

**Zelaya v Irizarry**

2021 NY Slip Op 32109(U)

October 25, 2021

Supreme Court, New York County

Docket Number: Index No. 153505/2021

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

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INDEX NO. 153505/2021

ARIANA ZELAYA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

EDWARD IRIZARRY,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 10, 11 were read on this motion to/for DISMISSAL.

Defendant Edward Irizarry moves to dismiss this personal injury action commenced by plaintiff Ariana Zelaya. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff commenced the captioned action by filing a summons with notice on April 9, 2021. Doc. 1. On June 28, 2021, defendant served a demand for a complaint pursuant to CPLR 3012(b). Doc. 3. However, plaintiff did not file a complaint until August 9, 2021, on which date defendant immediately rejected the same. Doc. 8.

In July, 2021, defendant filed the instant motion to dismiss the action on the ground that plaintiff failed to serve the complaint within 20 days after his demand, as required by CPLR 3012(b). Docs. 4-5.

Plaintiff opposes the motion in cursory fashion, asserting that it is moot because the complaint was served after defendant's motion was filed. Doc. 10. Additionally, plaintiff claims that "[t]he reason the complaint was not filed earlier was law office failure, which [she] asks the court to excuse." Doc. 10.

In reply, defendant argues that his motion must be granted since plaintiff failed to move for an extension of time to serve the complaint pursuant to CPLR 3012(d) and does not ask for such an extension of time in her papers. Doc. 11. He further asserts that plaintiff failed to establish a meritorious claim and reasonable excuse for her default. Id.

### LEGAL CONCLUSIONS

It is well settled that a party who commences an action by service of a summons with notice and fails to serve a complaint within 20 days of a demand therefor must demonstrate the merits of his or her action and a reasonable excuse for the delay in order to avoid dismissal (*See* CPLR 3012[d]; *Barasch v Micucci*, 49 NY2d 594, 599 [1980]; *Gear Up, Inc. v City of New York*, 140 AD3d 515 [1<sup>st</sup> Dept 2016]; *Nolan v Lechner*, 60 AD3d 473 [1<sup>st</sup> Dept 2009]). "[T]he decision as to what constitutes a reasonable excuse ordinarily lies within the sound discretion of the trial court" (*Barasch*, 49 NY2d at 599).

Plaintiff's unsubstantiated and utterly conclusory claim of law office failure does not constitute a reasonable excuse for her failure to serve a complaint (*See Okun v Tanners*, 11 NY3d 762, 763-764 [2008]; *see also Galaxy Gen. Contr. Corp. v 2201 7<sup>th</sup> Ave. Realty LLC*, 95 AD3d 789, 790 [1<sup>st</sup> Dept 2012] ["claims of law office failure which are 'conclusory and unsubstantiated' cannot excuse default"] [citations omitted]).

Since plaintiff has failed to set forth a reasonable excuse for her failure to serve a complaint, it is not necessary to consider whether she has a meritorious claim (*See Deutsche Bank Natl. Trust*

*Co. v Kuldip*, 136 AD3d 969, 969 [2d Dept 2016]). In any event, however, plaintiff has failed to submit an affidavit of merit (*See Kel Management Corp. v Rogers & Wells*, 64 NY2d 904, 905 [1985]; *Caruso v International House of Pancakes*, 228 AD2d 462 [2d Dept 1996]). Additionally, although a verified complaint may be submitted to establish a meritorious claim (*see Stevens v Stevens*, 165 AD2d 780 [1<sup>st</sup> Dept 1990]), and plaintiff asserts that she has filed a verified complaint (Doc. 10 at par. 3) the complaint filed is clearly unverified. Doc. 8.

Finally, as defendant asserts, plaintiff did not cross-move, pursuant to CPLR 3012(d), to extend her time to file a complaint or to compel defendant to accept her untimely complaint *nunc pro tunc*. Therefore, this Court is constrained to dismiss the complaint, although it notes that such dismissal is not on the merits (*see Samuels v Rosenberg*, 178 AD2d 639 [2d Dept 1991]) and so plaintiff may refile the action should she be so advised.

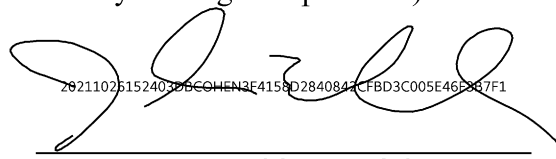
Accordingly, it is hereby:

ORDERED that the motion by defendant Edward Irizarry to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark this Court's records to reflect the dismissal and enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on *Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" [\*\*36] page on the court's website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)).



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10/25/2021  
DATE

DAVID B. COHEN, J.S.C.

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