

**Miller v Lester**

2011 NY Slip Op 31600(U)

June 2, 2011

Sup Ct, Nassau County

Docket Number: 13714/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
MARK H. MILLER,

Plaintiff,

-against-

TERESA LESTER a/k/a TERESA ERSKINE  
a/k/a TERESA MILLER,

Defendant.

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~~XXX~~  
MOTION DATE: 04/06/11  
SEQUENCE NO. 002, 003

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Upon the foregoing papers, defendant’s motion to dismiss the plaintiff’s Summons with Notice, pursuant to CPLR §3012(b), is granted. Plaintiff’s Order to Show Cause to disqualify the defendant’s attorneys of record and compel the defendant to accept service of the Amended Summons and Complaint, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

Plaintiff commenced this action on July 20, 2010 by filing a Summons with Notice at the Nassau County Clerk’s Office. In the Summons with Notice, Plaintiff lists six causes of action against the defendant, who is the plaintiff’s ex-wife. The causes of action include abuse of process, malicious prosecution, false arrest and imprisonment, assault, deprivation of constitutional liberties, and intentional infliction of emotional distress. Plaintiff is seeking money damages not less than \$10,000,000.00.

Although plaintiff filed the Summons with Notice, he did not serve the defendant until the Court extended his time to do so at a conference on November 16, 2010. Defendant was thereafter served, and, defendant appeared by serving and filing a Notice of Appearance on December 13, 2010.

As the plaintiff never timely served the defendant with a complaint within twenty (20) days after the service of the Defendant's Notice of Appearance, defendant moves to dismiss the Summons with Notice in accordance with CPLR 3012(b). Defendant contends that the plaintiff has no reasonable excuse for his failure to plead and that the plaintiff's claims have no merit. The defendant attests that this is the plaintiff's second abuse of process/malicious prosecution action against her (the first being *Miller v. Miller*, bearing Nassau County index number 11744/08).

Plaintiff moves to disqualify defendant's attorneys of record, Steven Lester and Anthony DeCarolis, from representing the defendant in this matter because Mr. Lester is the defendant's husband and "will likely be called by [plaintiff] to testify as a witness to the defendant's malicious intent" and hostile behavior toward the plaintiff. Plaintiff moves to disqualify Anthony DeCarolis because he was the defendant's attorney in the Family Court action and was sanctioned by the Family Court. Plaintiff also seeks to add Anthony DeCarolis as a defendant in his proposed Amended Summons and Complaint.

Plaintiff further argues that he should be given leave to serve an Amended Complaint and that the Court should compel the defendant to accept service of same because he has a reasonable excuse for the delay in pleading and a meritorious action. Plaintiff contends that his delay in timely serving a complaint was due to the fact that settlement discussions between the parties were taking place and because the Miller's daughter was hospitalized for one week at South Oaks Psychiatric Hospital.

Defendant contends that there were no settlement discussions and that plaintiff went skiing with his girlfriend on January 9, 2011 when his daughter was ill. The Court notes that settlement negotiations between attorneys is not a reasonable excuse for a party's default. (*See, Maspeth Federal Savings and Loan Assoc. v. McGown*, 77 A.D.3d 889, 909 N.Y.S.2d 403 (2d Dept. 2010); *DeRisis v. Santoro*, 262 A.D.2d 270, 691 N.Y.S.2d 111 (2d Dept. 1999); *Kouzos v.*

*Dery*, 57 A.D.3d 949, 871 N.Y.S.2d 303 (2d Dept. 2008); *Mastic Clothing, Inc. V. East Coast Storage, LLC*, 18 A.D.3d 516, 795 N.Y.S.2d 289 (2d Dept. 2005)). Defendant further contends that plaintiff's complaint was due on or before January 7, 2011 (25 days after the December 13, 2010 date that the Notice of Appearance was served by first class mail), so plaintiff's daughter's emergency room visits on January 13<sup>th</sup> and 20<sup>th</sup>, and her hospitalization from January 21-25, 2011, were *after* plaintiff's pleading was due. Further, defendant contends that the plaintiff is an experienced litigation attorney who is represented by an experienced litigation attorney and long-time friend, and that plaintiff has no reasonable excuse for his default in pleading.

Additionally, defendant argues that plaintiff does not have a meritorious action as plaintiff will not be able to prove two essential elements of his malicious prosecution claim: that the prior action has been finally terminated in his favor and that the defendant lacked probable cause to commence the Family Court proceedings. The essential elements of an action to recover damages for malicious prosecution are (1) the initiation of an action, (2) its termination favorably to the plaintiff, (3) lack of probable cause, and (4) malice as the motivating factor. (*Landsman v. Moss*, 133 A.D.2d 359, 519 N.Y.S.2d 262 (2d Dept. 1987); *Mondello v. Mondello*, 161 A.D.2d 690, 555 N.Y.S.2d 826 (2d Dept. 1990)). Defendant argues that plaintiff is not able to show that the Family Court action was terminated favorably to the plaintiff, because an appeal is pending in the Appellate Division, Second Department, under Docket Number 2010-05462. Defendant also contends that plaintiff had probable cause to bring the action based upon plaintiff's threatening emails and his arrest on charges of child endangerment."

The purposed amended summons and complaint submitted by plaintiff seeks to add defendant Teresa Lester's Family Court counsel, Anthony DeCarolis, Esq., as a defendant. The amended complaint, however, fails to state a cause of action against Anthony DeCarolis, Esq., as the proposed amended pleading contains only vague, conclusory allegations that Anthony DeCarolis, Esq. violated N.Y. Judiciary Law §487. Plaintiff has failed to allege the requisite pattern of wrongdoing or deceit necessary to sustain his claim against Anthony DeCarolis, Esq. (See, *Pellegrino v. File*, 291 A.D.2d 60, 738 N.Y.S.2d 320 (1<sup>st</sup> Dept. 2002)).

Plaintiff has failed to demonstrate that he has a reasonable excuse for his delay in pleading. In addition, even if plaintiff had demonstrated a reasonable excuse for the delay, he has

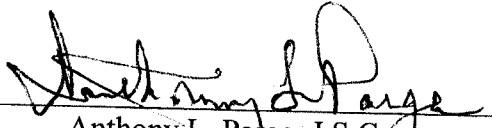
failed to demonstrate that he has a meritorious action herein. In order to vacate a default, the movant must establish **both** a reasonable excuse for the default and a meritorious defense to the action. (See, *Maspeth Federal Savings and Loan Assoc. v. McGown*, 77 A.D.3d 889, 909 N.Y.S.2d 403 (2d Dept. 2010); *Putney v. Pearlman*, 203 D.D.2d 333, 612 N.Y.S.2d 919 (2d Dept. 1994); *Sciavetta v. McKeon*, 190 A.D.2d 724, 593 N.Y.S.2d 468 (2d Dept. 1993); *Shaw v. Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231 (2d Dept. 1983)). The determination of the sufficiency of the excuse and the statement of merits rests within the sound discretion of the court. (*Goldman v. Cotter*, 10 A.D.2d 289, 781 N.Y.S.2d 28 (1<sup>st</sup> Dept. 2004); *Maspeth Federal Savings and Loan Assoc. v. McGown*, 77 A.D.3d 889, 909 N.Y.S.2d 403 (2d Dept. 2010)).

CPLR 3012(b) states:

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.

Plaintiff failed to serve his complaint within twenty days after defendant served her Notice of Appearance and has failed to offer a reasonable excuse for the delay. Accordingly, it is ordered that plaintiff's Summons with Notice is dismissed and plaintiff's Order to Show Cause is denied.

Dated: June 2, 2011

  
 Anthony L. Parga, J.S.C.

**ENTERED**

JUN 07 2011

**NASSAU COUNTY  
 COUNTY CLERK'S OFFICE**

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