21st Century Sec. Ins. Co. v Johnson
2017 NY Slip Op 30586(U)
March 27, 2017
Supreme Court, New York County
Docket Number: 150415/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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21st CENTURY SECURITY INSURANCE COMPANY, Index No. 150415/15

Plaintiff, Mot. seq. no. 002

-against- **DECISION AND ORDER**

ERISHA JOHNSON, *et al.*,

Defendants.

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BARBARA JAFFE, J.:

For plaintiff:
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By notice of motion, plaintiff seeks an order granting it a default judgment against certain defendants, and an extension of time within which to serve additional defendants. While defendant TAM Medical Supply Corp. interposed a cross motion, the action was subsequently discontinued against it. Plaintiff's motion is resolved as follows:

I. MOTION FOR DEFAULT JUDGMENT

Pursuant to CPLR 3215(c), a motion for a default judgment must be interposed within a year of the default, and if a plaintiff fails to move timely, the court may not enter judgment but shall dismiss the complaint as abandoned. Pursuant to CPLR 2211, a motion on notice is made when a notice of motion is served. Here, the instant notice of motion was served on May 26, 2016.

A. Personal defendants

Plaintiff served defendants Erisha Johnson, David Roman, and Miguel Rodriguez in February 2015 by personal service pursuant to CPLR 308(1), and they were required to appear and answer within 20 days of service (CPLR 320), or by the end of March 2015. As the instant motion was not made until May 26, 2016, the motion as to these defendants is untimely.

For defendant Ahn, service was made by substitute service and mailing, with the mailing made on March 2, 2015. Had plaintiff complied with CPLR 308(2), which requires that the affidavit of service be filed with the court within 20 days of the mailing, service would have been complete 10 days after the filing. Thus, assuming that plaintiff had filed the affidavit at the latest on March 20, 2015, service would have been complete on March 30, 2015, allowing Ahn to answer or appear within 30 days thereafter, or on or before April 29, 2015. As Ahn therefore defaulted by April 30, 2015, the instant motion is untimely against her as well.

The same analysis is true for defendants Marquis Square and Bianca Rodriguez, who were served in March and February 2015, respectively, by substitute service.

B. Corporate defendants

Pursuant to Limited Liability Company Law 303, process may be served on the secretary of state as an agent of a limited liability company by personal delivery of the pleadings to the secretary. Service is complete when the secretary of state is served. Thus, an LLC served via the secretary of state must appear or answer within 30 days thereafter. (CPLR 320[a], 3012[c]; *Paez v 1610 St. Nicholas Ave., L.P.*, 103 AD3d 553 [1st Dept 2013]). Service on a domestic corporation pursuant to Business Corporation Law 306 has the same provisions, and an

appearance or answer is also required within 30 days of service on the secretary of state. (CPLR 3012[c]).

On January 30, 2015, the following defendants were served via the secretary of state: (1) Advanced Recovery Equipment and Supplies LLC, (2) Arisdov Medical P.C., (3) Arthur Avenue Medical Office, P.C., (4) Haar Orthopaedics & Sports Medicine, P.C., (5) Harmony Anesthesiology, P.C., (6) Jefferson Healthcare Supplies LLC, (7) Lincoln Supplies Inc., (8) Park Slope Medical One Complete Services, P.C., (9) Professional Medical Healthcare Service of New York, P.C., (10) Regency Healthcare Medical, PLLC, and (11) Wellness Diagnostic Medical, P.C.

As service on these defendants was complete on January 30, 2015, they thus defaulted on March 2, 2015. Consequently, the motion for a default judgment against them is untimely.

II. MOTION TO EXTEND TIME FOR SERVICE

Although plaintiff, in its notice of motion, did not move for an extension of time to serve certain defendants (CPLR 2214), I address its argument.

CPLR 306-b provides that service of a summons and complaint must be made within 120 days after the commencement of an action, and if service is not made within that period, the court, upon motion, must 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. To establish good cause for an extension, the plaintiff must show that it made reasonably diligent efforts at service within the 120-day period. To demonstrate a basis for extension in the interest of justice, the court may consider the plaintiff's diligent efforts or lack thereof, along with other relevant factors, including the meritorious nature of the action, length of delay in service, promptness of the request for the

extension, and prejudice to the defendant. (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

While law office failure may not constitute good cause, circumstances beyond the plaintiff's control may. (*Id.*; *Henneberry v Borstein*, 91 AD3d 493 [1st Dept 2012]). Late service caused by mistake, confusion, or oversight, such as law office failure, may warrant an extension in the interest of justice. (*Id.* at 105).

Here, plaintiff filed its summons and complaint with the court on January 14, 2015 (NYSCEF 1), and it thus had until May 14, 2015 to serve all of the defendants. The instant motion was made on May 26, 2016.

A. Defendant Robert Brown

According to plaintiff, it served Brown as follows:

(1) on January 28, 2015, the process server attempted service at a Bronx address and was told by the occupant that Brown had moved;

(2) thereafter, a search was made of Brown's claim documents as well as a search of DMV records, both of which reflected that Brown lived at the Bronx address; the search records are dated June 10, 2015; and

(3) on June 23, 2015, the process server attempted service at the same address and delivered it to a Jane Doe, who allegedly stated that Brown lived at the address.

(NYSCEF 64).

As plaintiff submits proof that it did not search for Brown's correct address until June 10, 2015, almost a month after the 120-day deadline of May 14, 2015, had passed, and offers no explanation for its failure to conduct the search within the 120 days, plaintiff has not shown that it made a diligent effort to find and serve Brown. Consequently, an extension of time to serve Brown is not warranted.

B. Defendant Baron Franklin

Plaintiff asserts that it served Franklin as follows:

(1) on March 7, 2015, a process server attempted service on Franklin but the building where he allegedly resided appeared to be vacant;

(2) on March 19, 2015, plaintiff searched for Franklin's address, and found that he had not resided at the now-vacant building since April 2014, but now resided at a different address; and

(3) on June 6, 2015, the process server served Franklin at the second address by substitute service.

While plaintiff discovered Franklin's current address by March 19, 2015, it made no attempt to serve him there until June 6, 2015, after the 120-day deadline of May 14, 2015, had passed, again failing to show that it made a diligent effort at service within the 120 days.

C. Medical provider defendants

Plaintiff alleges that the delay in serving defendants Dmitri Petrychenko, M.D., James G. Gutierrez M.D. a/k/a Jamie Gutierrez M.D., Lawrence P. Kempf, M.D., Sean W. McKnight DC a/k/a Sean William McKnight DC, and Sherman Abrams Laboratory, was due to law office failure. It submits an affidavit from a supervising secretary employed by counsel for plaintiff's claims administrator, wherein she states that she asked a service company to serve the non-corporate defendants named in the caption, that on or about April 29, 2015, the service company told her that service had been completed, and that it was not until on or about August 4, 2015, when counsel reviewed the affidavits of service and discovered that these defendants had not been served. (NYSCEF 66).

Thus, on or about August 4, 2015, counsel again asked the the service company to serve the defendants, which it did as follows:

(1) for Petrychenko, service was attempted but not made at one address on August 21, 2015, and was thereafter made by substitute service at another address on September 8, 2015;

(2) for Gutierrez, service was made on August 21, 2015, by substitute service;

(3) for Kempf, service was made on August 14, 2015, by substitute service;

(4) for McKnight, service was attempted on August 12, 2015, but the process server was told that he had moved from that address, and another attempt at service at an address in Connecticut yielded the same information. No affidavit explaining the attempted Connecticut service is submitted. Thus, McKnight has not yet been served; and

(5) for Sherman Abrams Laboratory, service was made on August 24, 2015, by substitute service.

(NYSCEF 67-72).

In *Estate of Jervis v Teachers Ins. and Annuity Assn.*, the plaintiff filed a complaint on May 26, 1998, but found out that along with the statute of limitations, after the 120-day period had expired, the process server had never served the defendants. On March 22, 1999, the plaintiff served the complaint and on April 5, 1999, moved to have service deemed timely *nunc pro tunc*. The Appellate Division, First Department, found that the action was properly dismissed, as the plaintiff did not establish good cause within the meaning of CPLR 306-b, nor was an extension warranted in the interest of justice as there was "an unacceptably protracted delay measured from the expiration of the 120-day period." (**279 AD2d 367, [1st Dept 2001]**).

Here, the secretary does not state when counsel asked the service company to serve defendants, and it is thus unknown whether it did so before the 120 days expired. Even if service had been requested within the 120 days, and even if plaintiff's delegation to the service company of its responsibility to serve defendants may constitute a reasonably diligent effort to serve, the

ultimate responsibility to timely serve remained with plaintiff. (*See eg Kleeman v Rheingold*, 81 NY2d 270 [1993] [attorney may be held liable for malpractice based on process server's failure to serve properly; as proper service is "particularly critical component of a lawyer's over-all responsibility for commencing a client's lawsuit," attorney may not evade responsibility simply by hiring process server to effect service]).

Having filed the summons and complaint in January 2015, plaintiff should have been aware that service was to be effected within 120 days thereof, or by May 14, 2015. There is no evidence that it any attempt was made to monitor the service company's efforts or to contact it to ascertain its progress. Rather, the secretary states that counsel was informed on or about April 29, 2015, that the defendants had not been served, and there is no indication that counsel sought to verify that information or that it requested copies of the affidavits, a puzzling omission given that service under CPLR 308 is not deemed complete, and a defendant's time to answer, does not begin to run, until after an affidavit of service has been filed with the court. (CPLR 308, 320; *see McKibben v Credit Lyonnais*, 1999 WL 604883 [SD NY 1999] [counsel is responsible for monitoring activity of process server and taking reasonable measures to ensure that defendant is timely served]).

Moreover, no explanation is offered for the company's failure to serve the defendants, nor has plaintiff submitted an affidavit from the company verifying the secretary's allegations. Additionally, on July 27, 2015, plaintiff filed affidavits of service for other defendants, which affidavits were prepared by the same service company, thus raising the question of why counsel did not then know that other defendants had not been served. However, assuming plaintiff did not know until August 4, 2015, it nevertheless waited until May 2016, when it made this motion

for a default judgment, to request an extension of time to serve them, and offers no reason for this additional nine-month delay.

Based on the delay of more than one year between the expiration of the 120-day deadline for service and this motion, plaintiff's failure to explain sufficiently the service company's failure to serve defendants, and its failure to ensure that the pleadings were served timely, plaintiff has not demonstrated that an extension of time should be granted for good cause or in the interest of justice. (*See Redman v S. Is. Orthopaedic Group, P.C.*, 78 AD3d 1147 [2d Dept 2010] [no good cause shown as plaintiff's unsubstantiated excuse that process server failed to serve defendants insufficient, and not entitled to extension in interest of justice based on more than one year delay between filing of pleadings and making of motion, among others]; *see also Johnson v Concourse Vil., Inc.*, 69 AD3d 410 [1st Dept 2010], *lv denied* 15 NY3d 707 [although counsel served pleadings within one day left in 120-day service period and had attempted to serve with eight days remaining, counsel did not show due diligence as statute of limitations had expired and he did not follow up with process server regarding completion of service until after 120-day period had expired]; *Ping Chen ex rel. U.S. v EMSL Analytical, Inc.*, 966 F Supp 2d 282 [SD NY 2013] [good cause not shown based on process server's failure to serve, as counsel did not explain cause of failure and in any event, misplaced reliance on process server insufficient]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a default judgment against the following defendants is denied and the complaint is dismissed as against them: (1) Advanced Recovery

Equipment and Supplies LLC, (2) Arisdov Medical P.C., (3) Arthur Avenue Medical Office, P.C., (4) Haar Orthopaedics & Sports Medicine, P.C., (5) Harmony Anesthesiology, P.C., (6) Jefferson Healthcare Supplies LLC, (7) Lincoln Supplies Inc., (8) Park Slope Medical One Complete Services, P.C., (9) Professional Medical Healthcare Service of New York, P.C., (10) Regency Healthcare Medical, PLLC, (11) Wellness Diagnostic Medical, P.C., (12) Erisha Johnson, (13) David Roman, (14) Miguel Rodriguez, (15) Hannah Ahn, (16) Marquis Square, and (17) Bianca Rodriguez; and it is further

ORDERED, that plaintiff's motion for an extension of time to serve defendants is denied.

ENTER:

Barbara Jaffe, JSC

DATED: March 27, 2017
New York, New York