SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

ARISTA LEASING CO LLC,

Plaintiffs,

-against-

BIG CITY LIMO, LLC; MOSES CRAWFORD,

Defendants.

MOTION DATE: 10/30/10
MOTION SEQ. NO.: 001

INDEX NO.: 5951/08

The following papers read on this motion (numbered 1):
Notice of Motion.....1

In this action to collect the sum of $25,239.09 allegedly due and owing by defendants pursuant to three vehicle leases, plaintiff ARISTA LEASING CO LLC moves for an Order: (i) pursuant to **CPLR §305(c)**, permitting plaintiff to amend the summons to reflect a new corrected address for defendant MOSES CRAWFORD ("CRAWFORD"); and (ii) pursuant to **CPLR §306-b**, extending the 120-day period to effect service of process.

The Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission. No opposition to this motion was received by the Court.

The Court first considers whether or not plaintiff should be permitted additional time for service of process upon CRAWFORD. **CPLR §306-b** permits the Court to extend a plaintiff's time for service of the summons and complaint beyond the statutory 120-day period "upon good cause shown" or "in the interest of justice." The Court of Appeals has confirmed that the two standards are separate and distinct. The "good cause" standard requires a showing of reasonable diligence in effectuating service and does not generally include conduct characterized as "law office failure." *See* **Leader v. Maroney,**

Ponzini & Spencer, 97 NY2d 95, 104-105. Generally, the party seeking relief must show that the failure to serve process in a timely manner was a result of exceptional circumstances beyond his or her control. **State of New York v. Sella,** 185 Misc.2d 549 (2000), *citing* **Eastern Refractories Co. v Forty Eight Insulations**, 187 FRD 503, 505 [SDNY 1999].

Where no good cause is shown, relief may be granted pursuant to the "interest of justice" standard. That is a broader, more flexible, standard, which may accommodate late service due to mistake, confusion or oversight, so long as there was no prejudice to the defendant. *See* **Leader,** 97 NY2d 95, 104-105. Application of the interest of justice standard requires a careful analysis of the factual setting of the case, and a balancing of the competing interests of the parties. **Leader,** 97 NY2d at 105. The factors to be considered include: (1) plaintiff's reasonable diligence in attempting to effect service; (2) the expiration of the applicable statute of limitations; (3) the meritorious nature of the cause of action; (4) the length of the delay in service; (5) the promptness of the request for an extension of time; and (6) the prejudice to the defendant. No one factor is determinative. The court may consider any factor relevant to the exercise of its discretion, consistent with the express legislative intent to serve the interests of justice. **Leader,** 97 NY2d at 105-106.

In this case, the Summons and Complaint were filed on March 31, 2008. BIG CITY LIMO, LLC ("BIG CITY") was served on or about April 4, 2008, by delivery to the Secretary of State pursuant to **Business Corporation Law §306**. The Court notes that the Secretary of State's mailing of the summons and complaint by certified mail to 400 Post Avenue, Westbury, NY 11590 was returned, with the notation: "Attempted unknown/not known." [*See* Motion, Exhibit "A"]. According to plaintiff's counsel, plaintiff's process server attempted to serve CRAWFORD at the same address (400 Post Avenue 302, Westbury, NY 11590), but was unable to do so, and the papers were returned as a "non-serve."

Plaintiff's counsel states that, notwithstanding the foregoing, the parties engaged in "ongoing settlement negotiations." According to plaintiff's counsel, BIG CITY was represented by Attorney Kecia Weaver in this matter. (The Unified Court System's computerized data-base shows no attorney of record for either defendant.) By letter dated January 4, 2010, Kecia J. Weaver informed plaintiff's counsel that she no longer represented BIG CITY as of January 15, 2010, and directed plaintiff's counsel to refer all questions to CRAWFORD at the telephone number provided. Thereafter, plaintiff conducted a postal search and found a new address for CRAWFORD. Counsel states that CRAWFORD informed her that BIG CITY was out of business. Nonetheless, counsel states, CRAWFORD made an offer of settlement (for $7500) on or about February 22,

and plaintiff made a counter-offer of $10,000 on or about March 1, 2010 [hereinafter, the "Counter-Offer," attached to the motion as Exhibit "D"]. A handwritten note appears on the Counter-Offer, which appears to be from plaintiff's principal to counsel: "I need to have an answer by 3/5 or file judgment. Don't let this sit again." CRAWFORD never responded to the Counter-Offer. The instant motion was filed on or after August 31, 2010.

The Court finds that plaintiff has not demonstrated entitlement to an extension of time to serve, even under the more liberal "interest of justice" standard. Although consideration of all of the factors weighs against plaintiff's application, the most clear and compelling factor is the absence of any evidence of a meritorious cause of action. There is no affidavit of the facts underlying the claim and the amount due, sworn to by a party with first-hand knowledge. The so-called "Verified Complaint" is unsigned, as is the Attorney Verification. There is no copy of the three leases from which defendants' obligations purportedly arise. There is no evidence that the leases imposed personal liability upon CRAWFORD.

In addition, counsel has not shown that a reasonably diligent effort was made to serve CRAWFORD. There is no documentation to support counsel's claim that an attempt at service was timely made. If service was unsuccessful at the Westbury address, as counsel states, there is no evidence that counsel sought to ascertain a current, valid address for CRAWFORD, and to serve him there. There is no evidence that a postal search was conducted until January 2010, at the earliest, which was over one year and nine months after the initial attempt at service.

Equally unjustified is the delay in seeking an extension of time. The instant motion was made over two years and one month after the expiration of the 120-day period. Counsel implies that the delay is attributable to "ongoing settlement negotiations." There is no evidence that CRAWFORD (as opposed to Attorney Kecia Weaver) engaged in settlement negotiations on behalf of BIG CITY or himself, and no admissible proof substantiating counsel's claim that CRAWFORD made an offer of settlement. (The Counter-Offer is inadmissible as proof that an offer was made, and, notably, does not name CRAWFORD, but rather, refers to "the debtor.") Further, the Court finds no authority for the proposition that unsuccessful, undocumented, settlement negotiations provide a reasonable excuse for the lack of diligence in effecting service and seeking an extension of time to serve. Moreover, according to the handwritten note on the Counter-Offer, referred to above, all settlement negotiations were supposed to end by March 5, 2010. There is no explanation for the delay thereafter; i.e., not filing the instant motion until six months after the Counter-Offer expired.

At best, if all facts asserted by counsel are true, then CRAWFORD had actual knowledge of the claim close to its inception and would not be prejudiced by the delay in effecting service. The Court finds, however, that this consideration is outweighed by the factors arguing against the relief sought.

Accordingly, the application is denied and the action dismissed as to CRAWFORD pursuant to **CPLR §306-b**. In view of this determination, the court need not reach the application for relief pursuant to **CPLR §305(c)**.

The Court notes that plaintiff does not state that BIG CITY answered the complaint or otherwise appeared. No answer is attached to the motion papers. The Unified Court System computerized database shows no appearance by an attorney on behalf of BIG CITY, and no motion for a default judgment filed against BIG CITY pursuant to **CPLR §3215**. The Court thus believes that dismissal of the action against BIG CITY is warranted pursuant to **CPLR §3215(c)**.

Based upon the foregoing, it is

ORDERED, that plaintiff's application pursuant to **CPLR §306-b** and **CPLR §305(c)** is **denied** in its entirety. It is further

ORDERED, that the action is **dismissed** as against CRAWFORD pursuant to **CPLR §306-b**. It is further

ORDERED, that the action is **dismissed, conditionally**, as against BIG CITY pursuant to **CPLR §3215(c)** unless an appropriate application is made to the Court within thirty days following entry of this Order in the records of the Nassau County Clerk. If the Court receives no communication on behalf of plaintiff within that time period, the action is dismissed in its entirety without further Order of the Court.

ENTER:

Dated: Jan 3, 2011

J.S.C.

ENTERED
JAN 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE