57th St. Vacation Owners Assn., Inc. v Oyewole
2019 NY Slip Op 32386(U)
August 7, 2019
Supreme Court, New York County
Docket Number: 850031/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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57TH ST. VACATION OWNERS ASSOCIATION, INC., BY AND THROUGH ITS BOARD OF DIRECTORS,

Plaintiff,

- v -

OLUGBENGA LEKE OYEWOLE et al.,

Defendants.

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INDEX NO. 850031/2017

MOTION DATE 07/25/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

NYSCEF Doc Nos. 18–27 were read on this motion to extend time and approve alternative service method.

Motion by Plaintiff pursuant to CPLR 306-b and 308 (5) for an order extending the time to serve defendant Olugbenga Leke Oyewole ("Oyewole") with process and approving an alternative method of service of process on Oyewole is denied, and the action is dismissed in its entirety.

BACKGROUND

Plaintiff commenced the instant action and filed a notice of pendency on January 25, 2017, seeking foreclosure of a certain notice of lien for unpaid and delinquent timeshare owners' association assessments in the amount of $11,300.63. The complaint alleges that Oyewole failed to pay certain charges relating to her .015838% ownership interest in a timeshare unit located at 102 West 57th Street, New York, New York, and that Plaintiff therefore filed the subject lien. Plaintiff seeks payment of the lien amount by means of a money judgment or foreclosure action along with payment of any other arrears, interest, costs and legal fees.

On February 7, 2017, Plaintiff filed an affidavit of service indicating that defendant 57th Street Vacation Owners Association, Inc. (the "Association") was served with process on January 31, 2017, pursuant to CPLR 311 (a) (1), by delivery of a copy of the summons and complaint to an authorized agent.

On July 18, 2017, Plaintiff filed motion seq. 001 pursuant to CPLR 308 (5) for an order permitting Plaintiff to serve process on Oyewole by an alternative service method. On November 2, 2017, this Court denied the motion in seq. 001, finding that Plaintiff had failed to show that service upon Oyewole, who allegedly resides in Nigeria, was impracticable using the methods prescribed in CPLR 308 (1), (2), and (4), noting that a defendant's residing in a foreign country does not, by itself, relieve the plaintiff of her obligation to make a reasonable effort to effectuate service in a customary manner before seeking relief pursuant to CPLR 308 (5). (NYSCEF Doc No. 16.) The decision and order in seq. 001 was e-filed on November 6, 2017.

On June 26, 2019, no further filings having been made in the instant matter, the court by order of the administrative justice issued a Court Notice setting the matter down for an appearance on a "Pre-Note Blockbuster Calendar" day to be held in Part 29 on July 11, 2019, at 9:30 a.m. (NYSCEF Doc No. 17.)

On July 3, 2019, Plaintiff filed the instant motion pursuant to CPLR 306-b and 308 (5) for an order extending the time to serve defendant Oyewole with process and approving an alternative method of service of process on Oyewole—Priority Mail Express International to an address for Oyewole in Nigeria. The affirmation submitted in support is nearly verbatim the affirmation submitted in seq. 001 on July 18, 2017, nearly two years prior. The exhibits annexed are also identical, except, as relevant here, that a May 23, 2018 email allegedly sent to an email address controlled by Oyewole is annexed, which attached a copy of the summons and complaint and requested confirmation of receipt of the email. No acknowledgement was received.

On July 11, 2019, the matter was adjourned to September 18, 2019, as the instant motion was not yet fully submitted; the motion was fully submitted with no opposition on July 25, 2019.

DISCUSSION

In the first instance, movant has failed to address in any way the issues raised in the Court's November 2, 2017 order, having filed, in the instant motion, nearly identical papers, and having made no new arguments or showing as to the impracticability of service under CPLR 308 (1), (2), or (4). On that basis alone, the branch of the motion as to an alternative method of service under CPLR 308 (5) must be denied.

Nevertheless, in the first instance, an alternative method of service would only be approved where the time to serve Oyewole with process had not run, and here, it has run. Pursuant to CPLR 306-b, "[i]f service is not made upon a defendant within [120 days after commencement of the action], the court, upon motion, shall 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." The instant action was commenced on January 25, 2017, and Plaintiff admits that it has not made service upon Oyewole to date.

In *Diaz v Perez*, the Appellate Division, First Department upheld a motion court's decision to dismiss a complaint sua sponte against a defendant on a plaintiff's motion pursuant to CPLR 3215 for entry of a default judgment where the motion court found that the defendant had not been served with the summons and complaint as required by CPLR 306-b. (113 AD3d 421, 421 [1st Dept 2014].) The court stated that "there exist[ed] no reason to disturb the dismissal of the complaint as against" the individual defendant. (*Id.*) In that case the movant had sought a default judgment against both an individual and a corporate entity and the movant had failed to take proceedings for a default judgment within a year of a supposed default by the defendants.

Similarly, in the instant action, an individual and a corporate entity have been sued. Further, Plaintiff has failed to take proceedings for a default judgment within a year of the Association's default in answering the complaint. CPLR 3215 (c) provides, in relevant part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the

default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." The Appellate Division, First Department has recently defined a showing of "sufficient cause" as the setting forth of "a viable excuse for the delay" and "a meritorious cause of action." (*Selective Auto Ins. Co. of New Jersey v Nesbitt*, —NYS3d—, 2018 NY Slip Op 03616, *1 [1st Dept, May 17, 2018]; *see also Seide v Calderon*, 126 AD3d 417 [1st Dept 2015]; *Diaz v Perez*, 113 AD3d 421 [1st Dept 2014]; *Utak v Commerce Bank Inc.*, 88 AD3d 522 [1st Dept 2011].)

Here, Plaintiff has made no showing as to its nearly two-year delay in filing a motion that is nearly identical to the motion which was already denied. Rather, it is apparent to the Court that the instant motion was prompted by the June 26, 2019 Court Notice as to the Pre-Note Blockbuster Calendar appearance.

There appears to be a split of authority between the Appellate Division, First Department and the Appellate Division, Second Department regarding whether a court shall dismiss an action pursuant to CPLR 306-b without a motion to dismiss made by a defendant. In *Daniels v King Chicken & Stuff, Inc.*, the motion court denied the plaintiff's motion for leave to enter a default judgment because the plaintiff had failed to present proof of valid service of process on the defendant. (35 AD3d 345 [2d Dept 2006].) The motion court then dismissed the complaint for lack of personal jurisdiction. The Appellate Division, Second Department held that, pursuant to CPLR 306-b, it was error for the motion court to dismiss the complaint not "upon motion" of the defendant but sua sponte, upon its own initiative. (*Id.*; *see also Rotering v Satz*, 71 AD3d 861 [2d Dept 2010].)

This Court is bound by the Appellate Division, First Department's decision in *Diaz*. The *Diaz* Court explicitly endorsed the "sua sponte" dismissal of a complaint pursuant to CPLR 306-b. This Court infers that the "upon motion" requirement of CPLR 306-b means that a motion must be made by either party and considered by a court. (*See, e.g., Auto-Chlor System of New York City, Inc. v Better Living Food Corp.*, 2018 NY Slip Op. 31058 [U] [Sup Ct, NY County 2018, Kalish, J.].) The motion need not seek the specific remedy of dismissal of an action nor raise a CPLR 306-b issue explicitly. Rather, the motion court need only determine that CPLR 306-b has not been complied with.

In the instant action, the Court finds that there is not sufficient good cause, and it is not in the interest of justice, to extend Plaintiff's time to serve Oyewole, where well over two years have passed since the action was commenced, 604 days passed between when the Court published its decision and order in seq. 001 and Plaintiff filed the instant motion in seq. 002, and there is no indication that Oyewole is aware that the action was commenced, and there were not timely, diligent efforts made to serve Oyewole. (*See Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]; *see also Goldstein Group Holding, Inc. v 310 East 4th Street Hous. Dev. Fund Corp.*, 154 AD3d 458 [1st Dept 2017].) Rather, as to both Oyewole and the Association, against which Plaintiff has failed to take proceedings within one year of its default, which time elapsed in early 2018, the instant action must be dismissed pursuant to CPLR 306-b and 3215 (c), respectively.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff pursuant to CPLR 306-b and 308 (5) for an order extending the time to serve defendant Olugbenga Leke Oyewole ("Oyewole") with process and approving an alternative method of service of process on Oyewole is denied in its entirety; and it further

ORDERED that the action is dismissed pursuant to CPLR 306-b and 3215 (c); and it is further

ORDERED that Plaintiff shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, serve a copy of this order with notice of entry on Defendants and on the Clerk, who is directed, no sooner than five days after entry of this order, to cancel and vacate the Notice of Pendency (NYSCEF Doc No. 2) on premises known as 102 West 57th Street, New York New York 10019-3302, at Block 1009 and Lot 37, dated January 20, 2017, and filed in this action on January 25, 2017.

The foregoing constitutes the decision and order of the Court.

8/7/2019
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			/	NON-FINAL DISPOSITION
APPLICATION:		GRANTED	X	DENIED		GRANTED IN PART		OTHER
		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

850031/2017 57TH ST. VACATION OWNERS vs. OYEWOLE, OLUGBENGA LEKE
Motion No. 002