

Fason v Loeger Realty Co.

2009 NY Slip Op 32081(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 111852/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Fason, Ronald

INDEX NO.

111852/08

MOTION DATE

- v -

Locher Realty

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

is decided for

at all.

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

[Signature]

Dated: 9/8/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

EMILY JANE GOODMAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
RONALD FASON and YOLANDA FASON

Plaintiffs

-against-

Index No.: 111852/08

LOEGER REALTY CO. et al,

Defendants.

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
EMILY JANE GOODMAN, J.S.C.:

In this action, Plaintiff Ronald Fason allegedly slipped and fell on October 14, 2005 at a Burger King located at 92-85 Queens Boulevard, Queens. Plaintiffs move, pursuant to CPLR 306-b, to extend time to serve "Loeger Realty Co." with the summons and complaint, and, for production of a lease. The motion is moot with respect to production of the lease, as it has been produced, except that, Defendants are ordered to produce all leases/subleases with respect to the premises, not only the original lease, which was been produced.

As to the requested extension, the motion is denied, with leave to renew within the time period below; otherwise the action will be deemed dismissed against Loeger Realty Co. CPLR 306-b provides, in relevant part, that service of the summons with notice shall be made within 120 days of the filing of the summons with notice, and if service is not made upon a defendant within such time, the court 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." A leading case on CPLR 306-b is *Leader v Maroney, Pozinni & Spencer* (97 NY2d 95 [2001]). In *Leader*, the Court of Appeals noted that, unlike an extension request based on "good cause," there is no requirement, under the "interest of justice" standard, that a plaintiff show diligent efforts at service as a threshold matter. Instead, in its discretion the court may consider diligence (or the lack thereof) along with other factors to determine whether under the "interest of justice" standard, an extension of the time for service should be granted. The factors may include "[the] 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." *Id.* at 105-106.

In the instant case, it is undisputed that service was attempted on Loeger Realty Co. within the statute of limitations on August 28, 2008 via the Secretary of State, after the business could not be located at 299 Broadway New York. Service was not effective, however, and Plaintiffs concede that the business was not listed with the Secretary of State. Service was also attempted after the statute of limitations expired on December 11, 2008 c/o Creative Foods Corp., 200 Garden City Plaza, Suite 505, Garden City, New York. This motion was not made until five months later.

Defendants Woodhaven Burgers Co., Inc., individually and d/b/a BURGER KING and Creative Foods Corp., individually and d/b/a BURGER KING CREATIVE FOODS CORP., object to the court's granting of the motion, but they do not have standing to do so. However, Plaintiffs have not demonstrated that the defendant it seeks to serve had notice of their claims, which is one factor to consider in granting or denying the motion (*id.* at 107). Moreover, the statute of limitations has expired, but Plaintiffs have not demonstrated a meritorious cause of action against the defendant they seek to serve. Furthermore, according to the lease annexed to Defendants papers, it appears that the entity that Plaintiffs seek to serve is not "Loeger Realty Co." but rather, "Loeger Realty Co., Inc." a domestic corporation that had its principal place of business at 242 East 86th Street in Manhattan in 1962, and which may no longer be in existence.

Accordingly, it is

ORDERED that the motion is moot with respect to production of the lease, except that, Defendants are ordered to produce, within 20 days of receipt of a copy of this Decision and Order, all leases/subleases with respect to the premises; and it is further

ORDERED that the motion is denied with leave to renew, upon proper papers, to the extent that Plaintiffs' seek an extension of time to serve, which motion must be made within 30

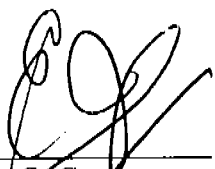
days of receipt of a copy of this Decision and Order; and it is further

ORDERED that if the motion is not timely renewed, the action with be deemed dismissed against Loeger Realty Co.

This constitutes the Decision and Order of the Court.

Dated: September 8, 2009

ENTER:



J. S. C.
EMILY JANE GOODMAN

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK