

Sultan v Connery

2005 NY Slip Op 30629(U)

October 5, 2005

Supreme Court, New York County

Docket Number: 113715/04

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

BURTON S. SULTAN, M.D., MARILYN SULTAN, and
MARLA B. SULTAN, M.D.,

Plaintiffs,

- v -

SEAN CONNERY; MICHELINE ROQUEBRUNE CONNERY;
STEPHANE COSMAN CONNERY; TANIA CONNERY;
ROBERT P. LYNN, JR.; ROBERT P. LYNN, JR.,
LLC; PIETRO CICOGNANI; ANN KALLA; CICOGNANI
KALLA ARCHITECTS, P.C.; JOSEPH A. DE
NARDIS; DE NARDIS ASSOCIATES, LLP; R.
DOUGLASS RICE; RICHARD F. MOON, JR.; R.D.
RICE CONSTRUCTION, INC.; TYRONE INTERIOR
CONTRACTING, INC., PAUL MOORE; KILLPORT
CONTRACTING, INC.; JET PAK ELECTRIC, INC.;
SAGE MECHANICAL, INC.; CSH SUPPLY CORP.;
MURRAY CONSTRUCTION CO., INC.; HALSTEAD
WELLES ASSOCIATES, INC., JEPOL
CONSTRUCTION, INC.; JOHN DOES I-X and JOHN
DOE CORPS. I-X,

Defendants.

Index No.: 113715/04

Motion Date: 06/02/05

Motion Seq. No.: 01

Motion Cal. No.: 129

The following papers, numbered 1 to 400 were read on this motion to dismiss.

Notice of Motion/Affirmation -Affidavits -Exhibits
Notice of Cross-Motions- Answering Affirmations-Affidavits - Exhibits
Notice of Cross-Motions-Answering Affirmations- Affidavits - Exhibits
Replying Affirmations-Affidavits- Exhibits

PAPERS NUMBERED

1-85

86-99; 100-110;

111-200; 201-

340-400

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants Sean Connery, Micheline Roquebrune Connery,
Stephane Cosman Connery, Tania Connery, Robert P. Lynn, Jr., and
Robert P. Lynn, Jr., LLC, move to dismiss the complaint in this

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Handwritten notes and stamps, including a large '100' and a signature.

action in which plaintiffs make claims sounding in negligence, trespass, nuisance and personal injury. Defendant Halstead Welles Associates, Inc. cross-moves on the same grounds to dismiss such complaint. Defendants R. Douglass Rice, Richard F. Moon, Jr., and R.D. Rice Construction Inc., also cross-move to dismiss for lack of personal jurisdiction. Defendants Pietro Cicognani, Ann Kalla and Cicognani Kalla Architects, P.C. likewise cross-move for the same relief.

The plaintiffs in this action Burton S. Sulton, M.D.; Marilyn R. Sultan and Marla B. Sultan, M.D. oppose defendants' motions and bring their own cross-motion to extend plaintiff's time to effectuate service on defendants.

Plaintiffs instituted this action by filing a Summons with Notice with the New York County Clerk's Office on September 24, 2004. Such Summons named all of the above-named defendants except for Jelpol Construction, Inc., John Does I-X and John Doe Corps. I-X. No Affidavits of Service were filed with the Court with respect to the September 24, 2004 Summons with Notice.

Under this same Index Number, on February 18, 2005 plaintiffs filed with the New York County Clerk's Office an Amended Summons with a Verified Complaint that added the additional defendants. Affidavits of Service that allege service of the Amended Summons with Verified Complaint on the defendants Sean Connery, R. Douglas Rice, Robert P. Lynn, Jr., Robert P.

Lynn, Jr., LLC, Pietro Cicognani, Micheline Roquebrune Connery, De Nardis Associates, Joseph De Nardis, Richard F. Moon, R.D. Rice Construction, Inc., Cicognani Kalla Architects, P.C., Ann Kalla, Halsted Welles Associates, Inc., between March 9 and March 18, 2005 were filed with the Clerk between March 14 and March 24, 2005. Plaintiff's opposition papers also append copies of Affidavits of Service that allege service of the Amended Summons with Verified Complaint on other of the defendants on April 1, 2005, May 9, 2005 and May 20, 2005.

A Verified Answer dated April 6, 2005 and Amended Verified Answer dated April 7, 2005 of Halstead Welles Associates, Inc., which asserts no personal jurisdiction affirmative defense, is appended to plaintiffs' cross-motion papers. A Verified Answer dated March 29, 2005, of defendants Pietro Cicognani, Ann Kalla and Cicognani Kalla Architects, P.C., which asserts a personal jurisdiction defense are appended to plaintiffs' papers. Finally, a Verified Answer dated April 25, 2005 of defendants Joseph A. Denardis and De Nardis Associates, LLP, which does not assert a lack of personal jurisdiction, is appended to plaintiff's opposition papers.

The court must grant: (1) the motion of defendants Sean Connery, Micheline Roquebrune Connery, Stephane Cosman Connery, Tania Connery, Robert P. Lynn, Jr., and Robert P. Lynn, Jr., LLC., (2) the cross-motion of defendant Halstead Welles

Associates, Inc., (3) the cross motion of defendant R. Douglass Rice, Richard F. Moon, Jr. and R.D. Rice Construction Inc. and (4) the cross motion of Pietro Cicognani, Anna Kalla and Cicognani Kalla Architects, P.C. and dismiss the complaint against each and every one of these defendants because plaintiffs failed to effectuate service of process in this action within the time period set forth under CPLR § 306-b.

CPLR § 306-b, which is part of the commencement-by-filing system applicable in Supreme Court actions, requires that the summons and complaint (or summons with notice) be served on the defendant within 120 days of commencement (that is, filing) of the action.

Plaintiffs misapprehend the law by arguing that the period for service should be measured from the date they filed the Complaint, or February 18, 2005, and that the time period for service expired 120 days after that date or on June 20, 2005. Plaintiffs' interpretation of CPLR § 306-b is incorrect since it is the filing of the Summons and not the filing of the Complaint that commences the action. Under plaintiffs' logic the filing of a Summons with Notice would theoretically extend the one hundred and twenty days for an indefinite period.

The moving defendants are correct that the applicable case law provides that the service must take place within 120 days of the filing of the original summons, here the Summons with Notice.

Since the original Summons with Notice was filed on September 24, 2004, the 120 day period for service of process, whether it be of the original Summons with Notice or the Amended Summons with Complaint, ended on January 24, 2005.

This case is distinguishable from Perez v Creations Associates, L.P. (11 AD3d 328 [1st Dept 2004]) and Spitzer v Dewar Foundation, Inc. (280 AD2d 385 [1st Dept 2001]) because in those cases, the plaintiffs each served the amended or supplemental pleadings within the 120 days after the filing of the original process, whereas here plaintiffs' time period had elapsed by forty-two days.

The court is unable to find "good cause shown" under Leader v Maroney, Ponzini & Spencer (276 AD2d 194 [2d Dept 2000]), a case commenced shortly after the change in the statute, effective January 1, 1998, as the ignorance of plaintiffs' counsel of the time limit no longer suffices. See Lipschitz v McCann, 13 AD3d 417 (2d Dept 2004).

The court shall grants plaintiffs' motion to extend their time to serve the non-moving defendants Tyrone Interior Contracting, Inc., Paul Moore, Killport Contracting, Inc., Jet Pak Electric, Inc., Sage Mechanical, Inc., CSH Supply Corp., Murray Construction Co., Inc., Jepol Construction, Inc., and such time shall be extended nunc pro tunc until June 20, 2005.

Accordingly, it is hereby

ORDERED and ADJUDGED that defendants' Sean Connery, Micheline Roquebrune Connery, Stephane Cosman Connery, Tania Connery, Robert P. Lynn, Jr., and Robert P. Lynn, Jr., LLC. motion to dismiss for lack of personal jurisdiction is GRANTED, and the complaint against such defendants is DISMISSED, without prejudice; and it is further,

ORDERED and ADJUDGED that defendants' Halstead Welles Associates, Inc., cross-motion to dismiss for lack of personal jurisdiction is GRANTED, the complaint against such defendant is DISMISSED, without prejudice; and it is further

ORDERED and ADJUDGED that the cross-motion of defendants' Pietro Cicognani, Ann Kalla and Cicognani Kalla Architects, P.C., to dismiss for lack of personal jurisdiction is GRANTED, and the complaint against such defendants is DISMISSED, without prejudice; and it is further,

ORDERED and ADJUDGED that defendants' R. Douglass Rice, Richard F. Mood, Jr. And R.D. Rice Construction, Inc. cross-motion to dismiss for lack of personal jurisdiction is GRANTED, and the complaint against such defendants is DISMISSED, without prejudice; and is further

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

ORDERED that plaintiffs' cross-motion to extend the time to serve process against defendants Tyrone Interior Contracting,

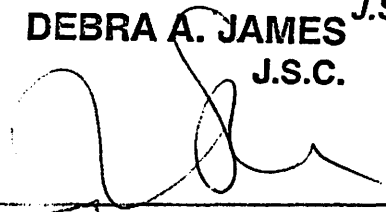
Inc., Paul Moore, Killport Contracting, Inc., Jet Pak Electric, Inc., Sage Mechanical, Inc., CSH Supply Corp., Murray Construction Co., Inc., Jepol Construction, Inc., until June 20, 2005, nunc pro tunc is GRANTED; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on Friday, November 18, 2005, 11:00 AM in IAS Part 59, 111 Centre Street, Room 1254.


This is the decision and order of the court.

Dated: October 5, 2005

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.
J.S.C.


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