

Otis v Martinez-Scholz
2023 NY Slip Op 30322(U)
February 1, 2023
Supreme Court, New York County
Docket Number: Index No. 159416/2020
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO

PART

33M

Justice

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INDEX NO. 159416/2020

ETHAN OTIS,

MOTION DATE 04/28/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

JAMIE MARTINEZ-SCHOLZ, KYLE FORTIN

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 22, 25, 26, 29, 31, 33, 35, 36

were read on this motion to/for

DISMISS

Upon the foregoing documents, and after oral argument, which took place on January 31, 2023, where Ira Ginsburg, Esq. appeared for Plaintiff Ethan Otis ("Plaintiff"), Allan S. Hollander, Esq. appeared for Defendant Kyle Fortin ("Fortin"), and Eric K. Schwarz, Esq. appeared for Defendant Jamie Martinez ("Martinez"), Defendant Fortin's motion to dismiss pursuant to CPLR § 3012(b) is granted.

I. Factual and Procedural Background

Plaintiff filed a summons with notice on November 3, 2020 (NYSCEF Doc. 1). Plaintiff never filed an affidavit of service on NYSCEF. Defendant Fortin filed a notice of appearance on March 16, 2021 (NYSCEF Doc. 3). The notice of appearance demanded a copy of the Complaint (id.). A Complaint was never served. Fortin therefore filed the instant motion to dismiss pursuant to CPLR § 3012(b) on April 28, 2021 (NYSCEF Doc. 6).

Annexed to Fortin's moving papers was e-mail correspondence between counsel for Plaintiff and Defendant (NYSCEF Doc. 10). Mr. Hollander e-mailed counsel for Plaintiff on April 15, 2021 in a good faith attempt to remind Plaintiff to file a complaint (id.). The e-mail also

provided notice that if Plaintiff did not file a complaint within five days, Fortin would move to dismiss the action (*id.*). On the same day, Mr. Ginsburg, responded and stated they would file a Complaint (*id.*). However, the Complaint was never filed until months later on June 17, 2021, after Fortin's motion to dismiss was marked fully submitted, without any opposition (NYSCEF Doc. 20).

Plaintiff did not file any formal opposition, but rather sent a letter to the prior judge on this matter on June 18, 2021 (NYSCEF Doc. 22). Plaintiff also attempted to serve an affidavit sworn by Plaintiff personally in opposition to the motion on June 22, 2021 (NYSCEF Doc. 26). On September 14, 2021, the judge who previously presided over this matter accepted the late opposition papers and permitted Defendants to submit reply papers (NYSCEF Doc. 31).

Defendant Fortin, in reply, argued that Plaintiff has not submitted a sworn affidavit detailing the reasonable excuse for its delay, and Plaintiff's own affidavit, which was sworn in Florida, is defective because it lacked certificate of conformity (NYSCEF Doc. 36). At oral argument, counsel for Plaintiff stated the delay was caused by Covid-19. However, despite repeated opportunities to do so, Plaintiff did not explain in specific, detailed, and substantiated terms how Covid-19 caused Plaintiff to not timely serve his Complaint.

II. Discussion

Pursuant to CPLR § 3102(b), service of a complaint shall be made within twenty days after service of a written demand. Moreover, if no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. Finally, the rule provides that "the court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision."

In order to defeat a motion to dismiss pursuant to CPLR § 3012(b), Plaintiff must submit a reasonable excuse for the delay as well as a proof of the merits of its claim (*McKenzie v Jack D. Weiler Hospital*, 171 AD3d 615 [1st Dept 2019]). Allowing service of a complaint more than 20 days after a defendant's written demand following the service of a summons will be considered an abuse of discretion absent a reasonable excuse for the delay (*Alvarado v New York City Housing Authority*, 192 AD2d 461, 462 [1st Dept 1993]).

Plaintiff's counsel has not provided a sworn affidavit or affirmation proffering a reasonable excuse for their delay. This alone is grounds to grant Defendant Fortin's motion. Even if the Court were to entertain Plaintiff's arguments made in a letter to the prior judge, and during oral argument, the Court does not find a reasonable excuse. Plaintiff essentially argues law office failure during the pandemic which forced its office to work part time. However, a conclusory and unsubstantiated claim, of law office failure will not constitute a reasonable excuse for failure to serve a complaint (*Elkaim v Lotte New York Palace Hotel*, 193 AD3d 566 [1st Dept 2021]; *see also Grace v Follini*, 80 AD3d 560 [2d Dept 2011]). Indeed, via correspondence annexed to the moving papers, counsel for Plaintiff knew they were deficient in serving their Complaint, represented they would file it within ten days, and yet delayed approximately a further two months before attempting to serve his Complaint after a motion to dismiss had already been filed (NYSCEF Docs. 6-11; 20). As Covid-19 clearly did not prevent Plaintiff from initiating this action via a summons, nor from responding to e-mails regarding service of the Complaint, the vague, conclusory, and unsubstantiated Covid-19 related excuse as to why they failed to serve the Complaint is unreasonable. Without a reasonable excuse, Plaintiff cannot defeat Defendant Fortin's motion to dismiss, and the Court need not reach Defendant Fortin's remaining arguments. Defendant Fortin's motion to dismiss is granted.

Accordingly, it is hereby

ORDERED that Defendant Kyle Fortin's motion to dismiss Plaintiff Ethan Otis' Complaint against him is granted, and the allegations in Plaintiff Ethan Otis' Complaint against Defendant Kyle Fortin are hereby dismissed; and it is further

ORDERED that within ten (10) days of entry, counsel for Defendant Kyle Fortin shall serve a copy of this Decision and Order on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2/1/2023

DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE