaintiffs failed to establish their entitlement to an extension in the interest of justice when they demonstrated an extreme lack of diligence in their attempts to serve defendant).

Moreover, Kushner first requested an extension of time to serve the summons and complaint in response to the moving defendants' motion to dismiss for lack of timely service. See Ludemann v. Maisel, 292 A.D.2d 428, 429 (2d Dep't 2002) (denying request to extend time for service when plaintiffs failed to explain their delay in seeking to extend time for service and first sought relief in response to defendant's motion to dismiss).

Next, as the statute of limitations has not expired, and Kushner can commence a new action, this factor does not weigh in favor extending the time to serve the complaint. Compare Estey-Dorsa v. Chavez, 27 AD3d 277 (1st Dept 2006)(holding that in granting an extension of time to serve the complaint, the court properly considered, among other things, that the statute of limitation had expired). Furthermore, even assuming arguendo that the verified complaint is

sufficient to demonstrate the merit of Kushner's individual claims, as he is no longer an attorney,² Kushner cannot assert claims on behalf of the other plaintiffs which include limited liability companies.³ See Whitehead v Town House Equities, Ltd., 8 AD3d 369, 370 (2d Dept 2004)(noting that a person who "is not licensed to practice law in the State of New York pursuant to the Judiciary Law may not appear pro se in court on behalf of a litigant as an attorney-in-fact pursuant to a power of attorney);See Michael Rcilly Design, Inc. v. Houraney, 40 AD3d 592 (2d Dept 2007)(holding that a limited liability company can only be represented by counsel and cannot appear by one of its members who is not an attorney admitted to practice in New York State). To the extent the action on behalf of the other plaintiffs is unsustainable in the absence of representation by counsel, this factor weighs against granting an extension of the time to serve the complaint. See generally Estate of Jervis v. Teachers Ins. & Annuity Ass'n, 181 Misc. 2d 971, 974 (Sup. Ct. N.Y. Co. 1999), aff'd, 279 A.D.2d 367 (1st Dept 2001).

Next, while the late service of process has not prejudiced defendants, this factor alone is insufficient to warrant granting an extension of time to serve the complaint. In addition, although Kushner is appearing pro se, since, as indicated above, Kushner was previously a New York attorney, this factor does not weigh in his favor.

Finally, as the other named defendants have not been served, it is appropriate to dismiss

²See Matter of Kushner, 200 A.D.2d 1 (1st Dep't 1994)(disbarring Kushner based on his conviction, upon his guilty plea, of the felony of grand larceny in the fourth degree).

³In addition, while Foreclosure 911, Ltd. is alleged to be a limited partnership, Steinberg, on behalf of the moving defendants, states in his reply affidavit that this plaintiff is a New Jersey corporation.

the complaint in its entirety.

Accordingly, it is

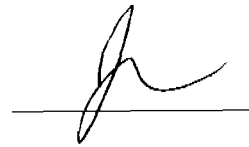
ORDERED that the motion to dismiss, pursuant to CPLR 306-b, by defendants Israel Steinberg; I & I Consulting; 8 in Properties, LLC; In Properties, LLC; and In Properties of PA, LLC, is granted; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDER that the dismissal of the complaint is without prejudice.

Dated: March 24, 2009



J.S.C.

FILED
MAR 31 2009
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