Aspen Am. Ins. Co. v Smith

2022 NY Slip Op 33167(U)

September 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 526091/2018

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the ___th day of ______, 2022.

SEP 0 8 2022

P R E S E N T:

HON. RICHARD J. MONTELIONE,
Justice.

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ASPEN AMERICAN INSURANCE COMPANY A/S/O NOSTRAND ATLANTIC HOLDING LLC,

Plaintiff,

-against-

MARCIE ALYSE SMITH, CHARLES CAUMAN-WHITE AND HELEN GAGNON,

Defendants.

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DECISION AND ORDER

Index No.: 526091/2018

Motion Seq. 1-3

The following e-filed papers read herein:	NYSEF Nos.:
Notice of Motion (motion seq. 1)	3
Affidavits (Affirmations) and Exhibits Annexed	4-18
Notice of Cross-Motion (motion seq. 2)	22
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On January 4, 2016 a fire at 1306 Atlantic Avenue originated in apartment 3L, which had been leased by defendant Marcie Alyse Smith. Plaintiff, Aspen American Insurance Company (hereinafter "Aspen"), who insured the premises, examined the property and interviewed the occupants, Charles Cauman-White and Helen Gagnon, on January 7, 2016. According to plaintiff's investigator, one of the occupants, Mr. Cauman -White, admitted that he may have left a burning incense stick in the apartment, and as such, Aspen concludes that his negligence caused the fire (NYSCEF #6). This action is for

reimbursement of $134,812.07 paid by Aspen in checks dated May 16, 2016 and November 8, 2016 to the building owner, Nostrand Atlantic Holding LLC for the ensuing fire loss claim. Aspen alleges that pursuant to her lease with Nostrand, the lessee, Ms. Smith, was responsible for any damage to the premises.

Aspen moves for a judgment of default (motion. seq. 1). Ms. Smith opposes the motion and cross-moves (motion. seq. 2) for dismissal of the case inasmuch as she was never served with process and the motion for the default judgment was not filed within a year of the purported service. Aspen opposed the cross-motion and moves (mot. seq. 3) pursuant to CPLR 306-b to extend the time to serve Ms. Smith "now that her address has been finally established."

Aspen filed the summons and complaint commencing this action on December 28, 2018. The parties concur that the filing of the action was within the three-year statute of limitations, which would have expired on January 4, 2019. Plaintiff attempted to serve Ms. Smith at a location in Hillsborough, North Carolina, which they believed was where she resided, by affixing the summons and complaint to the door on February 2, 2019 and mailing the summons and complaint two days later to the same North Carolina address. Aspen contends that it diligently searched for Ms. Smith and believed she resided at the North Carolina address they had found, since she had gone to law school in North Carolina many years earlier. However, Ms. Smith did not live in North Carolina, she lived in Brooklyn, New York and was a professor of law at John Jay. She had no connection to the North Carolina address where the summons and complaint were affixed and mailed. She had no notice that the action commenced until the default motion was mailed to her at her Brooklyn address.

The motion for a default judgment was filed on June 30, 2020 and as such was not timely made within a year of the alleged service of February 2, 2019 within the statutory 1-year deadline set by CPLR 3215(c), which states: "Default not entered within one year. If 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. A motion by the defendant under this subdivision does not constitute an appearance in the action."

Aspen has provided no excuse for filing of the motion four months past the deadline for doing so, thereby abandoning the action. Inasmuch as none of the named defendants in this action were served with process and inasmuch as Aspen did not diligently pursue any remedies it may have had, but rather waited until just before the Statute of Limitations was about to expire to file the suit; did not attempt to serve the papers until the statute had lapsed and did not timely seek a default judgment, the case must be dismissed in its entirety.

Aspen contends that there no prejudice would inure to Ms. Smith by the extension of the time to serve, stating "[T]his action should not be a surprise to Ms. Smith. She has known about the fire since it happened. She therefore cannot show any prejudice. She has not indicated that she is unable to defend the action. To the contrary, in her affidavit she indicates that she believes she has defenses. We served her in good faith at an address we believed to be good based on people finder databases and a return from the Post Office verifying the North Carolina address."

Actually, Ms. Smith would suffer extreme prejudice should the court extend the time to serve. She had no notice that any claims against her existed until she received the motion for the default judgment some time after it was filed on June 30, 2020, more than four and one-half years from the date of the fire. Aspen admits it was already unable to locate the co-defendants who resided in the apartment and had knowledge of the conditions that existed at the time of the fire, when they attempted to serve the summons and complaint in 2019, and Aspen alleges that despite diligent efforts, they still could not locate them when the default judgment was sought. As such, Aspen's failure to diligently pursue the claim when they had knowledge that a claim existed, within a few days of the fire in 2016, means that the witnesses to the event, whom Aspen interviewed shortly after the fire, cannot be found to testify as to the occurrence. Ms. Smith thus would not be in a position to present any actual witnesses to the occurrence.

Further, the plaintiff did not establish that an extension of time was warranted in the interest of justice. "When deciding whether to grant an extension of time to serve a summons and complaint in the interest of justice, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant' " (*Furze v. Stapen,* 161 A.D.3d 827, 828, 77 N.Y.S.3d 506, quoting *Leader v. Maroney, Ponzini & Spencer,* 97 N.Y.2d at 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018. *Butters v. Payne*, 176 A.D.3d 1028, 1029, 112 N.Y.S.3d 245, 247 [2d Dept., 2019]).

Here, Aspen failed to show good cause, as it did not exercise reasonable diligence in attempting service. The plaintiff failed to substantiate the claim that the process server was unable to locate the defendants in New York, despite affidavits of due diligence and evidence of various records searches (*see Umana v. Sofola,* 149 A.D.3d 1138, 1139, 53 N.Y.S.3d 343; *cf. Wilmington Sav. Fund Socy., FSB v. James,* 174 A.D.3d 835, 836, 106 N.Y.S.3d 106; *Emigrant Bank v. Estate of Robinson,* 144 A.D.3d 1084, 1085, 44 N.Y.S.3d 48), inasmuch as Ms. Smith, an attorney working in New York, was able to be located at the time of attempted service by the same means that she was located for service of the motion for default.

Further, the plaintiff did not establish that an extension of time was warranted in the interest of justice. "Unlike an extension request premised on good cause, a plaintiff [seeking an extension in the interest of justice] need not establish reasonably diligent efforts at service as a threshold matter" (*Leader v. Maroney, Ponzini & Spencer,* 97 N.Y.2d at 105, 736 N.Y.S.2d 291, 761 N.E.2d 1018). "However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*id.* at 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018; *see BAC Home Loans Servicing, L.P. v. Herbst,* 180 A.D.3d 980, 981, 121 N.Y.S.3d 343). *Feng Li v. Peng*, 190 A.D.3d 950, 141 N.Y.S.3d 77, 80, leave to appeal dismissed sub nom. *Feng Li v. Diana Peng*, 37 N.Y.3d 937, 170 N.E.3d 451 (2021)

In view of the extreme lack of diligence shown by plaintiff, and the long delay (more than a year and a half after running of the statute of limitations) before defendant received any notice of the action, it would be an abuse of discretion to granting plaintiff an extension to serve defendant "in the interest of justice" pursuant to CPLR 306–b (*see Leader v. Maroney, Ponzini & Spencer,* 97 N.Y.2d 95, 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018 [2001]; *Slate v. Schiavone Const. Co.,* 4 N.Y.3d 816, 816, 829 N.E.2d 665 [2005]).

Accordingly, plaintiff's motions for a default judgment and for an extension of time to serve defendant are denied in their entireties, and defendant's cross-motion to dismiss is granted. The case is dismissed.

The foregoing constitutes the decision and order of the court.

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KINGS COUNTY CLERK
FILED

ENTER

HON. RICHARD J. MONTELIONE

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