

Baxter v Sandy Hollow Assoc., LLC

2010 NY Slip Op 33412(U)

November 30, 2010

Supreme Court, Nassau County

Docket Number: 18992/09

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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JOAN BAXTER,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 18992/09
Motion Seq. Nos.: 02, 03, 04 & 05**

SANDY HOLLOW ASSOCIATES, LLC, MILL POND
ACRES CONDOMINIUM ASSOCIATES, INC., J.M.I.
MANAGEMENT COMPANY, INC., J.S. CONTRACTING,
N.C., INC. and JOBCO MANAGEMENT, INC.,

Defendants.

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Papers Read on this Motion:

Defendant Sandy Hollow’s Notice of Motion	02
Defendants Mill Pond Acres and JMI Management Company’s Notice of Cross-Motion	03
Defendant J.S. Contracting’s Notice of Motion	04
Plaintiff’s Notice of Cross-Motion	05
Defendant Sandy Hollow’s Affirmation in Opposition	xx
Defendants Mill Pond Acres and JMI Management Company’s Affirmation in Opposition	xx
Defendant J.S. Contracting’s Affirmation in Reply	xx
Plaintiff’s Affirmation in Opposition	xx
Defendant J.S. Contracting’s Affirmation in Opposition to Cross-Motion	xx

In motion, sequence number two, Sandy Hollow Associates, LLC, (“Sandy Hollow”) move for an Order pursuant to CPLR §3126 dismissing the Complaint of the plaintiff, Joan Baxter, for willful failure to respond to defendant’s discovery demands or in the alternative relief pursuant to CPLR §3124 compelling plaintiff to respond to outstanding discovery demands.

Mill Pond Acres Condominium Associates, Inc. (“Mill Pond”) and JMI Management Company, Inc. (“JMI”), cross-move in motion sequence number three for an Order pursuant to CPLR §3126

dismissing the Complaint of the plaintiff for willful failure to respond to defendant's discovery demands.

In motion sequence number four, defendant, J.S. Contracting, N.C., Inc. ("J.S. Contracting") move for an Order pursuant to CPLR §3211 (a) (8) dismissing the Complaint of the plaintiff due to improper service. Plaintiff cross moves in motion sequence number five for an Order pursuant to CPLR §306-b for an extension of time to properly serve defendant, J.S. Contracting.

Plaintiff commenced the underlying action by filing a summons and complaint in October, 2009, alleging that defendants were jointly and severally negligent in the maintenance, supervision, operation, management and control of the premises, causing the plaintiff to trip and/or slip and fall and consequently, sustain serious injuries.

FACTS

On March 2, 2007, plaintiff, while on the premises, condominiums located at 130 Pondview Drive, Port Washington, NY, tripped and fell on the slope area of a driveway. She sustained serious injuries, including fractures, to her legs, face, mouth and knees. Plaintiff alleges that the design of the slope was too steep for pedestrian use and its design caused sand used in snow and ice removal, to accumulate creating a hazardous and dangerous condition on which plaintiff slipped and fell.

PROCEDURE

Plaintiff served her Complaint in October, 2009 upon all defendants, and issue was joined by Mill Pond, JMI, and Sandy Hollow. In addition to their Verified Answers, Mill Pond, Sandy Hollow and JMI cross-claimed against each other and J.S. Contracting for indemnification. As the plaintiff had not served a Bill of Particulars, Sandy Hollow served a demand for the Bill along with Combined Demands and Notice of Discovery and Inspection. As plaintiff did not respond, Sandy Hollow moved to dismiss the Complaint. In response, the Court scheduled a Conference in May, 2010 ordering all parties to appear. It is noted that J.S. Contracting did not appear for the conference but its attorney participated by telephonic

communication to the limited extent of indicating that he had not been retained, nor had he filed an answer. The Court ordered the plaintiff to comply with the outstanding discovery demands on or before June 7, 2010.

When plaintiff did not comply with the discovery demands by June 7, 2010 pursuant to this Court's Order, Sandy Hollow advised her by letter, dated June 7, 2010, that it would file the instant motion if there was no response within ten days. As plaintiff did not respond, Sandy Hollow filed the instant motion in chief on or about June 24, 2010 and Mill Pond and JMI served their motions in July, 2010 seeking similar relief. Plaintiff finally served her Bill of Particulars and Response to Discovery and Disclosure Demands upon all defendants in August, 2010.

J.S. Contracting appeared in June, 2010 and filed its Motion to Dismiss in August, 2010. The other co-defendants opposed J.S. Contracting's motion, arguing that a dismissal of the Complaint would cause their cross-claims to be dismissed. As such, they sought alternative relief that their cross claims against J.S. Contracting be converted to third-party complaints. Further, they allege that JMI hired J.S. Contracting as the snow and ice removal contractor and dismissing the Complaint as to J.S. Contracting would cause them to move to formally implead it as a necessary party. Plaintiff argues, in opposition, that J.S. Contracting is not prejudiced by an extension of time to properly serve it and such extension should be granted in the interest of justice, particularly as the statute of limitations expired in March, 2010.

DISCUSSION

Generally, a defendant is not entitled to the dismissal of the complaint under CPLR §3126 (3) without first moving to compel the disclosure and/or it seeks, accompanied by an affirmation that she made a good faith effort to resolve the discovery dispute (*Holohan v. Amity Nissan Superstore*, 2008 WL 2489500 citing 22 NYCRR 202.7[a]; *Hegler v. Loews Roosevelt Field Cinemas*, 280 AD2d 645 [2nd Dept 2001]). Here, Sandy Hollow did submit an Affirmation of Good faith while simultaneously moving to

compel discovery.

However, while the nature and degree of the penalty to be imposed on a motion pursuant to CPLR §3126 is a matter generally left to the discretion of the court, to invoke the drastic remedy of striking a pleading, a court must determine that the party's failure to comply with a disclosure order was the result of willful and contumacious conduct (*Patterson v. New York City Health & Hosps. Corp.*, 284 AD2d 516 [2nd Dept 2001]); *Diel v. Rosenfeld*, 12 AD3d 558 [2nd Dept, 2004]; *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, 13 AD3d 784 [2nd Dept, 2008]). Sandy Hollow has not met its burden of demonstrating that plaintiffs' conduct was willful and contumacious. In addition, plaintiff has complied with the outstanding discovery demands. Accordingly, Sandy Hollow's motion as to dismissing the Complaint, is denied. Its motion to compel discovery has been rendered moot by plaintiff's compliance with its demands.

In view of the foregoing, and in addition to the facts that JMI and Mill Pond have not submitted an Affirmation of Good faith and have not moved to compel discovery pursuant to CPLR §3124, their motion is **denied**.

As to J.S. Contracting's Motion to Dismiss, the Court finds that service upon this defendant was improper. J.S. Contracting did not conduct business at the 277 Northern Blvd., Great Neck, NY address where plaintiff served the pleadings and she failed to serve the Secretary of State. However, CPLR §306-b permits the court to extend the 120-day time period for service "upon good cause shown or in the interest of justice", which are two separate standards upon which to base an application for an extension (see *Spath v. Zack*, 36 AD3d 746 [1st Dept 2004]).

Here, plaintiff failed to show reasonable diligence in attempting to effect service, as required to demonstrate good cause for an extension of time (see *Leader v. Maroni, Ponzini & Spencer*, 97 NY2d 95 [2001]). Her ineffective attempts did not comply with statutory service requirements and plaintiff's papers

failed to outline reasonable steps taken to locate J.S. Contracting. The alternative standard, however, allows the Court to exercise discretion. The interest of justice standard is broader and permits the court to consider many factors, including the meritorious nature of the action, the expiration of the statute of limitations, and the promptness of plaintiff's request for an extension of time and prejudice to defendant (see *Spath v. Zack*, supra; *Mead v Singleman*, 24 AD3d 1142 [3rd Dept 2005]).

Upon a consideration of the relevant factors, an extension of time to re-serve J.S. Contracting is warranted. Service, although defective, was timely made, the statute of limitations has expired, and there is no legal prejudice to J.S. Contracting, who had notice of the action. Finally, as public policy favors resolution of cases on the merits (see *Aabel v Town of Poughkeepsie*, 301 AD2d 739 [3rd Dept 2003]), and in view of the foregoing factors, relief is warranted here. Accordingly, plaintiff's motion to extend time to serve the Summons and Complaint is **granted** and J.S. Contracting's Motion to Dismiss is **denied**.

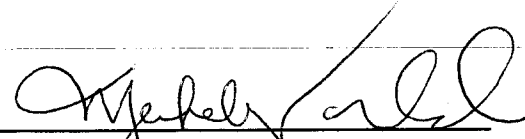
The plaintiff is hereby ordered to properly serve J.S. Contracting and file the affidavit of service in this Court, within ten (10) days of receipt of this Order. It is hereby

ORDERED, that the conference currently schedule for December 2, 2010 is adjourned until December 21, 2010 at 9:30 a.m. before the undersigned.

This constitutes the Decision and Order of the Court.

DATED: November 30, 2010
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED
DEC 06 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE