

**Pappas v Schatz**

2013 NY Slip Op 32736(U)

October 23, 2013

Sup Ct, New York County

Docket Number: 650157/13

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

STEVE PAPPAS

INDEX NO. 650157/13

-v-

MOTION DATE

LARRY H. SCHATZ et al

MOTION SEQ. NO. 001

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

Upon the foregoing papers, it is ordered that this motion is by plaintiff for an extension of time to file and serve a complaint is GRANTED to the extent that filing and service must be effected within 20 days of service of the attached Decision and Order with Notice of Entry.

Defendant's cross motion to dismiss and for sanctions DENIED.

All as per the attached Decision and Order.

A Preliminary Conference is scheduled for 12-19 at 10:30 AM at 60 Centre St.

Dated: October 23, 2013

Melvin L. Schweitzer, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE



On June 7, 2013, Meekins filed a consent to change attorney for plaintiff, in which Simos C. Dimas, Esq. (Dimas) was designated as plaintiff's new attorney.

On June 10, 2013, Dimas received a letter from Gerard E. Harper, Esq. (Harper), who is a member of Paul, Weiss, Rifkind, Wharton & Garrison, LLP, co-counsel for the defendants, in which Harper expressed his opinion that the matter brought by Pappas is frivolous. After reviewing the matter on that same day, Dimas determined that he could not adequately represent plaintiff, and now makes this motion, seeking an extension of time for plaintiff to hire new counsel and serve and file a complaint.

According to Dimas, plaintiff has a sincere belief that he has a good cause of action and should be afforded the opportunity to find a law firm to litigate this matter. Dimas has set forth the sequence of events pertinent to this litigation in his affirmation in support of plaintiff's motion.

In opposition, defendants argue that any motion brought pursuant to CPLR 3012 (d) that does not include an affidavit of merit, cannot be granted. They further argue for dismissal on the ground that this matter is merely duplicative of the claims and issues set forth in *Pappas v Tzolis*, 20 NY3d 228 (2012)], in which the Court of Appeals dismissed plaintiff's entire case.

Pursuant to CPLR 3012 (d), “[u]pon application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” It is squarely within the discretion of the court to require an affidavit of merit (*Mufalli v Ford Motor Co.*, 105 AD2d 642 [1st Dept 1984]). On this issue, the court in *Mufalli* quotes the language of the Senate sponsor of the bill for CPLR 3012 (d):

“Although the language of [the new CPLR] 3012 (d) is substantially identical to that of 5015 (a) [motion for relief from a judgment or order], there is no intent to extend the full judicial gloss on 5015 (a) to the new provision. Specifically, while the merits of the applicant’s case may sometimes be an appropriate factor for consideration, routine insistence on a showing of merits in cases of short delay would be an unwarranted burden.”

(*Mufalli*, 105 AD2d at 644 [1st Dept 1984], quoting the Memorandum of Sen. Stafford, 1983 NYS Legis, Ann at 144 [the bill’s Senate sponsor]).

Here, there was only a 17-day period between the service of the demand and the filing of the motion for an extension of time to file a complaint. This is within the 20-day period set forth under the statute for service of the complaint after the demand (*see* CPLR 3012 [b]). In his affirmation in support of the motion, Pappas’s attorney offers a reason for plaintiff’s request for a short delay; he explains the sequential substitution of plaintiff’s counsel and plaintiff’s resulting need for time to hire new counsel to file and serve the complaint. Accordingly, Pappas has satisfied the required conditions under CPLR 3012 (d) and need not offer an affidavit of merit. The court, therefore, grants his motion for an extension of time.

As it is not necessary for the court to review the merits of this matter on this motion, the court denies the defendants’ motions to dismiss and for sanctions.

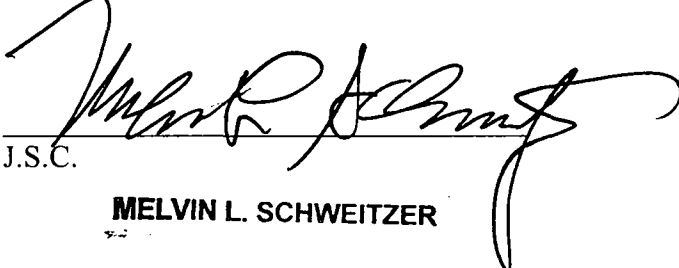
Accordingly, it is

ORDERED that plaintiff Steven Pappas’s motion pursuant to 3012 (d) for an extension of time to file a complaint is granted to the extent that plaintiff Steve Pappas must serve and file a complaint within twenty (20) days of service of this order with notice of entry; and it is further

ORDERED that defendants Larry H. Schatz and Grubman, Indursky, Shire & Meiselas, PC’s cross-motion to dismiss and for sanctions is denied.

Dated: October ~~13~~ 2013

ENTER:

  
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J.S.C.

**MELVIN L. SCHWEITZER**