

Hoops v Sinram

2015 NY Slip Op 31013(U)

June 9, 2015

Supreme Court, Suffolk County

Docket Number: 14-14574

Judge: Joseph A. Santorelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

INDEX No. 14-14574
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-24-15, 4-21-15
X-MOT DATE 4-10-15, 4-24-15
SUBMIT DATE 5-28-15
Mot. Seq. # 001 - MD
X-Mot. Seq. # 002 - MG
Mot. Seq. # 003 - MD
X-Mot. Seq. # 004 - MG

-----X

CARL HOOPS,

Plaintiff,

- against -

WILLIAM SINRAM, RICHARD MEYER,
ANTON AUGUSTIN, EDWARD ZADIGAN,
PETER GUERNE, KEITH SABOE, HAROLD
GRESLIN, JEFFREY WAUNSCH, VINCENT
FARINELLA, ROBERT BOLTREK,
KENNETH LAMOTTE, ROBERT
KRETZMER, MIKE OLSON, ADELE
SANDERMANN, JOE BATTACHIARI,
LAWRENCE SAILOR, EDWARD
HARTMANN, and EDWIN NARANJO,

Defendants.

-----X

PAUL L. DASHEFSKY, ESQ.
Attorney for Plaintiff
317 MIDDLE COUNTRY RD
SMITHTOWN, NY 11787

EDWARD G. MCCABE, ESQ.
*Attorney for Defendants- Sinram, Meyer, Augustin, Zadigan,
Guerne, Saboe, Greslin, Waunsch, Boltrek, Olson, Battachiari,
& Naranjo*
80 ORVILLE DR
BOHEMIA, NY 11716

WHITE FLEISCHNER & FINO, LLP
Attorney for Defendant- Lamotte
1527 FRANKLIN AVE, STE 200
MINEOLA, NY 11501

**VINCENT FARINELLA
ROBERT KRETZMER
ADELE SANDERMANN
LAWRENCE SAILOR
EDWARD HARTMANN**
Unerved Defendants

Upon the following papers numbered 1 to 48 read on this motion for summary judgment & to extent time to serve complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 (#001) & 28 - 37 (#003); Notice of Cross Motion and supporting papers 10 - 13 (#002) & 38 - 43 (#004); ~~Answering Affidavits and supporting papers _____~~; Replying Affidavits and supporting papers 14 - 27 (#001) & 44 - 48 (#003); ~~Other _____~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions are consolidated for the purpose of this determination.

The defendant, Kenneth Lamotte, under motion #001, seeks an order pursuant to CPLR 3211(a)(8) dismissing the plaintiff's complaint against him. Plaintiff opposed that motion and cross

moves, under motion #002, for an order pursuant to CPLR 306-b extending his time to effectuate service of the summons and complaint upon defendant Lamotte in the interest of justice. The defendants, Harold Greslin, Keith Saboe, and Robert Boltrek, under motion #003, seek an order pursuant to CPLR 3211(a)(8) dismissing the plaintiff's complaint against them. Plaintiff opposed that motion and cross moves, under motion #004, for an order pursuant to CPLR 306-b extending his time to effectuate service of the summons and complaint upon defendants Greslin, Saboe and Boltrek in the interest of justice.

Plaintiff commenced this action by filing a summons and complaint on or about July 25, 2014. The plaintiff's complaint relates to claims of defamation for statements that were allegedly published on August 1, 2013. The affidavit of service indicates that defendant Lamotte was served on September 16, 2014, by "nail and mail" service at 334 W. 8th Street, Deer Park, New York. On November 10, 2014, defendant Lamotte served an answer that included the affirmative defense of lack of personal jurisdiction based upon improper service, claiming he was never served with the complaint. The Court notes that this address is his parents address and that this defendant and his father share the name Kenneth Lamotte.

The affidavit of service indicates that defendant Boltrek was served by on August 29, 2014, by delivering a copy to a co-tenant at 58 Chestnut Lane, Levittown, New York. The affidavit of service indicates that defendant Greslin was served by on October 22, 2014, by "nail and mail" service at 182 Woodlawn Avenue, Saint James, New York. The affidavit of service indicates that defendant Saboe was served by on October 15, 2014, by delivering a copy to "Mrs. Saboe, Mother" at 44 Baycrest Avenue, East Quogue, New York.

CPLR 306(b) provides that "if service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306(b)). "An extension of time for service is a matter within the court's discretion (see, Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C306-b:2, at 477; see also, Mem of Off of Ct Admin No. 97-67R [hereinafter OCA Mem], reprinted in 1997 NY Legis Ann, at 318-319; see also, Senate Mem in Support of L 1997, ch 476, reprinted in 1997 McKinney's Session Laws of NY, at 2456-2457 [identical to OCA Mem])." (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101, 761 NE2d 1018, 736 NYS2d 291 [2001]).

It is well-settled that for a plaintiff to avoid dismissal of the action for failure to timely serve a complaint, a reasonable excuse for the delay and the meritorious nature of the claim must be demonstrated (*Marion v Notre Dame Academy High Schl*, 133 AD2d 614, 519 NYS2d 721 [2d Dept 1987]). The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties; the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendants (*Leader v Maroney, Ponzini & Spencer*, *supra* at 105-106).

CPLR 206(b) empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. (*Leader v Maroney, Ponzini & Spencer, supra* at 106). “No one factor is determinative--the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served. (*Leader v Maroney, Ponzini & Spencer, supra*).

“The Court of Appeals has made clear that these are two distinct standards and that, while ‘good cause’ requires a showing of reasonable diligence, ‘the interest of justice’ has a broader scope, which can encompass late service due to ‘mistake, confusion or oversight, so long as there is no prejudice to the defendant’.” (*Matter of Baumann & Sons Buses, Inc. v Ossining Union Free Sch. Dist.*, 121 AD3d 1110, 1113 [2nd Dept 2014]; citing *Leader v Maroney, Ponzini & Spencer, supra* at 105; see *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 883 NYS2d 99 [2nd Dept 2009]).

In this matter, the service upon all of the moving defendants was made at an address identified as each defendants’ which was located through “an online computer search” conducted by the plaintiff. Defendants Saboe and Lamotte were alleged to have been served at an address where their mothers lived. The moving defendants each received actual notice of the existence of this lawsuit and will suffer no prejudice by allowing the plaintiff an extension of time to serve the summons and complaint. Therefore these cross motions by plaintiff, Carl Hoops, for an order pursuant to CPLR 306-b extending his time to effectuate service of the summons and complaint upon the moving defendants in the interest of justice are granted, provided that service upon each moving defendant is completed within sixty (60) days from the date of this order.

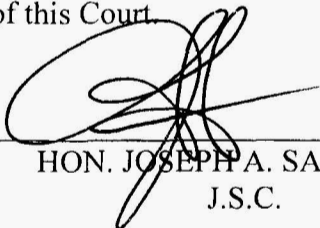
The two motions to dismiss filed by the moving defendants, pursuant to 3211(a)(8), are denied at this time.

Further, the parties are directed to appear in Room 200 of the courthouse located at 235 Griffing Avenue, Riverhead, for a preliminary conference on August 13, 2015 at 9:30 A.M. (see **22 NYCRR § 202.12**).

Plaintiff is directed to serve a copy of this order upon counsel for the parties and upon the Calendar Clerk of this court within twenty (20) days of the date of this order.

The foregoing constitutes the decision and Order of this Court.

Dated: June 8, 2015


 HON. JOSEPH A. SANTORELLI
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

COPY

INDEX No. 14-1474
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-2-15
SUBMIT DATE 6-4-15
Mot. Seq. # 03 - MD

-----X	
RACHEL BOERKE,	RACHEL BOERKE
	<i>Plaintiff</i>
Plaintiff(s),	1083 JERICHO TPKE
	COMMACK, NY 11725
-against-	NICOLINI, PARADISE, FERRETTI &
	SABELLA
ROBERT M. URSO,	<i>Attys. for Defendants</i>
	114 OLD COUNTRY RD, STE 500
Defendant(s).	PO BOX 9006
	MINEOLA, NY 11501
-----X	

Upon the following papers numbered 1 to 7 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; ~~Notice of Cross Motion and supporting papers~~; ~~Answering Affidavits and supporting papers~~; ~~Replying Affidavits and supporting papers~~; Other ~~_____~~; (and after hearing counsel in support and opposed to the motion) it is,

This motion by defendant, Robert M. Urso, for an order dismissing the complaint of plaintiff, Rachel Boerke, for want of prosecution is denied (*see* CPLR 3216).

Plaintiff commenced this action by filing a summons and complaint on January 22, 2014. Issue was joined by defendant serving an answer with affirmative defenses which is dated April 25, 2014. On September 25, 2014 defendant attempted to serve notice pursuant to CPLR 3216 demanding the plaintiff resume the prosecution of this case by certified mail. On October 3, 2014, that notice was returned to the defendant's attorney marked "return to sender not deliverable as addressed unable to forward".

The defendant filed the within notice of motion, dated April 30, 2015 and served it upon plaintiff via regular mail on May 1, 2015.

CPLR 3216 states:

- (a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon

motion, *with notice to the parties*, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits. (Emphasis added).

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days *after receipt of such demand*, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed... (Emphasis added).

(e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

CPLR 3216 requires that a party seeking a dismissal thereunder wait 90 days after the other party receives the demand before moving for a dismissal. (See, *Genovese v Kogel Materials Corp.*, 61 AD2d 820 [2nd Dept 1978]). Strict compliance with the conditions precedent under CPLR 3216 is necessary to invoke the jurisdiction of the Court to reach the merits of such a motion. (*Genovese v. Kogel Materials Corp.*, *supra*; *Wilson v Boerum Auto Serv.*, 24 AD2d 1029; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3216.14, p 925). Noncompliance with said conditions precedent is not waived by a failure to raise such defects in opposition. (*Genovese v. Kogel Materials Corp.*, *supra*; *Martine v Griffiths*, 39 AD2d 553). "Since CPLR 3216 is a legislative creation and not part of a court's inherent power, the failure to serve a written notice that conforms to the provisions of CPLR 3216 is the failure of a condition precedent to dismissal of the action for failure to prosecute" (see *Docteur v Interfaith Med. Ctr.*, 90 AD3d 814, 815 [2nd Dept 2011]; *citing Chase v Scavuzzo*, 87 NY2d 228, 232, 661 NE2d 1368, 638 NYS2d 587 [1995]; *Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902, 508 NE2d 927, 516 NYS2d 193 [1987]; *Cohn v Borchard Affiliations*, 25 NY2d 237, 246, 250 NE2d 690, 303 NYS2d 633 [1969]; *Wasif v Khan*, 82 AD3d 1084, 1084-1085, 919 NYS2d 203 [2011]; *Maspeth Fed. Sav. & Loan Assn. v Simon-Erdan*, 67 AD3d 750, 751, 888 NYS2d 599 [2009]; *Dominique v Flushing Hosp. Med. Ctr.*, 22 AD3d 789, 803 NYS2d 176 [2005]). The Court lacks jurisdiction to entertain a CPLR 3216 motion, when the movant fails

Boerke v Urso
Index # 1474/2014
Page 3

to wait the full 90 days after the demand was received by the opposing party before seeking a dismissal (*see Genovese v. Kogel Materials Corp., supra; Cohn v Borchard Affiliations*, 25 NY2d 237; *Patricia Ann Homes v Damiani*, 35 AD2d 825).

In this case the defendant acknowledges that the plaintiff did not receive the notice because it was returned to defendant's attorney. Parenthetically the Court notes that the defendant avers that an investigator was retained to locate the plaintiff and "unfortunately in searching all applicable directories and records, our investigator was unsuccessful in locating the plaintiff", but defendant fails to attach an affidavit of that investigator to the motion papers.

Therefore, this motion by defendant for an order dismissing the complaint of plaintiff is denied. The defendant did not comply with the condition precedent to wait 90 days after the other party receives the demand before moving for a dismissal. The Court lacks jurisdiction to entertain this CPLR 3216 motion since the 90 days would only begin to run upon the plaintiff's receipt of the notice.

The foregoing constitutes the decision and Order of this Court.

Dated: June 9, 2015



HON. JOSEPH A. SANTORELLI
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION