

Panlilio v Fisher
2012 NY Slip Op 33025(U)
December 18, 2012
Supreme Court, New York County
Docket Number: 103778/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADSEN
Justice

PART 11

LEONAR PAVILLO

- v -

DEROME FISHER

INDEX NO.

103778/12

MOTION DATE

MOTION SEQ. NO.

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is determined in accordance with the annexed decision and order.

FILED

DEC 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 18, 2012

J.S.C.

Check one: ☒ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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 11

-----X
LEONOR R. PANLILIO,

Plaintiff,

INDEX NO. 103778/12

-against-

JEROME FISHER,

Defendant.

-----X
JOAN A. MADDEN, J.:

FILED

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Defendant moves for an order pursuant to CPLR 3211(a)(8) dismissing the complaint for lack of personal jurisdiction, lack of adequate service of process and failure to state a cause of action. Defendant also moves for an order pursuant to 22 NYCRR §216.1 "to remove the complaint from the court record in this action and place it under seal, to seal the papers filed on this motion, and to seal all other papers filed in this action." Plaintiff, who is pro se, opposes dismissal, but does not oppose sealing the record.

The motion to dismiss the complaint is denied as premature. On or about September 24, 2012, defendant filed the instant order to show cause to dismiss the complaint, which this court signed on October 3, 2012. Plaintiff commenced this action on September 13, 2012, when she filed the summons and complaint and purchased an index number. Pursuant to CPLR 306-b, service of the summons and complaint "shall be made within one hundred twenty days after the commencement of the action" Here, the 120 day period for serving defendant does not expire until 120 days after the September 13, 2012 commencement of the action, which is January 11, 2013. Thus, since plaintiff still has time to serve defendant properly in accordance with CPLR

308, defendant's motion to dismiss based on improper service is premature. See Rink v. Fulgenzi, 231 AD2d 562 (2nd Dept 1996); Gelbard v. Northfield Savings Bank, 216 AD2d 267 (2nd Dept 1995); WU/LH 36 Midland, LLC v. Levinson, 25 Misc3d 1144 (Sup Ct, Nassau Co 2009); 219 Siegel's Prac Rev 4 (2010).

Plaintiff admits that she simply mailed the summons and complaint to defendant by certified mail return receipt requested, to his Florida address, which is insufficient to effectuate service pursuant to CPLR 308. Defendant submits an affidavit that he is a "retired businessman," he is a "resident of the State of Florida," his "home is in Palm Beach Florida," and he does "not have any residence or office in the State of New York." Under CPLR 313, the same methods used to serve process on a defendant located in New York must also be used when service is made outside New York. Morgenthau v. Avion Resources Ltd, 11 NY3d 383, 389 (2008).

CPLR 308 governs service on natural persons, and under that provision, plaintiff may serve defendant by delivering the summons and complaint to defendant in person. CPLR 308(1). As an alternative to personal delivery, plaintiff may deliver the summons and complaint to a "person of suitable age and discretion" at defendant's "actual place of business, dwelling place or usual place of abode," and then mailing the summons and complaint to defendant at his "last know residence" or "actual place of business." CPLR 308(2). If service cannot with due diligence be made by either the personal delivery method or the "delivery and mail" method described above, plaintiff may use the "affix and mail" method provided for in CPLR 308(4). Under 308(4), the summons and complaint are affixed to the door of either defendant's actual place of business, actual dwelling place or usual place of abode," and then mailed to either

defendant's last known residence or actual place of business.

As noted above, plaintiff has until January 11, 2013 to serve defendant by the foregoing methods provided for in CPLR 308. In the event plaintiff is unable to serve defendant by those methods by the January 11, 2013 deadline, she may ask the court for additional time to do so by making motion under CPLR 306-b, which authorizes the court to extend the time for service "upon good cause shown or in the interest of justice." However, once the 120-day period has expired, plaintiff may renew his motion to dismiss. In the absence of proper service and personal jurisdiction over defendant, the court at this juncture cannot consider the additional grounds for dismissal raised in defendant's motion.

The motion for an order sealing the record is denied. Section 216.1(a) of the Uniform Rules of Trial Court directs that "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public as well as of the parties." 22 NYCRR § 216.1(a); Liapakis v. Sullivan, 290 AD2d 393 (1st Dept 2002); In re Will of Hoffmann, 284 AD2d 92, 93 (1st Dept 2001); Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter Ltd., 274 AD2d 1, 8 (1st Dept 2000).

Although "good cause" is a standard that is "difficult to define in absolute terms, a sealing order should rest on a sound basis or legitimate need to take judicial action," Danco Laboratories Ltd. v. Chemical Works of Gedeon Richter, Ltd., *supra* (quoting Coopersmith v. Gold, 156 Misc2d 594 [Sup Ct, Rockland Co 1992], presupposing that "compelling circumstances must be shown by the party seeking to have the records sealed." Coopersmith v.

Gold, supra at 606. "Confidentiality is clearly the exception, not the rule," In re Will of Hoffman, supra at 94, and the presumption of openness of court records remains in the absence of compelling circumstances for secrecy, Coopersmith v. Gold, supra at 606.

Here defendant fails to make a sufficient showing of "good cause" to warrant a sealing order in this action. His assertions as to the need to protect his privacy, and to prevent plaintiff from using this action to embarrass him and "extract a settlement" are not persuasive, in view of the presumption that judicial proceedings are open to the public and the press, unless compelling reasons for closure are presented. See Anonymous v. Anonymous, 263 AD2d 341, 341-342 (1st Dept 2000); Herald Co, Inc. v Weisenberg, 89 AD2d 224, 226 (4th Dept 1982), aff'd 59 NY2d 378 (1983); Merrick v. Merrick, 154 Misc2d 559, 562 (Sup Ct, NY Co 1992), aff'd 190 AD2d 516 (1st Dept 1992).

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied, without prejudice to renewal upon expiration of the 120-day period; and it is further

ORDERED that defendant's motion to seal the record is denied.

DATED: December 18, 2012

FILED

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J.S.C.