

**Ross v Rinnert**

2017 NY Slip Op 30128(U)

January 23, 2017

Supreme Court, New York County

Docket Number: 162703/2015

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32**

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**DAVID W. ROSS,**

**Plaintiff,**

**-against-**

**STEPHAN RINNERT, MARK SILVERBERG and  
CHARLENE H. AN,**

**Defendants.**  
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**Index No. 162703/2015  
Motion Seq: 001**

**DECISION & ORDER**

**HON. ARLENE P. BLUTH**

Defendants' motion to dismiss for failure to timely serve the complaint is granted.

Plaintiff's cross-motion for an extension of time to serve the complaint is denied.

**Background**

Plaintiff, a physician and an attorney representing himself, filed a summons with notice on December 14, 2015 (*see* NYSCEF Doc. No. 1). Plaintiff served defendants An and Rinnert on April 11, 2016 (*see* NYSCEF Doc Nos. 13 and 15) and defendant Silverberg on April 12, 2016 (NYSCEF Doc. No. 14). Defendants filed a notice of appearance and demanded a complaint on April 27, 2016 (*see* NYSCEF Doc. No. 2). Plaintiff acknowledges that he did not serve a complaint on defendants within the 20 days provided under CPLR 3012(b). Defendants now move to dismiss and plaintiff cross-moves for an extension of time to serve the complaint.

In reply to his cross-motion, plaintiff attaches a complaint dated October 26, 2016 (*see* NYSCEF Doc. No. 26).

## Discussion

CPLR 3012(b) provides that if an action is commenced by summons without a complaint, a defendant may serve a written demand for a complaint and the complaint must be served within 20 days. “The court upon motion may dismiss the action if service of the complaint is not made” (CPLR 3012[b]). “A plaintiff who wishes to serve a complaint after the 20 days has expired must demonstrate the merits of the cause of action as well as a reasonable excuse for the delay” (*Wess v Olympia and York Realty Corp.*, 201 AD2d 365, 365, 607 NYS2d 335 [1st Dept 1994]).

It is undisputed that plaintiff did not timely serve a complaint after defendants’ demand. Therefore, plaintiff must establish that he has a reasonable excuse for his delay and demonstrate the merits of his causes of action.

As an initial matter, the Court observes that plaintiff e-filed a complaint (although he did not include an affidavit of service) on October 26, 2016 (NYSCEF Doc. No. 26). However, the mere filing of a proposed complaint does not, by itself, merit rejection of a motion to dismiss under CPLR 3012(b) (*see Carducci v Russell*, 120 AD3d 1375, 1376, 993 NYS2d 119 [2d Dept 2014]; *see also Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905, 488 NYS2d 156 [1985]).

## Reasonable Excuse

Plaintiff submitted a report from his rheumatologist stating that plaintiff has a disability that prevented him from working in early 2015. The report states that plaintiff might suffer flare-ups or exacerbations but it does not indicate that plaintiff was prevented from writing and serving a complaint in April-May 2016. It also does not state that plaintiff was prevented from drafting a complaint from the time he started the case (December 2015) until he personally served defendants in April 2016. Further, this doctor’s report is dated January 6, 2015, and, therefore, it

holds little value for evaluating plaintiff's condition in 2016.

Plaintiff's affirmation in opposition (and in support of his cross-motion) contains contradictory statements that suggest that plaintiff was capable of drafting a complaint. The affirmation insists that plaintiff works full-time as an emergency physician and raises three middle school-aged children (affirmation of plaintiff in opposition ¶ 5). If plaintiff is able to fulfill these responsibilities, then he was clearly capable of drafting and serving a complaint. Not having enough time *is not* a sufficient reason for plaintiff's long delay; instead, plaintiff could have hired an attorney for this matter.

Plaintiff chose to initiate this action by summons with notice in December 2015. Plaintiff, although representing himself in this matter, is an attorney. It should not have been a surprise that defendants quickly demanded a complaint after being served with only a summons with notice and plaintiff should have been ready to serve the complaint. The Court finds that plaintiff failed to assert a reasonable excuse that explains his long delay in serving the complaint and this case is dismissed on this ground.

### **Merits of Cause of Action**

Even if plaintiff had a reasonable excuse, plaintiff failed to assert a meritorious cause of action.

Plaintiff's affirmation in opposition and in support of his cross-motion argues that defendants "maliciously issued false and libelous email and digital characterizations of Plaintiff denigrating Plaintiff's reputation as a competent physician" (plaintiff's affirmation in opposition ¶ 2). Plaintiff offers no further details or evidence supporting his purported causes of action in his affirmation. Specifically, plaintiff does not identify the specific words that he alleges were

libelous.

Defendants argue that plaintiff submitted no proof that his cause of action has any merit and cites to a purportedly similar Court of Claims action. The Court declines to consider that case because allegations in that cause of action, even though they might be similar, do not, on a motion to dismiss pursuant to CPLR 3012(b), establish or disprove that plaintiff's causes of action have merit. Further, defendants cited to it for the first time in reply.

In plaintiff's reply to his cross-motion, plaintiff cites to his complaint (filed on the same day) as evidence of the merits of his case. As an initial matter, the Court observes that plaintiff's strategy of filing and referencing the complaint for the first time in reply is unfair to defendants because plaintiff has prevented defendants from responding to these allegations. Referencing the complaint for the first time in reply is improper and, therefore, the complaint will be disregarded (*see Roberts v Northington*, 128 AD3d 1487, 1488, 8 NYS3d 814 [4th Dept 2015]; *see also James C. v Cintron*, 126 AD3d 464, 465, 2 NYS3d 786(Mem) [1st Dept 2015]).

The rest of plaintiff's reply fails to establish a meritorious cause of action.

### **Conclusion**

Plaintiff has failed to assert a reasonable excuse for his months-long delay and failed to allege a meritorious cause of action. Plaintiff's cross-motion for an extension of time to serve the complaint is denied because plaintiff has not asserted a basis upon which to grant such a request. Plaintiff started this action in December 2015 and, for some reason, did not prepare a complaint in the months leading up to the date he served defendants. Plaintiff did not timely serve the complaint after receiving defendants' demand. Plaintiff did not serve the complaint after receiving defendants' notice of motion to dismiss for failure to serve the complaint.

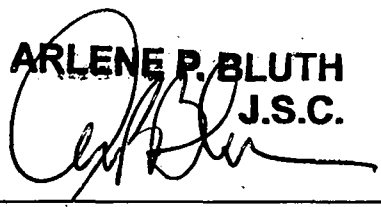
Instead, plaintiff waited. Although this Court is sensitive to plaintiff's medical condition, plaintiff, by his own account, is able to work as a physician and raise three children. If plaintiff did not have the time necessary to draft a complaint, then he should have hired an attorney. Unfortunately, a busy life does not justify a nearly six-month delay.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and plaintiff's cross-motion is denied.

This is the Decision and Order of the Court.

Dated: January 23, 2017  
New York, New York

**ARLENE P. BLUTH**  
**J.S.C.**  


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ARLENE P. BLUTH, JSC