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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7
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NORAH COLTON, Index No. 158480/14

Plaintiff,

- against -

THE RELATED COMPANIES LP;
THE RELATED COMPANIES INC.;
THE RELATED REALTY GROUP, INC.;
QUALITY BUILDING SERVICES CORP.;
TIME WARNER CENTER;
TIME WARNER CENTER CONDOMINIUM;
TIME WARNER, INC.;
TIME SHAREHOLDERS OF TIME WARNER, INC.
TIME WARNER SERVICES, INC.,
COLUMBUS CENTRE RESIDENTIAL LLC,
COLUMBUS CENTRE, LLC;
TIME WARNER REALTY, INC.
TIME WARNER COMPANIES INC.;
25 COLUMBUS CIRCLE, LLC;
ONE COLUMBUS CIRCLE, LLC
25PH COLUMBUS CIRCLE, LLC,
CRABTREE & EVELYN, LTD.;
WEBER SHANDWICK INC. n/k/a CMGRP, INC.;
and XYZ SIGN INSTALLATION COMPANY,
said name being fictitious,

Defendants.
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LEBOVITS, J.:

This decision disposes of motion sequence numbers 001, 002, and 003.

In motion 001, defendants The Related Companies, L.P. s/h/a The Related Companies LP, The Related Companies, Inc. s/h/a The Related Companies Inc., The Related Realty Group, Inc., Columbus Centre Residential LLC, Columbus Centre LLC s/h/a Columbus Centre, LLC, and 25PH Columbus Circle, LLC (collectively, the Related Companies Defendants) move,

pursuant to CPLR 3012 (b), for dismissal of the action for plaintiff's failure to timely serve a complaint.

Plaintiff Norah Colton cross-moves, pursuant to CPLR 3012 (d), to extend her time to serve her e-filed complaint nunc pro tunc to the e-filing date of May 5, 2015, and to compel defendants to accept service of the same.

In motion 002, defendants Time Warner Inc. s/h/a Time Warner, Inc., Time Shareholders of Time Warner, Inc., Time Warner Companies Inc., Time Warner Services Inc., and Time Warner Realty, Inc. (collectively, the Time Warner Defendants) move, pursuant to CPLR 3102 (b), for dismissal of the action for plaintiff's failure to timely serve a complaint.

Defendant Weber Shandwick Inc. n/k/a CMGRP, Inc. (Weber Shandwick) cross-moves, pursuant to CPLR 3012 (b), for dismissal of the action for plaintiff's failure to timely serve a complaint.

In motion 003, defendant Crabtree & Evelyn, Ltd. (Crabtree) moves, pursuant to CPLR 3102 (b), for dismissal of the action for plaintiff's failure to timely serve a complaint.

Plaintiff cross-moves, pursuant to CPLR 3012 (d), to extend her time to serve her e-filed verified complaint nunc pro tunc to the e-filing date of May 5, 2015, and to compel Crabtree to accept service of the same.

Background

Plaintiff states that she was injured on August 28, 2011, while walking in the passageway on the south side of 10 Columbus Circle in Manhattan (Premises). She avers that defendants, collectively, owned and maintained the Premises. She explains that, in the "vicinity" of a Crabtree store (a tenant of the Premises), her "foot struck a protuberance" from a "Faces of

Ground Zero, Portraits of The Heroes of September 11, 2011" sign. She alleges that defendants negligently designed, installed, and maintained the sign, which caused her serious injuries. The issue of these three motions is whether plaintiff should be permitted to pursue her claim against defendants, or whether the action should be dismissed because plaintiff failed to timely file and serve a complaint.

Plaintiff commenced this action by e-filing a summons with notice on August 28, 2014, the last possible date to file within the statute of limitations, in that her alleged injury occurred on August 28, 2011 (CPLR 214). Plaintiff served the summons with notice on December 24, 2014. Demands for the complaint were made in January 2015 and March 2015. Plaintiff filed her complaint on May 5, 2015. Two of the three instant motions to dismiss the action were filed prior thereto: motions 001 and 002 on March 12, 2015 and March 17, 2015, respectively. Crabtree filed motion 003 on May 22, 2015.

Motion 001

In support of their motion, the Related Companies Defendants, through the affirmation of their counsel, Julie Bernstein, Esq., assert as follows: movants served a notice of appearance and a demand for a complaint in accordance with CPLR 3012 on January 13, 2015. The demand required service of a complaint within 20 days from the date of the demand (Bernstein affirmation, ¶ 6). At the time that they filed their motion for dismissal, approximately two months had passed without movants having received the demanded complaint. They claim that they had not received any communication from plaintiff's counsel (*id.*, ¶ 8). Movants argue that plaintiff's inaction warrants dismissal pursuant to CPLR 3012, because it had been 30 days past the statutory deadline for plaintiff to respond. They also argue that plaintiff failed to demonstrate

that she has a meritorious claim.

Movants contend that, despite naming 18 defendants in her summons and complaint, plaintiff's affidavit of merit does not provide any reason for commencing a lawsuit against so many entities. They argue that plaintiff had several years to timely investigate what entity owned and maintained the Premises, and which entities installed the signs located near the Crabtree store. Yet, they argue further, plaintiff appears to have done no research, and has frivolously sued every entity with a name that might have some relationship with the Premises. They assert that the defendants listed in the summons with notice are the same ones named in the proposed complaint, and, allegedly, all defendants purportedly owned, leased, operated, maintained, and controlled the Premises.

In opposition to the motion, Brian McCaffrey, Esq., counsel for plaintiff, blames, in part, "law office failure" for not timely filing and serving the demanded complaint. He states that he had been in contact with all but one defense counsel by phone immediately upon receipt of their demands for a complaint, and explained that he was awaiting the appearance of certain other defendants. Also, he was seeking leases from the Time Warner Defendants and from Crabtree to ascertain whether there could be an early dismissal from the action before the filing of the complaint.

Specifically, Mr. McCaffrey states that, on January 7, 2015, he spoke to Charles Kreines, Esq., representing the Time Warner Defendants, and on January 15, 2015, to Rose Harper, Esq., representing Crabtree, upon receipt of their respective notices of appearance. They discussed the merits of the action, as well as awaiting the appearance of other parties and an opportunity to obtain the leases from the Time Warner Defendants to draft a complaint that might dispose of

some defendants. Both counsel agreed to this procedure (McCaffrey affirmation, ¶¶ 5-6).

Mr. McCaffrey continues that, on February 9, 2015, after several phone calls with the insurance adjuster assigned to the matter for Weber Shandwick, Mr. McCaffrey was contacted by Philip Menna, Esq., representing Weber Shandwick, who requested an adjournment of his client's time to appear, which he granted by stipulation to March 11, 2015 (*id.*, ¶ 7). On March 10, 2015, he received a good faith letter dated March 9, 2015 from Ms. Harper requesting service of the complaint within 10 days. On March 10, 11, and 12, he left messages, explaining that he still did not have the leases, and that Weber Shandwick's counsel had not filed his appearance, and that he would request an additional 30 days (*id.*, ¶ 8). On March 13, 2015, Ms. Harper informed Mr. McCaffrey that she would agree to the extension. One day earlier, the Related Companies Defendants filed their instant motion to dismiss. On March 13, 2015, Weber Shandwick filed a notice of appearance and demand for a complaint, which plaintiff accepted, even though it was untimely (*id.*, ¶¶ 9-11). Thereafter, Mr. McCaffrey avers, he unsuccessfully held discussions with counsel for all of the defendants to resolve the motion. None of the defendants' counsel contacted him with a request for the complaint, or indicated that they did not agree to the delay (*id.*, ¶¶ 11-13).

As for law office failure, Mr. McCaffrey states that he does not recall having any discussions with counsel for movants (the Related Companies Defendants) until after receipt of their motion, and he cannot state that he sought an extension prior to their motion. He contends that he overlooked their notices of appearance on e-courts, and his office had not received a copy of the notice of appearance (*id.*, ¶ 14).

Regarding the merits of the action, plaintiff submitted an affidavit alleging that, on the

afternoon of August 28, 2011, she was severely injured while walking in the Premises in the vicinity of the Crabtree store after a substantial rainfall. She states that, on information and belief, the Premises was owned and maintained by defendants and their tenant Crabtree. Plaintiff states that she was caused to fall when her "foot struck a protuberance from a negligently installed and maintained 'Faces of Ground Zero, Portraits of The Heroes of September 11, 2011' sign" (plaintiff aff, ¶ 4).

Plaintiff states further that she was assisted by persons whom she believed to be security guards employed by The Related Companies, L.P. An ambulance was called, and she was removed by paramedics to St. Luke's Roosevelt Hospital, where her right knee cap and left elbow were operated on (*id.*, ¶ 5). She avers that the accident caused her to suffer severe injuries, including a fracture of her right kneecap and left elbow, and permanent scarring. Plaintiff avers that she had to use a cane and hemi walker, walks with a limp, and suffers continuing buckling of the knee and a fear of falling (*id.*, ¶ 6). Plaintiff claims to have undergone three surgeries, and incurred medical costs in excess of $15,000, and loss of income as a court reporter, from the date of the accident to December 5, 2011, and diminished income thereafter (*id.*, ¶ 7).

Based on the foregoing, plaintiff argues that she has demonstrated a prima facie showing of legal merit and offered a reasonable excuse, thereby warranting denial of the motion to dismiss and the grant of her cross motion.

Movants respond that plaintiff failed to provide a reasonable excuse for the delay in serving the complaint, in that the reasons proffered, that certain defendants had not yet appeared, and that additional time was needed to investigate the matter are not valid excuses. They contend that plaintiff could have performed a property record search, or utilized pre-suit discovery tools

to obtain this information pursuant to CPLR 3102 (c). They also contend that the affirmation of plaintiff's counsel fails to specify what additional investigation was needed, and what was actually performed to obtain additional information prior to the drafting of the complaint. They also note that plaintiff's counsel never obtained a stipulation from any codefendant extending plaintiff's time to serve a complaint.

For the reasons discussed below, the motion by the Related Companies Defendants is granted, and plaintiff's cross motion is denied.

"A party who has commenced an action by service of a summons without complaint and fails to serve a complaint within 20 days of a demand must demonstrate the merits of the action and a reasonable excuse for the delay in order to avoid dismissal (CPLR 3012 [d])" (*Nolan v Lechner*, 60 AD3d 473, 473 [1st Dept 2009]; *see also Beltrez v Chambliss*, 68 AD3d 681, 681-682 [1st Dept 2009], *lv denied* 14 NY3d 707 [2010] [a plaintiff seeking to oppose a CPLR 3102 motion to dismiss should demonstrate a reasonable excuse for the "delay in serving the complaint after defendants served their demand for it and a meritorious cause of action"]). Plaintiff has not satisfied either of these two requirements.

Movants served a demand for a complaint on January 13, 2015. Plaintiff served the complaint on May 5, 2015, 112 days later. Plaintiff has not provided a reasonable excuse for this lengthy delay, especially considering that the incident occurred four years earlier, in August 2011. Counsel for plaintiff has not explained the importance of why he was waiting for appearances by the various defendants prior to the filing of a complaint. He also states that he was investigating the matter, so that he could determine whether all of the defendants named in the summons with notice needed to remain in the action. He has not shown, however, that he

needed the additional time in which to establish a meritorious action, as is required when challenging a CPLR 3012 motion to dismiss. He has not explained what steps he took so as to be able to demonstrate the existence of meritorious claim.

In contrast, in *Rose v Our Lady of Mercy Med. Ctr.* (268 AD2d 225 [1st Dept 2000]), the Court held that plaintiffs offered a reasonable excuse for their delay, because the time was spent obtaining requisite evidence to support the claim. In *Rose v Our Lady of Mercy Med. Ctr.*, the defendants sought dismissal of a medical malpractice action on the ground that the plaintiffs failed to serve a timely complaint. The plaintiffs served the defendants in January and February 1998 with a summons with notice, because the statute of limitations might have expired before they could obtain all the expert review necessary to serve a detailed complaint. In late January and February, the defendants served the plaintiffs with demands for a complaint. On March 25 and April 15, 1998, the various defendants made motions to dismiss the action, because the plaintiffs had not served a complaint within 20 days after the summons. "On April 9, 1998, a sparse but adequately verified complaint was served" (*id.* at 225).

The Appellate Division found that the plaintiffs "needed additional time to obtain a medical expert's review of extensive hospital records so that they could proffer an informed physician's affidavit of merit," which provided "sufficient evidence of a meritorious claim." The affidavit described in detail a series of medical operations performed at the defendant hospital (*id.* at 226). The Court held that, because plaintiffs had not "evinced any intent to abandon their claim or otherwise prejudiced defendant, it was not an abuse of discretion" for the trial court to refuse to dismiss the complaint on timeliness grounds (*id.*). Here, however, the delay did not result in the obtaining of evidence or information showing a meritorious action.

Mr. McCaffrey states that he was discussing the case with counsel for the various defendants, but does not state that the parties were actively involved in settlement negotations that might otherwise excuse the untimely service of a complaint (*cf. Leff v Lemonia Rest. Corp.*, 187 AD2d 252, 252 [1st Dept 1992] [plaintiff showed that during the time which elapsed between the date the parties had agreed to extend the time to file a complaint following defendant's initial demand, and when defendant moved to dismiss, the parties were actively involved in settlement negotiations]).

To be sure, as shown by Mr. McCaffrey's affirmation, plaintiff had not evinced an intent to abandon the claim, which fact militates in favor of her cross motion (*see Nolan v Lechner*, 60 AD3d at 473 [factors to consider on a CPLR 3102 motion include (1) plaintiff's affidavit of merit, (2) whether plaintiff evinced an intent to abandon the claim, and (3) whether defendants have been prejudiced by reason of the delay]). Nevertheless, even while crediting plaintiff with this attribute, and assuming that plaintiff established a reasonable excuse for the delay, the action warrants dismissal; the record does not support her assertion of a meritorious claim.

The affidavit of merit should contain "evidentiary facts sufficient to establish a prima facie case" (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905 [1985]). "To show merit the plaintiff must demonstrate the existence of such issues of fact as would suffice to defeat a motion for summary judgment" (*Chiaffarano v Winston*, 234 AD2d 329, 330 [2d Dept 1996]). "[A] plaintiff must tender sufficient first-hand evidence of a meritorious claim" (*Abele Tractor & Equip. Co., Inc. v RJ Valente, Inc.*, 94 AD3d 1270, 1272 [3rd Dept 2012] [internal quotation marks and citation omitted]).

Plaintiff alleges that the sign was "negligently designed, installed, placed and maintained

by defendants." This assertion is conclusory and, as such, does not support the obligation to provide evidence of a meritorious claim (*see Bistre v Rongrant Assoc.*, 109 AD3d 778, 779 [2d Dept 2013] [plaintiffs alleged that the parking lot was improperly designed, and submitted an affidavit of the injured plaintiff, which was insufficient to demonstrate merit, because it contained only self-serving and conclusory allegations without evidentiary support]).

Plaintiff also alleges that there was a substantial rainfall when she was walking toward the Premises. She does not explain, however, the relevance of the allegation that there was a substantial rainfall. She does not claim that the presence of water contributed to the fall that led to the injuries.

The only nonconclusory detail is that her "foot struck a protuberance" from the sign. In the context of this occurrence, the allegation that something protruded from a sign does not satisfy the requirement that a plaintiff support the claim with "evidentiary facts sufficient to establish a prima facie case" (*see Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d at 905). No details are furnished as to the alleged protuberance, and that assertion, standing alone, does not indicate negligence. Where on the sign was the protuberance? What were its approximate dimensions? In what manner did the accident occur? The affidavit of merit could have supplied these basic details, since they were within the knowledge of plaintiff. Plaintiff need not prove her case; but she must establish potential liability.

The situation is different from those instances where a plaintiff alleges injury from falling due to object protruding from a sidewalk, where that assertion, by itself, is indicative of negligence (*see e.g. Amabile v City of Buffalo*, 93 NY2d 471, 472 [1999] [plaintiffs asserted that 10 inches of what had once been a stop-sign post protruded from the ground at an angle, the sign

itself was missing and the concrete surrounding the base of the sign was severely cracked and broken]; *Sehnert v New York City Tr. Auth.*, 95 AD3d 463, 464 [1st Dept 2012] [plaintiff was allegedly injured after tripping and falling over a piece of metal protruding from the sidewalk, contending that the piece of metal was a broken signpost that the City installed and removed]).

In conclusion, the Related Companies Defendants have demonstrated entitlement to dismissal of the action based on a "totality of the circumstances," including the "inordinate delay in serving the complaint and the lack of a reasonable excuse" (*Alvarado v New York City Hous. Auth.*, 192 AD2d 461, 462 [1st Dept 1993]). Moreover, plaintiff failed to provide adequate evidence or even detailed allegations supporting a meritorious claim.

Motions 002 and 003

Similarly, the other movants are also entitled to dismissal of the action.

In motion 002, Charles W. Kreines, Esq., counsel for the Time Warner Defendants, states that movants served and filed a notice of appearance and demand for a complaint on January 5, 2015 (Kreines affirmation, ¶ 3). After not receiving the complaint in a timely manner, he wrote to plaintiff's counsel on February 13, 2015, asking his intentions. Plaintiff's counsel did not serve the complaint, nor did he respond to this letter either by correspondence or a phone call (*id.*, ¶ 4). These assertions are uncontroverted.

In its cross motion to 002, Philip G. Menna, Esq., counsel for Weber Shandwick, states that his client filed and served its notice of appearance and demand for a complaint on March 13, 2015 (Menna affirmation, ¶ 3). Plaintiff's counsel did not serve the complaint, nor did he respond to this demand for a complaint either by correspondence or by phone (*id.*, ¶ 4). These assertions are uncontroverted.

In motion 003, Nicole M. Witteck, Esq., counsel for Crabtree, explains that service was made upon Crabtree by plaintiff on December 24, 2014 (Witteck affirmation, ¶ 4). Crabtree served and filed a notice of appearance and demand for a complaint on January 13, 2015 (*id.*, ¶ 5). On March 9, 2015, she sent a good faith letter to plaintiff, indicating that a complaint had not yet been filed, and demanded that one be provided within 10 days (*id.*, ¶ 6). On March 13, 2015, she and plaintiff's counsel discussed this matter telephonically and Ms. Witteck, in good faith, granted plaintiff an additional 25-day extension to file the complaint (*id.*, ¶ 7). Plaintiff's counsel did not file the complaint until May 5, 2015, 53 days after Crabtree granted a 25-day good faith extension (*id.*, ¶ 8). Plaintiff does not controvert these assertions.

Crabtree argues that plaintiff failed to demonstrate that she has a meritorious claim against Crabtree, and failed to serve a timely complaint, making arguments similar to those by the Related Companies Defendants in motion 001. Crabtree contends that plaintiff's opposition papers do not contain the kind of affidavit necessary to overcome the untimely service, and plaintiff's affidavit fails to provide additional support for why she believes Crabtree was involved with her alleged accident.

For the reasons discussed above, motions 002 and 003, and the cross motions thereto, warrant the same result as in motion 001. The circumstances involving the other moving defendants are similar to those of the Related Companies Defendants.

Plaintiff's affidavit of merit, submitted in opposition to motion 003 by Crabtree, is essentially the same as that submitted in motion 001. In her opposition to Crabtree's motion, plaintiff's affidavit contains additional assertions, but these are without consequence. She states that, on information and belief, the sign was placed in the Premises to promote consumer foot

traffic for the benefit of the various shops located at the Premises, including Crabtree (plaintiff aff, ¶ 9). On information and belief, the sign was placed there as part of a presentation sponsored by an unincorporated group known as "The Shops at Columbus Circle" with which Crabtree is associated and a member thereof (*id.*, ¶ 10). Plaintiff states further that she has shopped at the Crabtree store located at the Premises several times prior to the installation of the sign at issue. She states that she was caused to stop by pedestrian traffic outside the store when different types of signs were placed there and then noticed a display in Crabtree's store or a scent emanating therein in and went into Crabtree to purchase a product (*id.*, ¶ 11).

These additional allegations relate to the issue of attaching liability to Crabtree for any negligence involving the sign, but do not add any information as to the issue of negligence itself.

Accordingly, it is

ORDERED that the motion (001) by defendants The Related Companies, L.P. s/h/a The Related Companies LP, The Related Companies, Inc. s/h/a The Related Companies Inc., The Related Realty Group, Inc., Columbus Centre Residential LLC, Columbus Centre LLC s/h/a Columbus Centre, LLC, and 25PH Columbus Circle, LLC for dismissal of the action is granted and the action is dismissed with costs and disbursements to these defendants upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by plaintiff Norah Colton to extend her time to serve her e-filed complaint nunc pro tunc to the e-filing date of May 5, 2015, and to compel defendants to accept service of the same is denied; and it is further

ORDERED that the motion (002) by defendants Time Warner Inc. s/h/a Time Warner. Inc., Time Shareholders of Time Warner, Inc., Time Warner Companies Inc., Time Warner

Services Inc., and Time Warner Realty, Inc. for dismissal of the action is granted and the action is dismissed with costs and disbursements to these defendants upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by defendant Weber Shandwick Inc. n/k/a CMGRP, Inc. for dismissal of the action is granted and the action is dismissed with costs and disbursements to this defendant upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion by defendant Crabtree & Evelyn Ltd. to dismiss the action is granted and the action is dismissed with costs and disbursements to this defendant upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by plaintiff to extend her time to serve her e-filed verified complaint nunc pro tunc to the e-filing date of May 5, 2015, and to compel Crabtree to accept service of the same is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/2/16

ENTER:

J.S.C.

HON. GERALD LEBOVITS
J.S.C.