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| <b>Clement v Shiu</b>                                                                                                                                                                                                                                            |
| 2017 NY Slip Op 30979(U)                                                                                                                                                                                                                                         |
| May 11, 2017                                                                                                                                                                                                                                                     |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 153890/14                                                                                                                                                                                                                                         |
| Judge: Sherry Klein Heitler                                                                                                                                                                                                                                      |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

-----x  
MICHAEL P. CLEMENT,

Plaintiff,

-against-

MARY SHIU,

Defendant.  
-----x

**SHERRY KLEIN HEITLER, J.S.C.**

Index No. 153890/14  
Motion Sequence 002

**DECISION AND ORDER**

In this personal injury action, defendant Mary Shiu (“Defendant”)<sup>1</sup> moves to dismiss the complaint on the ground that plaintiff Michael P. Clement (“Plaintiff”) failed to effect proper service of the summons and complaint upon her. Plaintiff opposes and cross-moves for an order striking Defendant’s answer for failing to comply with court-ordered discovery. Plaintiff also moves for sanctions against Defendant. The motion and cross-motion are decided as more fully set forth below.

This action arises from a July 11, 2013 accident alleged to have occurred in a residential building owned by Defendant (the “Building”) at 17 Pike Street in Manhattan. On July 11, 2013, Plaintiff, then a firefighter with the New York City Fire Department, was called to the scene of a fire that had broken out at the Building, allegedly due to Defendant’s negligent storage of combustible materials. Plaintiff claims to have fallen in the course of his duties while navigating an interior stairway, causing him to sustain serious personal injuries.

Plaintiff commenced this action by filing a summons and verified complaint on April 23, 2014. According to the affidavit of service filed by Plaintiff on June 5, 2014, Defendant was served with a copy of the summons and complaint at her “dwelling place” at 17 Pike Street, Apt. 1A, New

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<sup>1</sup> Defendant is representing herself in this action. 2 of 6

York, NY by delivery to a person of suitable age and discretion on May 21, 2014 and by mailing a copy to Defendant at that address as her “last known residence” on May 23, 2014.<sup>2</sup> Defendant, *pro se*, mailed a verified answer to Plaintiff’s counsel on October 17, 2014. While the answer itself does not claim improper service as an affirmative defense, Defendant’s cover letter to Plaintiff’s counsel asserts that service was improper and made to a vacant store.<sup>3</sup>

On March 2, 2015 the parties appeared in Part 17 of this court for a preliminary conference. Among other things, the preliminary conference order directed the parties to exchange insurance coverage information, photographs, and witness information no later than May 5, 2015. The order also directed that depositions be held no later than June 30, 2015.<sup>4</sup> No discovery was exchanged by either side and no depositions were held. A compliance conference was held on June 8, 2015 and the court extended the parties’ time to complete discovery and conduct depositions to July 31, 2015.<sup>5</sup> In an undated and unsworn “Answer to Compliance Conference”, Defendant claimed that the Building was not insured at the time of the accident and that Plaintiff had not yet provided a Bill of Particulars or medical authorizations or appeared for a physical exam.<sup>6</sup>

By notice of motion dated December 2, 2015 Plaintiff moved to strike Defendant’s answer. A March 7, 2016 order deciding Plaintiff’s motion directed the Defendant to respond to Plaintiff’s discovery requests by April 7, 2016. There is nothing in the record to show whether Defendant complied. In or about September 20, 2016 this matter was transferred to me. Thereafter several court conferences were held. On March 9, 2017 Defendant filed the instant motion to dismiss. Plaintiff filed his cross-motion and opposition on March 21, 2017.

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<sup>2</sup> Plaintiff’s Exhibit B.

<sup>3</sup> Plaintiff’s Exhibit C.

<sup>4</sup> Plaintiff’s Exhibit E.

<sup>5</sup> Plaintiff’s Exhibit F.

<sup>6</sup> Plaintiff’s Exhibit H.

### DISCUSSION

Defendant's motion to dismiss for failure to effectuate proper service is authorized by CPLR 3211(a)(8), which permits a party to move to dismiss an action where "the court has not jurisdiction of the person of the defendant". Pursuant to CPLR 3211(e), a motion to dismiss for failure to effectuate proper service must be made within 60 days following the service of an answer unless an extension of time is warranted on the ground of undue hardship. Here, Defendant's motion on such ground was filed more than two years after she filed her answer, and there is no support in the record to establish any undue hardship that would have prevented her from making her motion within the statutory period. In this regard, the court notes that Defendant was clearly aware that she was a defendant in this case, having answered the complaint and having appeared at several court conferences since March of 2015. For these reasons Defendant's motion to dismiss is denied.

With respect to Plaintiff's cross-motion, it is clear that Defendant has not abided by several court orders.<sup>7</sup> But the circumstances of this case do not warrant the severe punishment of striking this *pro se* Defendant's answer without first permitting her the opportunity once more to comply. Accordingly, Plaintiff's cross-motion is granted to the extent that the parties are hereby directed to complete discovery as follows:

1. On or before June 9, 2017, Defendant shall advise Plaintiff by sworn statement if there was insurance on the Building at the time of the fire. If there was insurance, Defendant shall provide the name of the insurance carrier, the policy number, and the terms of coverage. Defendant's response shall be in the form of a signed, notarized affidavit mailed to Plaintiff's counsel, Mr. Steve Fils-Aime, Esq., at Sullivan, Papain, Block, McGrath & Cannavo, P.C., 120 Broadway, New York, NY 10271.

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<sup>7</sup> Nor for that matter does it appear that Plaintiff met his discovery obligations. The record is devoid of any effort by Plaintiff to respond to Defendant's request for a Bill of Particulars or medical authorizations.

2. On or before June 9, 2017, Defendant shall serve Plaintiff's counsel with a formal demand for a Bill of Particulars. Within 20 days from receipt thereof, Plaintiff shall serve Defendant with a verified Bill of Particulars at her last known address, 133 Harris Road, Princeton Junction, New Jersey 08550.
3. On or before June 9, 2017, Plaintiff shall provide Defendant with proper authorizations for Plaintiff's medical records relating to the accident and injuries in question.
4. On or before June 9, 2017, Plaintiff and Defendant shall each exchange the names of any witnesses to the accident and copies of any relevant photographs. Defendant's response shall be in the form of a signed, notarized affidavit mailed to Plaintiff's counsel, Mr. Steve Fils-Aime, Esq., at Sullivan, Papain, Block, McGrath & Cannavo, P.C., 120 Broadway, New York, NY 10271. Plaintiff's response shall be in the form of a signed notarized affidavit or attorney affirmation mailed to Defendant at 133 Harris Road, Princeton Junction, New Jersey 08550.
5. On or before June 23, 2017, during regular business hours, Defendant shall permit Plaintiff's counsel and any expert of Plaintiff's choosing to inspect the staircase where Plaintiff was injured, the surrounding areas, and any other relevant part of the Building. Defendant may accompany Plaintiff's counsel during said inspection. Such inspection shall last no longer than three hours.
6. If Defendant wishes to depose Plaintiff, Defendant shall mail a notice to that effect to Plaintiff's counsel indicating her intent to do so no later than June 30, 2017. Said deposition shall commence no later than July 28, 2017 and continue from day to day until completed.
7. If Plaintiff wishes to depose Defendant, Plaintiff shall mail a notice to that effect to Defendant at her Princeton address indicating his intent to do so no later than June 30, 2017. Said deposition shall commence no later than August 4, 2017 and continue from day to day until completed.

8. All depositions shall be held at the offices of Sullivan, Papain, Block, McGrath & Cannavo, P.C., 120 Broadway, New York, NY 10271.
9. Should Defendant desire to have Plaintiff examined by a physician, Defendant shall mail to Plaintiff's counsel a notice of her intent to have Plaintiff so examined no later than August 4, 2017. Such examination shall be held within 30 days of the completion of depositions, but in no event later than September 15, 2017.

The parties are directed to adhere to this schedule without waiting for the other side to act first. The parties are also cautioned that any non-compliance with this schedule may result in sanctions. No changes to this discovery schedule shall be permitted without the prior written permission of the court.

The parties are directed to appear for a compliance conference at 60 Centre Street, New York, NY 10007, Room 412, on June 26, 2017 at 9:30AM.

Accordingly, it is hereby

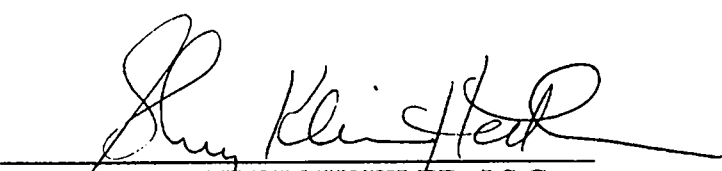
ORDERED that Defendant's motion to dismiss is denied; and it is further

ORDERED that Plaintiff's cross-motion is granted as set forth herein, and otherwise denied without prejudice.

This constitutes the decision and order of the court.

DATED:

*May 11, 2017*

  
SHERRY KLEIN HEITLER, J.S.C.