Ziverts v Wunderlich
2018 NY Slip Op 33887(U)
March 29, 2018
Supreme Court, Onondaga County
Docket Number: 2017EF2184
Judge: James P. Murphy

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NATHAN M. ZIVERTS,

Plaintiff,

vs.

SULLIVAN O. WUNDERLICH,

Defendant.

DECISION

Index No. 2017EF2184
RJI No. 33-17-2740

APPEARANCES:

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MURPHY, J.

This case was commenced by the e-filing of a Summons and Complaint on May 19, 2018, which alleges that on May 30, 2014, Defendant Sullivan Wunderlich ("Defendant"), was the owner of a 2000 Mercedes motor vehicle, and while traveling northbound on Morgan Road, in the Village of Liverpool, made a left-hand turn at a green light and failed to yield the right-of-way to a vehicle traveling southbound. *See,* Affirmation of David H. Walsh, IV, Esq., dated December 19, 2017, Exhibit A, Complaint, ¶¶ 7 and 9. The Complaint further alleges that Defendant's vehicle struck the southbound vehicle, which caused Plaintiff Nathan Ziverts

("Plaintiff"), a passenger in Defendant's vehicle, to sustain injuries. *Id.* at ¶¶ 8-9. The Complaint specifically alleges Plaintiff experienced serious bodily injuries, lost earnings, and medical expenses. *Id.* at ¶ 10.

On June 21, 2017, Defendant submitted his Answer dated May 30, 2017, raising eleven affirmative defenses, including lack of personal jurisdiction. *See,* Walsh Aff., Exhibit B, Answer, ¶ 7. Subsequently, on December 19, 2017, Defendant moved to dismiss the Complaint pursuant to C.P.L.R. § 3211 (a)(8), for lack of personal jurisdiction.

In opposition, Plaintiff's attorney contends that Defendant's affirmative defense of lack of personal jurisdiction, which was raised in his Answer dated May 30, 2017, is waived because a motion to dismiss pursuant to C.P.L.R. § 3211 (e) must be brought within 60 days from the filing of the Answer. In this case, Defendant's Answer was electronically filed June 21, 2017, and, therefore, any motion to dismiss should have been brought on or before August 21, 2017. Plaintiff's attorney further argues that while the law allows the Court to extend the time for Defendant's motion pursuant to C.P.L.R. § 3211 (e), for undue hardship, that the Defendant herein is unable to meet this burden.

On January 4, 2018, this Court heard oral argument from both Plaintiff and Defendant. The Court reserved decision, directing both parties to submit supplemental support for their respective positions on the issue of the "undue hardship" standard as set forth in C.P.L.R. § 3211 (e). Both parties have filed supplemental memorandum, which the Court has considered.

Discussion

C.P.L.R. § 3211 (a)(8), states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant[.]" C.P.L.R. § 3211 (a)(8). A "plaintiff bears the ultimate burden of proof on the issue of personal jurisdiction." *See, Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623, 624 (2d Dept. 2009). An objection that proper service was not effectuated is waived if the objecting party does not move to dismiss on that ground within 60 days of a pleading in which the objection is raised. *See,* C.P.L.R. § 3211 (e). C.P.L.R. § 3211 (e) specifically states,

> an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

C.P.L.R. § 3211 (e).

In this case, the parties concede that the motion to dismiss was not brought within 60 days, however, Defendant contends that he should receive an extension of time to bring the motion for "undue hardship." Though the "undue hardship" standard is not limited to the context of C.P.L.R. § 3211 (e), case law as to its meaning in that context is sparse.[1] *See, State of New York v. Mappa*, 24 Misc.3d 1149, 1152 (Kings Cty. Ct. 2009),

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[1] In David Siegel's Practice Commentary C3211:59, 1998 Cumulative Pocket Part, Book 7B, at page 11, the Commentator noted:

> It is not easy to think up "hardship" grounds when all the defendant wants to do is extend the time for adjudicating a defense of improper service . . . was the service proper or wasn't it?"

Siegel continued to discuss the meaning of "undue hardship." *See*, § 266 titled "Lack of Personal Jurisdiction," New York Practice 5th Edition of David D. Siegel. "The court may grant a discretionary extension of the 60-day period, but only upon a showing of 'undue hardship,' a strict standard that has been held more demanding than the 'good cause' showing that can earn time extensions in other context."

finding only two cases that discuss the undue hardship standard of C.P.L.R. § 3211 (e) in the context of an untimely motion to dismiss pursuant to C.P.L.R. § 3211 (a)(8). "While there are numerous cases in a variety of contexts that make reference to an undue hardship standard, there are few attempts to define it." *Id.* It seems settled that undue hardship is a more stringent standard than "for good cause shown." *See, Abitol v. Schiff*, 180 Misc.2d 949, 951 (Supreme Court, Queens County, 1999).

In *Reyes v. Albertson*, 62 A.D.3d 855, 855 (2d Dept. 2009), the Second Department suggested that the appropriate measure of an undue hardship is one "which prevented the making of the motion within the requisite statutory period." The Second Department is not alone in its strict understanding of the undue hardship standard under C.P.L.R. § 3211(e). Other courts have explained that the "undue hardship" standard "requires proof that the motion could not have been made within the time limited by C.P.L.R. § 3211 (e) by the exercise of ordinary diligence." *See, Abitol v. Schiff*, 180 Misc.2d 949, 951 (Supreme Court, Queens County, 1999). Thus, a motion to extend time for a motion to dismiss for lack of personal jurisdiction "is not to be had for the asking." *Id.*

The Fourth Department has often found that a defendant waived his objection to lack of personal jurisdiction when he did not move to dismiss the complaint on that ground, but included the personal jurisdiction objection in his Answer. *See, Anderson & Anderson, LLP-Guangzhou v. Incredible Investments Limited*, 107 A.D.3d 1520, 1521 (4th Dept. 2013); *see also, Britt v. Buffalo Municipal Housing Authority*, 48 A.D.3d 1181, 1182 (4th Dept. 2008); *see also, Woleben v. Sutaria*, 34 A.D.3d 1295, 1296 (4th

Dept. 2006). These decisions are consistent with the plain meaning of C.P.L.R. § 3211 (e), which provides that "an objection that the summons and complaint . . . is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days." *See*, C.P.L.R. § 3211 (e). More specifically, other courts have declined to find undue hardship due to law office failure, and alleged incompetence of prior counsel. *See, Worldcom, Inc. v. Dialing Loving Care*, 269 A.D.2d 159, (1st Dept. 2000); *see also, Abitol, supra*, at 952.

The purpose of C.P.L.R. § 3211 (e) was to require parties with genuine objections to the effectiveness of service to resolve the issue promptly, at the outset of the action. *See, Wade v. Byung Yang Kim*, 250 A.D.2d 323, 325 (2d Dept. 1998) (citing Senate Memorandum in support of L 1996, ch. 501).[2] Interpreting the undue hardship standard as requiring a proof that the motion could not be brought within sixty days is consistent with the purpose of C.P.L.R. § 3211 (e). *See, Reyes, supra*, at 855; *see also, Abitol, supra*, at 952.

Defendant relies on *Metz v. Roth*, 2010 N.Y. Misc. LEXIS 1233 (Supreme Court, New York County, 2010), and *State of New York v. Mappa*, 24 Misc. 3d 1149 (Supreme Court, Kings County, 2009), in claiming undue hardship. In *Metz*, the defendant moved to dismiss the complaint on the grounds that service was not properly effectuated because of plaintiff's failure to file proof of service. *See, Metz, supra*, at 2-3. Defendant claimed

[2] Pursuant to a review of the legislative history pertaining to C.P.L.R. § 3211 (e), the Court has found little discussion of this provision since 1996 when it was first proposed. There is no discussion on the meaning of "undue hardship" in these materials. Instead the discussion in adding Section (e) turned largely on the burden of requiring that a motion to dismiss for lack of jurisdiction be brought within 60 days. While the support for that provision was largely unanimous, the City of New York objected on ground that the 60-day limit was prejudicial given the large volume of cases it processes and the burden a 60-day limit to raise service objections would impose. *See*, Senate Mem in support of L 1996, ch. 501, 1996 McKinney's Session Laws of NY at 2443.

that plaintiff's failure to file proof of service presented undue hardship which impeded the ability to file the motion to dismiss within the sixty-day limit of C.P.L.R. § 3211 (e). *Id.* at 3-4. Finding that the lack of filing could have prejudiced defendant's ability to ascertain whether they had a "basis to move to dismiss for improper service," the court granted defendant's motion for an extension of time to file a motion to dismiss. *Id.* at 8-9.

In *Mappa*, the plaintiff obtained an ex parte order from the court to serve defendants' attorney in order to effectuate service. *See, Mappa, supra*, at 1150. More than fifteen months later, the Second Department reversed that order. *Id.* at 1151. Defendants then moved to dismiss the complaint on the basis that service was never made, and plaintiff opposed pursuant to C.P.L.R. § 3211 (e) as more than sixty days had gone by. *Id.* at 1151-52. The Court found that it was the reliance on the prior order allowing service to defendants' attorney that prevented defendants from moving to dismiss for improper service. *Id.* at 1155. The Court held that this satisfied the undue hardship requirement. *Id.* In both *Mappa* and *Metz*, the finding of an undue hardship was very dependent on the particular circumstances of the case.

In this case, and as will be discussed below, the Court finds that the Defendant has failed to meet his burden under C.P.L.R. § 3211 (e) in showing that an undue burden kept him from timely moving to dismiss the Complaint for improper service. On its face, C.P.L.R. § 3211 (e) requires such a motion be brought within sixty days of raising the improper service objection in a pleading. *See,* C.P.L.R. § 3211 (e). Here, Defendant raised lack of personal jurisdiction in his Answer dated May 30, 2017, and electronically filed on June 21, 2017. *See,* Walsh Aff., Exhibit B, Answer, ¶ 7. However, Defendant's

motion to dismiss for lack of personal jurisdiction was not made until December 19, 2017, some 121 days after the filing of the Answer which raised the objection.

Here, the Court adopts the Second Department's analysis of undue hardship as requiring a showing that the motion could not have been made within the statutory period of sixty days. *See, Reyes, supra*, at 855. Defendant has offered no such proof. Defendant offers no evidence of the kind described in either *Mappa* or *Metz*. Defendant relies on these cases but fails to sufficiently analogize them to the present case. Unlike in *Mappa* and *Metz*, there was no procedural conflict that affected Defendant's ability to determine whether or not service was proper; rather in this case it has been consistently appreciated by both parties that proper technical service was never made.

In a further attempt to rely on *Metz*, Defendant argues that because no proof of service has been filed, Defendant has suffered an undue hardship. *See,* Walsh Aff., ¶¶ 16-18. This argument cannot be supported by *Metz* where service was properly made *but for* filing proof with the clerk. *See, Metz, supra*, at 2-3. Defendant's argument fails to demonstrate how there was an undue hardship, that precluded moving for dismissal, because no proof of service was filed. Here, there is no dispute that service has not been made, thus there is no issue as to the filing of proof of service. Furthermore, there is nothing to suggest that Defendant was unsure as to whether service had been effectuated which would have prejudiced his ability to determine if moving for dismissal was proper.

Defendant also relies on his attorney's repeated assertion that he is under no obligation to accept service on behalf of his client. While correct, this argument fails to show why Defendant could not have moved for dismissal within the statutory period.

Finally, Defendant argues that moving for dismissal within the statutory period could have made Defendant liable for sanctions for filing a baseless motion. Defendant argues that if he had moved to dismiss the complaint for lack of jurisdiction within sixty days of his Answer, Plaintiff could have moved for sanctions based on the fact that Plaintiff still had time to serve the Complaint. The *Mappa* Court discussed this conundrum and found it persuasive that the sixty-day period under C.P.L.R. § 3211 (e) lapsed while plaintiff still had time under the 120-day period for service under C.P.L.R. § 306-b. *See, Mappa, supra*, at 1150.

In the present case, Defendant's Answer was electronically filed on June 21, 2017, thus Defendant had until August 21, 2017, to move for dismissal for lack of jurisdiction, yet Plaintiff had until September 30, 2017, to effectuate proper service. While this is certainly Defendant's most persuasive argument for an undue hardship, the fact remains that Defendant still did not move for dismissal until nearly two months after Plaintiff's time to serve had expired. Defendant's excuse for not moving earlier, that he feared sanctions, is rejected in light of the fact that he would have been complying with the express language of the statute as promulgated by the legislature. Any discrepancy or purported conflict between C.P.L.R. § 306-b allowing 120 days for service, and C.P.L.R. § 3211 (e) requiring a party to move within 60 days of the service of the answer to dismiss for lack of personal jurisdiction is a valid legal argument and must be resolved by the legislature and not by the courts.

Accordingly, based in the foregoing, the Court finds that Defendant has failed to meet his significant burden and show the requisite undue hardship under C.P.L.R. § 3211 (e). Consequently, the Court denies Defendant's motion to dismiss the Complaint pursuant to C.P.L.R. § 3211 (a)(8). The above constitutes the Decision of the Court. Plaintiff's attorney shall electronically file a proposed Order, on notice to Defendant's attorney, within ten (10) days of the date of this Decision.

Dated: March 29, 2018

ENTER

James P. Murphy
Justice of the Supreme Court