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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1
Justice

Index Number : 403152/2010
PROPERTY CLERK
vs.
DAVIS, ALTON
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. 403152/10
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for default/summary judgment

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits 1-12 | No(s). 1
Notice of Cross-Motion +
Answering Affidavits — Exhibits A-L | No(s). 2,3
Replying Affidavits | No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
SEP 26 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: Sept. 21, 2012

MARTIN SHULMAN J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. MARTIN SHULMAN, Justice **PART 1**

PROPERTY CLERK, NEW YORK CITY POLICE DEPARTMENT,

Plaintiff,

- v -

ALTON DAVIS,

Defendant.

INDEX NO.: 403152/10

DECISION & ORDER

In this civil forfeiture proceeding, plaintiff Property Clerk, New York City Police Department ("plaintiff" or "Property Clerk") moves for a default judgment pursuant to CPLR §3215(a) or, alternatively, for summary judgment pursuant to CPLR 3212. Defendant Alton Davis ("defendant" or "Davis") opposes the motion and cross-moves: 1) pursuant to CPLR 2221 for leave to renew his prior motion to dismiss (motion seq. 001); and 2) to dismiss this action based upon untimely service of the summons and complaint pursuant to CPLR §306-b and 38 RCNY §12-36. Alternatively, Davis requests leave to file an answer to plaintiff's amended verified complaint in the form attached to his cross-motion at Exhibit L.

A chronological summary of this action's procedural history is essential to determining this motion and cross-motion. As previously set forth in this court's decision and order dated January 30, 2012 denying defendant's prior motion to dismiss, the Property Clerk seeks forfeiture of Davis' vehicle, a 1999 Honda bearing Vehicle Identification Number JHLRD1845XC019292 (the "subject vehicle"), which was seized from him and vouchered under Property Clerk Invoice Number B318649V at the time of his October 9, 2010 arrest on charges of violating New York Vehicle & Traffic Law ("VTL") §1192.3 (driving while intoxicated), VTL §511.1(A) (aggravated unlicensed

operation of a motor vehicle) and New York Penal Law §265.01(1) (criminal possession of a weapon) and §195.05 (obstructing governmental administration).

Plaintiff commenced this action on November 10, 2010 by filing a summons and verified complaint, which were served on defendant by substituted service pursuant to CPLR §308(2). Specifically, the process server's affidavit of service states that the summons and verified complaint were delivered to a person of suitable age and discretion at defendant's actual dwelling and/or usual place of abode on January 4, 2011 and mailed to defendant at that address on January 10, 2011. See Motion at Exh. 7.

Davis timely appeared in this action by counsel and interposed an answer dated January 24, 2011 with three affirmative defenses, including in relevant part failure to properly serve the summons and complaint (first)[1] and failure to timely commence this forfeiture action (third).[2] Subsequently, plaintiff served a supplemental summons and amended verified complaint[3] by certified mail upon Davis' attorney, who agreed in

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[1] Davis bases this claim upon his allegation that he never received the summons and verified complaint in the mail as required by CPLR §308(2).

[2] Citing *McClendon v Rosetti*, 460 F2d 111 (2d Cir 1972), Davis' answer alleges that plaintiff failed to commence this action within ten working days of his demand for the subject vehicle's return.

[3] Davis' second affirmative defense pointed out what appears to be a typographical error in the verified complaint wherein plaintiff identified defendant by the wrong name. See Motion at Exh. 6, ¶¶ 7, 9 and 11. The amended verified complaint differs from the verified complaint solely to the extent that it corrects this error and provides further factual details in support of the first cause of action for forfeiture based upon violation of VTL §1192.3 (driving while intoxicated).

writing to accept service. It is undisputed that Davis did not serve and file an answer to the amended verified complaint.

On September 14, 2011, Davis pled guilty to fourth degree criminal possession of a weapon. It appears that neither party took any further action on this case until in or about November 2011 when plaintiff filed a Request for Judicial Intervention ("RJI") requesting a preliminary conference, which was first scheduled for January 30, 2012. In the interim, Davis, then appearing *pro se*, moved to dismiss the action based upon improper service and "insufficient evidence". Although the motion was unopposed, this court's January 30, 2012 decision and order (the "decision") denied it on the grounds that Davis' claim of improper service was untimely since his motion had not been brought within 60 days of his answer pleading the defense. See CPLR 3211(e). Additionally, this court rejected defendant's "insufficient evidence" claim as lacking merit.

Plaintiff's Motion

Plaintiff's motion for a default judgment is based upon Davis' failure to answer the amended verified complaint.[4] Should this court deny Davis' cross-motion to dismiss this action, Davis requests that the Property Clerk's motion be denied and that he be

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[4] No basis exists for plaintiff's alternative request for summary judgment because issue has not been joined. See CPLR 3212(a). Notwithstanding that defendant answered the original verified complaint, "that complaint was replaced by the amended verified complaint" and "bec[ame] the only complaint in the case as though the initial complaint was never served (citations omitted)." *Miloslavskaya v Gokhberg*, 2012 WL 858443, at *2 (Sup. Ct. Kings Cty.). Consequently, Davis' answer to the original complaint was rendered a nullity. *Id.* at *3.

permitted to interpose an answer to the amended verified complaint. In opposition, defendant contends his default should be excused because:

- he responded to the original verified complaint which is nearly identical to the amended verified complaint and as such, plaintiff was aware of his defenses and cannot claim prejudice;
- his failure to respond to the amended verified complaint was not wilful inasmuch as he believed that his then attorney, who had accepted service of the amended pleading, had responded, and it would be unjust to penalize him for his attorney's alleged incompetence, particularly where the Property Clerk took no action to prosecute this case for almost a year;
- once his former counsel withdrew from representing him in this action Davis actively participated in his defense by moving to dismiss in this action and by bringing an order to show cause in Bronx Supreme Court seeking the return of the subject vehicle;[5] and
- notwithstanding his guilty plea, the Property Clerk fails to establish a nexus between the subject vehicle and the crime of weapons possession.[6]

Defendant's Cross-Motion

Davis cross-moves for renewal of this court's decision which *inter alia* denied his prior motion to dismiss based upon improper service because it was not brought within 60 days of his answer alleging that defense as CPLR 3211(e) requires. That motion was grounded upon plaintiff's alleged failure to properly serve defendant in accordance with CPLR §308(2).

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[5] That action (*Alton Davis v Property Clerk NYPD and Office of Administrative Trials and Hearings*, Bronx County Index No. 251646/11) challenged the Office of Administrative Trials and Hearings' ("OATH") decision permitting the Property Clerk to retain the subject vehicle during the pendency of this forfeiture action. The outcome of that action is not disclosed on this record.

[6] Although this argument is made in response to plaintiff's alternative request for summary judgment, it is equally applicable in response to the motion for a default judgment as plaintiff must establish its prima facie case to obtain a judgment by default against Davis.

In support of renewal, Davis, now represented by new counsel, continues to argue that this court lacks personal jurisdiction but for the first time alleges a new theory in support of that claim. Instead of claiming this court lacks personal jurisdiction because the process server did not complete the mailing component required for substituted service, defendant now claims that plaintiff failed to timely serve the summons and amended complaint within 15 days of expiration of the statute of limitations, as required by CPLR §306-b.[7] Davis argues he should be permitted to renew his motion to dismiss to raise the foregoing argument because he was self-represented at the time he brought his prior motion and was unaware of this defense to the action.

Acknowledging that the present motion is not being brought within CPLR 3211(e)'s 60 day period, Davis' cross-motion further claims this court should nonetheless exercise its discretion to hear this motion because he meets CPLR 3211(e)'s undue hardship requirement for obtaining an extension of time to move. Defendant argues that but for prior counsel's negligence, this action would have been dismissed and the subject vehicle returned to him. In opposition to the cross-motion, the Property Clerk argues that Davis has waived the right to interpose this defense

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[7] Where a timely demand for the return of seized property has been made, the Property Clerk has twenty-five (25) days within which to commence a forfeiture proceeding. RCNY §12-36(a). Here, Davis contends the latest possible date of his demand was November 9, 2010 when he appeared for his retention hearing before OATH. Plaintiff timely filed this action within the 25 day period but under CPLR § 306-b had only 15 days from the limitations period's expiration to serve defendant. Forty days from November 9, 2010 is December 19, 2010, yet defendant was not served until January 4, 2011, with an alleged mailing on January 10, 2011.

because he failed to allege it in his answer and failed to timely move to dismiss as CPLR 3211(e) mandates.

Analysis

Turning first to the cross-motion, Davis correctly argues that the summons and verified complaint were not timely served in accordance with CPLR §306-b. See *Property Clerk, New York City Police Dept. v Ford*, 30 Misc3d 301, 914 NYS2d 594 (Sup. Ct. NY Cty. 2010), *aff'd* 92 AD3d 401 (1st Dept 2012); *Property Clerk, New York City Police Dept. v Smith*, 62 AD3d 486 (1st Dept 2009) (establishing the point at which the twenty-five (25) day limitations period begins to run). As a result, this action must be dismissed and plaintiff's motion for a default judgment denied as moot unless defendant waived this defense.

CPLR 2221(e) requires, *inter alia*, that a motion for leave to renew "shall be based upon new facts not offered in the prior motion . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." However, as Davis notes, "courts have discretion to relax this requirement . . . in the interest of justice (citations omitted)." *Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003).

Defendant cites *Seafood Emporium Fish Mkt., Inc. v Lee*, 26 Misc3d 141(A), 907 NYS2d 441 (App. Term, 9th & 10th Dist. 2010), as an example of a case where the court exercised its discretion to grant a *pro se* defendant's motion to renew a prior motion to vacate a default judgment, despite the fact that the basis for renewal was or should have been known to the defendant at the time of the original motion. Here, Davis'

belated realization that the summons and verified complaint were not timely served is not a new fact that could not have been raised on his prior motion.

The case at bar is distinguishable from *Seafood Emporium* because a specific statutory provision, CPLR 3211(e), governs the ultimate relief Davis seeks, to wit, an extension of time to move to dismiss on the ground that the court lacks personal jurisdiction. That statute expressly limits such extensions to cases of "undue hardship." As noted in *Abitol v Schiff*, 180 Misc2d 949, 950, 691 NYS2d 753 (Sup. Ct., Qns. Cty. 1999), *affd* 276 AD2d 571 (2d Dept 2000):

> In amending CPLR 3211(e) to require dismissal motions within 60 days of the service of answers asserting jurisdictional defenses based on improper service, the Legislature intended to compel defendants with such defenses to deal with them promptly, thereby winnowing out those with meritless objections and resolving service disputes at the outset of litigation (*Wade v Byung Yang Kim,* 250 AD2d 323, *supra*). Defendants subject to the requirement have obviously received notice of the action through some means, and have chosen to appear and assert the defense, rather than default. It is therefore appropriate to place the burden upon them to press the defense by moving for judgment.

In response to a defendant's request for a *nunc pro tunc* extension of time to move for dismissal, the court in *Abitol* considered the extent of proof required to establish undue hardship:

> The time requirement is not unyielding, and the court has explicit authority to extend the time for the motion. An extension is not to be had for the asking, however. The standard set by the Legislature for an extension of time is not merely "for good cause shown," or "in the interest of justice," but is instead the more stringent one of "undue hardship" (*compare, e.g.,* CPLR 306-b, 2004, *and* 3212 [a]). The attention of the court is thus narrowly focused on the existence of obstacles to a timely motion, and not on the over-all circumstances of the action. In the court's opinion, a showing of "undue hardship" in this context requires proof that the motion could not have been made within the time limited by CPLR 3211(e) by the exercise of ordinary diligence. That the defendant delayed by only a few

> days should not be sufficient, and the issue of prejudice to the plaintiff should ordinarily not be relevant. The merits of the motion should also be irrelevant, since the defects in service, however egregious they may have been, did not prevent the defendant from answering the complaint. Further, any delay due to law office failure, while relevant to considerations of "good cause" (*Tewari v Tsoutsouras,* 75 NY2d 1), should ordinarily be irrelevant here. *Id.* at 950-951.

See also, *Aris v McGregor*, 2 Misc3d 1004(A), 2004 WL 503481 at *2 (Sup. Ct., Nassau Cty. 2004) ("The standard for demonstrating undue hardship in the context of extending the time for a defendant to move for dismissal is more rigorous than the standard of 'good cause' used elsewhere in the CPLR.").

In the case at bar, although defendant brought his initial motion to dismiss *pro se*, he nonetheless had the benefit of counsel in interposing his first answer. Prior counsel's failure to interpose a jurisdictional defense based upon untimely service, as opposed to improper service, as well as his failure to timely move, is akin to law office failure which is insufficient to establish undue hardship. See *Abitol, supra*. Davis fails to demonstrate that his prior motion could not have been made within CPLR 3211(e)'s 60 day time frame by the exercise of ordinary diligence. Accordingly, undue hardship is not established.

As an additional matter, allowing defendant to renew his motion to dismiss would violate CPLR 3211(e)'s requirement that "[a]n objection based upon a ground specified in paragraphs eight or nine of subdivision (a) [of CPLR 3211] is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading." *Osserman v Osserman*, 92 AD2d 932 (2d Dept 1983), is

factually similar to the instant case. There, the defendant moved to dismiss due to lack of personal jurisdiction contesting the manner of service then subsequently renewed the motion to dismiss for lack of personal jurisdiction based upon the claim that long arm jurisdiction was lacking. The Second Department found that "the arguments urged in support of defendant's renewed motion were waived by his failure to raise them on his prior motion to dismiss." *Id.* at 933. Thus, "[b]y only raising a claim of defective service in his initial motion to dismiss, defendant waived any other objections to the court's assertion of jurisdiction over his person." *Id.* at 934.

Here, in light of CPLR 3211(e)'s firm time constraints, Davis' failure to establish undue hardship and the improper attempt to raise new arguments not raised in the prior dismissal motion, this court declines to exercise its discretion to relax CPLR 2221's requirements for renewal motions in the interest of justice. Accordingly, the portions of Davis' cross-motion seeking renewal of the decision and dismissal of the amended complaint must be denied.

Turning to the Property Clerk's motion for a default judgment, although defendant failed to timely answer the amended verified complaint in this action, he previously appeared by counsel and answered the original complaint and brought a pro se motion to dismiss. He also now appears by new counsel *inter alia* to oppose plaintiff's default motion and submit a proposed answer. Given the foregoing, it is clear Davis has never intended to default in appearing in this action. Public policy favors the resolution of cases on the merits, and in this case there has been delay by both parties.

Sippin v Gallardo, 287 AD2d 703 (2d Dept 2001). There is no indication of prejudice to plaintiff or willfulness on defendant's part.

Finally, plaintiff's motion must be denied because plaintiff fails to establish its prima facie case for forfeiture on this record. Specifically, there is no non-hearsay evidence establishing a nexus between Davis' use of the subject vehicle and the crime to which he pled. Accordingly, plaintiff's motion for a default judgment must be denied and the portion of Davis' cross-motion for leave to interpose an answer to the amended complaint is granted. The proposed answer attached to the cross-motion papers at Exhibit L is hereby deemed interposed, with the exception of the second and third affirmative defenses alleging untimely service of the summons and complaint in accordance with CPLR §306-b, which this court rejected for the reasons stated above.

For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is denied and defendant's cross-motion is granted solely to the extent that his proposed answer, without the second and third affirmative defenses, is deemed interposed, and the cross-motion is otherwise denied.

Counsel for the parties are directed to appear for a preliminary conference on October 23, 2012 at 9:30 a.m., at Part 1, 60 Centre St., Room 325, New York, New York.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been sent counsel for both parties.

Dated: September 21, 2012

Hon. Martin Shulman, J.S.C.