

170 E. 92nd St. Owners, Inc. v 172 E.92nd St., LLC
2018 NY Slip Op 32726(U)
October 24, 2018
Supreme Court, New York County
Docket Number: 155297/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 155297/2017

170 EAST 92ND STREET OWNERS, INC.

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

172 EAST 92ND STREET, LLC.

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 were read on this motion to/for DISMISSAL

The motion by defendant to dismiss for failure to serve a duly demanded complaint is granted. The cross-motion by plaintiff to extend the time to serve a complaint is denied.

Background

This case arises out of a property dispute on East 92nd Street in Manhattan. Plaintiff commenced this action by filing a summons with notice on June 9, 2017. Service was not effectuated until almost four months later, on October 4, 2017 (*see* NYSCEF Doc. No. 2). The parties entered into an agreement where defendant's time to appear and demand a complaint was extended to December 6, 2017 (*see* NYSCEF Doc. No. 3). On that same day, defendant filed a notice of appearance, demanded a complaint and the parties agreed to extend plaintiff's time to serve a complaint to January 22, 2018. Plaintiff never served a complaint.

Defendant moves to dismiss based on plaintiff's failure to serve a complaint. Defendant argues that plaintiff has failed to take any steps to prosecute this case.

In opposition, plaintiff asserts that this case is about a fence erected in defendant's backyard that blocks one of plaintiff's means of egress. Plaintiff wants this fence removed. According to plaintiff, in November 2017, defendant's attorney pressed for a settlement of the dispute between the parties. Unfortunately, an agreement was never reached. Plaintiff's counsel acknowledges that he failed to file a complaint after the January 22, 2018 deadline but he "understood that [he] would hear from counsel for [defendant] when further delay would be intolerable" (NYSCEF Doc. No. 17, ¶ 20). Plaintiff's counsel insists the instant motion was a surprise.

Discussion

CPLR 3012(b) provides in part that "The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision." "The courts have repeatedly concluded that in order to successfully resist the dismissal motion under CPLR 3012(b), the plaintiff must offer the traditional showing: an excuse for the default and an affidavit of merits" (Patrick M. Connors, Practice Commentaries, C3012:12).

Although plaintiff has laid out prima facie cause of action, it failed to articulate a reasonable excuse for failing to serve a complaint for over nine months. The Court observes that plaintiff did not attach a complaint to its cross-motion or provide a sufficient reason why it could not draft a complaint. Curiously, plaintiff merely cross-moves to extend its time to serve a complaint; plaintiff still has not drafted a complaint.

The delay in filing the complaint appears to arise from plaintiff's focus on efforts to settle rather than litigate and engage in discovery. While plaintiff is entitled to attempt to settle the case, it does not absolve plaintiff of its responsibility to file a complaint—especially after a demand therefor was made. This Court is unable to find that a plaintiff need not file a complaint

for more than a year after it commenced an action because it is trying to settle a case. That puts a defendant in untenable position—it is the subject of a lawsuit, but is unable to participate in the litigation except for making a motion to dismiss pursuant to CPLR 3012(b). The fact is that plaintiff started a case and then made every effort to avoid prosecuting that case.

Clearly, a short delay in filing a properly demanded complaint can be overlooked (*Klosterman v Federal Express Co.*, 271 AD2d 492, 492, 706 NYS2d 912 (Mem) [2d Dept 2000]; *see also Mills v Niagara Mohawk Power Corp.*, 216 AD2d 828, 829, 628 NYS2d 857 [3d Dept 1995] [finding that a six-day delay in filing complaint did not compel dismissal]). But the delay here is nine months and counting as plaintiff has still not yet filed a complaint (*see e.g., Graziano v Albanese*, 24 AD2d 712, 263 NYS2d 20 [1st Dept 1965] [finding in part that an approximately nine-month delay justified dismissal for failure to serve a complaint]). And the nine-month delay does not fully capture the circumstances here. Plaintiff commenced this action in June 2017—there is simply no reason why plaintiff should not have had a complaint drafted by the time he served defendant in October 2017 or by the January 22, 2018 deadline agreed to by the parties.

Summary

While this Court would prefer to have cases decided on the merits, the Court cannot justify giving plaintiff more time to file a complaint in a case that was started in June 2017. Even though the CPLR does not require the Court to dismiss cases under CPLR 3012(b) where a complaint is not timely filed, the Court must consider the fact that plaintiff started a lawsuit and then tried to avoid that litigation and the related discovery obligations for over a year. The purpose of having a deadline for a plaintiff to file a duly demanded complaint is to get a case

moving. It is simply unfair to defendant to allow plaintiff another extension of time to file a complaint under these circumstances.

Accordingly, it is hereby

ORDERED that the motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that the cross-motion by plaintiff for an extension of time to serve a complaint is denied.

10/24/18
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	HON. ARLENE P. BLUTH	
			<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE