Carducci v Russell
2013 NY Slip Op 33740(U)
March 19, 2013
Supreme Court, Westchester County
Docket Number: 53029/11
Judge: Linda S. Jamieson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

FILED: WESTCHESTER COUNTY CLERK 03/27/2013 INDEX NO. 53029/2011
NYSCEF DOC. NO. 39 RECEIVED NYSCEF: 03/27/2013

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec __x__ Seq. No.__1__ Type __dismiss____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

----------X
ANTONIO CARDUCCI,

Plaintiff,

-against-

Index No. 53029/11

DECISION AND ORDER

ROBERT RUSSELL, LISA RUSSELL, GARY BOTCHMAN, ASHER FENSTERHEIM, Esq. et. al,

Defendants.

----------X

The following papers numbered 1 to 3 were read on this motion:

Paper	Number
Notice of Motion, Affidavit, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition	2
Reply Affidavit	3

The Russell defendants bring this motion to dismiss the action as to them. Their grounds are lack of personal jurisdiction, failure to serve a complaint, and documentary evidence.

This case arises out of a real estate transaction in 2005. According to the Russells, the parties resolved all of their disputes in 2006 and 2008, and executed releases. Plaintiff counters that the releases were very limited in scope, and do not cover the instant action. Having reviewed the procedural history

of this case, the Court finds that it need not reach the issue of the releases.

In June 2011, plaintiff, then pro se, filed a bare Summons with Notice. He opted out of the e-filing system. Plaintiff served the Summons on the Russells on October 13, 2011. While the bare Summons was jurisdictionally inadequate, *see* SIEGEL-NYPRAC § 60 ("The use of a bare summons is now a jurisdictional defect and results in a dismissal for want of personal jurisdiction."), the Russells instead served on plaintiff a Notice of Appearance. (The service of the Notice of Appearance waives the jurisdictional defect of the bare summons.) The Russells served it by mail on November 1, 2011. Thereafter, they e-filed the Notice of Appearance on November 2, 2011.

Shortly thereafter, plaintiff retained counsel. Counsel for plaintiff e-filed the Affidavits of Service on November 8, 2011. This was after the 20-day time limit. This tardy filing is not enough for the Court to dismiss the action, however. *See* CPLR 2001 et. seq.

What is significant, though, is plaintiff's failure to serve the complaint within 20 days of the Russells' service of the Notice of Appearance, as is required by CPLR § 3012(b). That section states, in relevant part, that "the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if

service of the complaint is not made as provided in this subdivision."

This is exactly the motion that the Russells have made. Here, the Notice of Appearance was served on November 1, 2011, and e-filed on November 2, 2011. Plaintiff did not serve the complaint until November 14, 2012 - more than a year after the Russells had served their Notice of Appearance. This is grounds for dismissing the action. CPLR § 3012(b).

In order to withstand the Russells' motion "plaintiff was required to demonstrate both a meritorious cause of action and a reasonable excuse for the delay." *Abele Tractor & Equipment Co., Inc. v. RJ Valente, Inc.*, 94 A.D.3d 1270, 942 N.Y.S.2d 668 (3d Dept. 2012). *See also Moray v. Koven & Krause, Esqs.*, 15 N.Y.3d 384, 912 N.Y.S.2d 547 (2010). Plaintiff here did not demonstrate either a reasonable excuse for the delay or a meritorious cause of action. First, to show that plaintiff has a meritorious cause of action, plaintiff must submit an affidavit of merit. *Id.* at 388, 912 N.Y.S.2d at 549. Here, plaintiff did not submit any affidavit of merit. This is fatal. As the Court of Appeals held in *Stolowitz v. Mount Sinai Hosp.*, 60 N.Y.2d 685, 468 N.Y.S.2d 460 (1983), where no affidavit of merits is submitted, it is error to fail to grant a motion to dismiss.

Second, plaintiff is incorrect about certain assertions he makes about the timeliness of the service of the complaint.

Plaintiff claims that the Russells were required to serve the Notice of Appearance "in hard copy on Plaintiff pro se and file proof of service electronically." Plaintiff's assertions are correct - and this is exactly what the Russells did, as set forth above. The Court cannot fathom why plaintiff claims otherwise.

The Court also cannot fathom plaintiff's argument that once he had retained counsel, the Russells were required by 22 NYCRR § 202.5-b(f)(2)(ii) to serve a copy of their previously-served and filed Notice of Appearance on counsel "in order for service to be deemed effective." This is not what 22 NYCRR § 202.5-b(f)(2)(ii) says at all - and for good reason, since it was incumbent upon new counsel to review the previous filings, and not upon the parties to catch up their adversary's new counsel.

Finally, plaintiff's statement that he did not discover that the Russells had appeared in the action until recently, when he began to prepare a motion for a default judgment, is puzzling since the e-filing system plainly lists, as document #2 in the action, the Russells' Notice of Appearance. Items #3 through 8 were all filed by counsel for plaintiff, who could not have missed the Notice of Appearance listed just above.

As the above recitation makes clear, the Court must grant the Russells' motion to dismiss the complaint as to them. The remaining parties are directed to appear for a Preliminary

[* 5]

Conference in the Preliminary Conference Part on May 6, 2013 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
March 14, 2013

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Brian R. Hoch, Esq.
Attorney for Plaintiff
2 William St., Suite 406
White Plains, NY 10601

Peter J. Constantine, Esq.
Attorney for the Russells
656 Yonkers Ave.
Yonkers, NY 10704

Gary Botchman
223 Highridge Ct.
Peekskill, NY 10566

Asher Fensterheim Defendants
660 White Plains Rd., Suite 520
Tarrytown, NY 10591