

Thomas v Hershey Co.
2018 NY Slip Op 33676(U)
February 16, 2018
Supreme Court, Westchester County
Docket Number: 50872/2017
Judge: Charles D. Wood
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ANSHE THOMAS,

Plaintiff,

- against -

DECISION and ORDER
Sequence Nos. 1&2
Index No. 50872/2017

THE HERSHEY COMPANY,

Defendants.

-----X
WOOD, J.

The following papers were read in connection with defendant, The Hershey Company's ("Hershey") motion to dismiss (Seq 1), and plaintiff's cross-motion (Seq 2):

- Hershey's Notice of Motion, Counsel's Affirmation, Exhibits.
- Plaintiff's Notice of Cross-Motion, Counsel's Affirmation, Exhibits.
- Hershey's Counsel's Affirmation in Opposition to Cross-Motion, Exhibits.

This action sounds in negligence, strict products liability and breach of warranty. Plaintiff, in the instant complaint, alleges that on September 18, 2014, plaintiff suffered dental injury, i.e., a broken tooth, lacerated gums and lip, when biting down upon a Hershey chocolate product, which contained an invisible foreign object.

Plaintiff filed a summons with notice on January 20, 2017, and then filed an Amended Summons with Notice on June 5, 2017. Hershey served a Notice of Appearance and Demand for Complaint on June 20, 2017 ("the Demand"). As plaintiff failed to timely respond to said Demand, Hershey now moves this court for an order seeking to dismiss this action pursuant to CPLR 3012. Plaintiff cross-moves pursuant to CPLR 3012(d) to extend the time to serve plaintiff's complaint

dated August 25, 2017, *nunc pro tunc*.

Now, based upon the foregoing, the motions are decided as follows:

An action is commenced by filing a summons and complaint pursuant to CPLR 304 [a]), and service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action” (CPLR 306-b). CPLR 3012(b) requires service of a complaint within 20 days of a demand. Plaintiff failed to do so.

Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default” (CPLR 3012[d]). To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff “must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action” (Carducci v Russell, 120 AD3d 1375 [2d Dept 2014]); Dutchess Truck Repair, Inc. v Boyce, 120 AD3d 543, 544, [2d Dept 2014]). Under CPLR 3012(d), the court may exercise “its discretion in the interests of justice to excuse delay or default resulting from law office failure” (CPLR 2005). However, a claim of law office failure must be supported by a detailed and credible explanation of the default at issue (Neilson v 6D Farm Corp., 123 AD3d 676, 679 [2d Dept 2014]). A conclusory, undetailed, and uncorroborated allegation of law office failure does not amount to a reasonable excuse (Neilson v 6D Farm Corp., 123 AD3d at 679).

Here, the sole excuse for failure to timely serve a complaint, appears to be law office failure, and/or a misunderstanding between counsel as to service of the complaint. Plaintiff’s counsel explains that in July of 2017, he received a call and message from defense counsel, whom requested that they work out some type of custodial arrangement on the defective product, so that Hershey’s

representatives could review and evaluate the same, and plaintiff's injuries with a view toward settlement. The attorneys allegedly agreed to hold service of plaintiff's complaint in abeyance pending such review and evaluation. Plaintiff's counsel claims that a stipulation was to be prepared by Hershey's counsel, so that the chain of custody and possession transfer and return of the defective product could be accomplished. Hershey's counsel was to follow-up and prepare the stipulation as plaintiff's counsel was traveling in late July and early August. The stipulation never came, nor was there any further communication on the issue. Rather, plaintiff's counsel received a letter from Hershey's counsel dated August 1, 2017, noticing the failure to serve the complaint.

Hershey e-filed its instant motion on September 1, 2017, the same date that plaintiff's complaint was eventually e-filed and served upon Hershey.

Hershey's counsel claims that plaintiff's counsel had misrepresented the conversations and deliberately failed to timely serve the complaint in compliance with the CPLR. The complaint was due two days after Hershey's counsel served the Demand for Complaint on June 20, 2017.

Notably, upon Hershey's Demand, plaintiff's counsel was in contact with Hershey's counsel, and some course of action was proposed. Thus, plaintiff demonstrated a reasonable excuse for the delay in serving a complaint upon Hershey and a potentially meritorious cause of action against Cohen (Harris v City of New York, 121 AD3d 852, 855 [2d Dept 2014]). Given the relatively short delay, and the fact that the plaintiff sought an extension of time to serve the complaint, the claimed law office failure was sufficient to establish a reasonable excuse for the delay (Quinn v Wenco Food Sys. Co., 269 AD2d 437, 437-38 [2d Dept 2000]). Also, Hershey has not adequately demonstrated that it would suffer any significant prejudice from allowing the late service of plaintiff's complaint.

Furthermore, based upon the record, and plaintiff's affidavit, plaintiff made a prima facie showing of legal merit for the claim that the Hershey product ingested caused alleged injuries.

In view of the above, and based on the public policy in favor of resolving cases on the merits, Hershey's motion pursuant to CPLR 3012 is denied. Plaintiff's cross motion to compel Hershey to accept service of the complaint is granted.

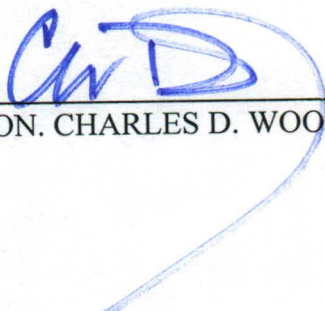
Any other relief requested and not decided herein is denied. The foregoing shall constitute the Decision and Order of this Court.

Accordingly, for the stated reasons, it is hereby

ORDERED, defendant Hershey's motion pursuant to CPLR 3012 to dismiss the action insofar as asserted against it for failure to serve a timely complaint is denied; and granted as to plaintiff's cross motion pursuant to CPLR 3012 (d), so now defendant, The Hershey Company is directed to accept the summons and complaint *nunc pro tunc*; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference Part on *March 5th*, 2018, in Room 811, at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: White Plains, New York
February 16, 2018



HON. CHARLES D. WOOD, J.S.C.

To: All Parties by NYSCEF