SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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COLEEN DOWELL,

Plaintiff,

Index No. 158752/12

-against-

DECISION/ORDER

CITY OF NEW YORK, DETECTIVE DOUGLAS STRONG, 3290 BWY. REST. INC., PARILLA STEAK HOUSE, INC., JOSE HERNANDEZ, and DETECTIVE JOHN DOES # 1-3,

Defendants.

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HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS ANNEXED.....	1,2..(Exs. A-F)..
NOTICE OF CROSS MOTION, AFFS. AND EXHIBITS ANNEXED.....	3,4..(Exs. A-B)..
REPLY MEMORANDUM OF LAW AND EXHIBIT ANNEXED.....	....5.. (Ex. "G")...
REPLYING AFFIDAVITS.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff Coleen Dowell moves, pursuant to CPLR 3215, for a default judgment against defendant Detective Douglas Strong, severing the action against the other defendants, scheduling a date for an inquest on damages against Strong, and for such other relief as this Court deems just and proper. Strong opposes the motion and cross-moves for an order denying plaintiff's motion for a default judgment and granting dismissal of plaintiff's action against him pursuant to CPLR 308, along with such other relief as this Court deems just and proper. Upon review of the parties' papers and

consideration of the applicable statutes and case law, this Court **denies** plaintiff's motion and **grants** the cross motion.

Factual And Procedural Background:

This action arises from an incident on February 16 and 17, 2012 in which plaintiff Coleen Dowell was allegedly sexually assaulted by Strong, then a Detective in the New York City Police Department. On December 10, 2012, plaintiff commenced an action ("the 2012 action") against the City of New York ("the City"), Strong, "3920 Bwy. Rest. Inc." ("3920 Broadway")[1], "Parilla Steak House, Inc." ("Parilla"), Jose Hernandez, and Detective John Does # 1-3 ("the John Does") by filing a summons and verified complaint with this Court under Index Number 158752/12 ("the initial complaint"). Ex. C.[2] In the initial complaint, plaintiff claimed that, as of February 16, 2012, she was employed as a waitress at Parilla, which was owned by defendant 3920 Broadway and managed and partially owned by defendant Hernandez. Ex. C. At approximately 11 p.m. that evening, Hernandez asked plaintiff to join Strong and defendant John Does # 1 -3, who were eating and drinking alcohol at Parilla in celebration of Strong's birthday. At approximately midnight on February 17, Hernandez led plaintiff to a room in the back of Parilla in which there was a bed. Strong followed plaintiff and Hernandez into the room and, after Hernandez left, Strong allegedly committed a sexual assault.

Plaintiff did not serve Strong with the initial complaint in the 2012 action, which set forth

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[1]Although the caption of the notice of motion lists "3290 Bwy. Rest. Inc." as a defendant, the complaint in the 2012 action names "3920 Bwy. Rest. Inc."

[2]Unless otherwise noted, all references are to plaintiff's motion for a default judgment against Strong.

causes of action sounding in negligence, assault, battery, intentional infliction of emotional distress, false imprisonment, and negligent hiring, training and supervision. Ex. C.

On March 22, 2013, plaintiff filed a supplemental summons and amended complaint in the 2012 action against the City, Strong, "Parilla Grill Rest. Inc.", Hernandez, and the John Does.[3] The supplemental summons and amended complaint were personally served on Strong pursuant to CPLR 308 on March 22, 2013. Ex. E. Neither the motion papers nor the court file indicate that Strong answered the amended complaint.

On August 16, 2013, plaintiff commenced a second action against the defendants named in the amended complaint under Index Number 157512/13 ("the 2013 action"). Ex. A to Strong's Cross Mot. In the complaint in the 2013 action, plaintiff represented, inter alia, that the 2012 action "was dismissed (as against [d]efendant Strong) by operation of law on or about April 9, 2013 for failure to file proof of service on [d]efendant Strong." *Id.*, at par. 29.

On October 25, 2013, plaintiff moved to extend her time to serve the initial complaint in the 2012 action. The motion was resolved by a so-ordered stipulation dated December 10, 2013. Ex. F. The stipulation provided, inter alia, that plaintiff had 60 days to serve the original summons and complaint on Hernandez, 3920 Broadway, and Parilla, and that plaintiff was "instructed" by this Court to move for a default judgment against Strong in the 2012 action. Ex. F.

In or about October, 2013, the City moved to dismiss plaintiff's 2013 action. Hernandez, 3290 Broadway and Parilla moved separately for dismissal of the 2013 action. Plaintiff cross-moved to consolidate the 2012 and 2013 actions. In an affirmation in opposition to the motions to dismiss

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[3]The amended complaint was essentially identical to the initial complaint but for the change of the name of the restaurant from "Parilla Steak House, Inc." to "Parilla Grill Rest. Inc."

and in support of the motion for consolidation, plaintiff admitted that she filed the 2013 action "after realizing that she had failed to file her affidavit of service on defendant Strong within 120 days of filing." Ex. B to Strong's Cross-Mot., at par. 8. She also admitted that she failed to seek leave before amending the complaint in the 2012 action and that she never served Strong with the initial complaint in the 2012 action. *Id.*, at par. 9.

Plaintiff now moves for a default judgment against Strong. In support of the motion, plaintiff submits an affidavit of merit setting forth the facts giving rise to her claim, a newspaper article regarding the alleged incident, the initial summons and verified complaint, the supplemental summons and amended complaint and affidavit of service relating to the same, and the so-ordered stipulation of December 10, 2012 resolving plaintiff's motion to extend her time to serve the initial summons and verified complaint.

Strong opposes the motion and cross-moves to dismiss the initial complaint. In support of the cross motion, Strong submits the summons and complaint in plaintiff's 2013 action against the defendants and plaintiff's affirmation in opposition to defendants' motions to dismiss the 2013 action and in support of plaintiff's cross motion seeking to consolidate the 2012 and 2013 actions.

Plaintiff also submits a reply memorandum of law containing case law which, she argues, supports her entitlement to an extension of time for her to serve the initial complaint in the 2012 action on Strong.

Positions of the Parties:

Plaintiff argues that she is entitled to a default judgment against Strong because he failed to answer the amended complaint in the 2012 action.

In opposition to plaintiff's motion and in support of his cross motion, Strong argues, in essence, that a default cannot be entered against him in the 2012 action, and that the action must be dismissed as against him, because he was not properly served with process.

In her reply memorandum of law, plaintiff requests that, if this Court does not enter a default judgment against Strong, then it should, in the interests of justice, allow her additional time to serve Strong with the initial complaint in the 2012 action. Plaintiff cites case law which, she asserts, supports her argument that good cause exists for such an extension of time.

Conclusions of Law:

Plaintiff's Motion for a Default Judgment

CPLR 3215(f) provides, in pertinent part, that "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint." Here, it is undisputed that Strong was never served with the initial complaint in the 2012 action. Therefore, plaintiff cannot file proof of service relating to the initial complaint.

Although plaintiff filed proof of service of the amended complaint in the 2012 action on Strong (Ex. E), service of this pleading was invalid. "A party may amend his pleading once without leave of court within 20 days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." CPLR 3025(a). Since the service of the amended complaint did not fall within any of the time periods set forth in CPLR 3025(a), plaintiff had to seek the leave of this Court, pursuant to CPLR 3025(b), in order to serve the same. Since plaintiff failed to obtain such leave from this court, the service of the amended

complaint in the 2012 action was a nullity[4]. *See Khedouri v Equinox*, 73 AD3d 532 (1st Dept 2010); *Nikolic v Federation Employment and Guidance Service, Inc.*, 18 AD3d 522 (2d Dept 2005); *Walden v Nowinski*, 63 AD2d 586 (1st Dept 1978). Since the amended complaint in the 2012 action was a nullity, the affidavit of service relating to that document (Ex. E) fails to satisfy the requirement of CPLR 3215(f) that proper proof of service of the summons and complaint be filed with the court. There can be no entry of a default judgment without proof of proper service of process. *See Pearson v 1296 Pacific Street Assocs., Inc.*, 67 AD3d 659 (2d Dept 2009).

Plaintiff's alternative prayer for relief, seeking an extension of time to serve the initial summons and complaint in the 2012 action on Strong in the interests of justice, raised for the first time in her reply memorandum of law, must be denied as well. It is well settled that a movant cannot introduce new grounds for relief in its reply papers. *See Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21-22 (1st Dept 2002).

It is also well settled that a notice of motion must specify the relief demanded. *See* CPLR 2214(a). The Appellate Division, First Department, has held that, where specific relief is not demanded in the notice of motion or the "wherefore" clause of the motion, denial of that relief is proper. *See Arriaga v Michael Laub Co.*, 233 AD2d 244 (1st Dept 1996), *compare HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 774-775 (2d Dept 1991). In her notice of motion and

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[4]This Court notes that, in *Moran v Hurst*, 32 AD3d 909 (2d Dept 2006), the Appellate Division, Second Department held that, by retaining an untimely amended pleading without objection, defendants waived their right to dispute its propriety. However, that case is distinguishable since the defendants therein were served with, and answered, the initial complaint, and served an answer to the amended complaint in which they did not assert the affirmative defense of lack of personal jurisdiction. Here, no such waiver occurred. On the contrary, Strong cross-moved to dismiss on the ground that no jurisdiction existed because he was not properly served with process.

"wherefore" clause, plaintiff does not request additional time to serve Strong with the initial summons and verified complaint.

Although the plaintiff's notice of motion contains a general relief clause requesting that "such other and further relief as the Court deems just and proper" be granted, "whether to grant such relief is discretionary" *Willette v Willette*, 53 AD3d 753, 755 (3d Dept 2008), *citing Van Slyke v Hyatt*, 46 N.Y. 259, 264 (1871); *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, *supra* at 774-775. This Court has the discretion "to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced." *Tirado v Miller*, 75 AD3d 153, 158 (2d Dept 2010).

For the following reasons, this Court, in its discretion, denies plaintiff's request for an extension of time to serve Strong with its initial complaint. First, since plaintiff did not seek this relief in her notice of motion or "wherefore" clause, Strong had no opportunity to oppose her argument that she is entitled to such an extension of time. *See Clair v Fitzgerald*, 63 AD3d 979, 980 (2d Dept 2009). Therefore, Strong would be prejudiced if such relief were granted. *See Tirado, supra* at 158.

Additionally, the default judgment demanded in the notice of motion is "too dramatically unlike" the extension of time sought in plaintiff's reply papers to warrant consideration of the latter prayer for relief. A plaintiff may obtain a default judgment if he or she can establish that a defendant properly served with process failed to answer or otherwise appear. A plaintiff may obtain an extension of time to serve a complaint upon a showing of "good cause" or "in the interest of justice." CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 (2001). These two burdens are completely disparate. Thus, plaintiff's request for an extension of time to serve the initial complaint

in the 2012 action is denied.

Strong's Cross Motion to Dismiss

CPLR 306-b provides, in pertinent part, that service of a summons and complaint "shall be made" within 120 days after the filing of the summons and complaint with the court. If, as here, service of process is not made within the 120-day period, the action is subject to dismissal without prejudice upon motion by the defendant. *See* CPLR 306-b; *Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345 (2d Dept 2006). Here, since there was no service of the initial complaint in the 2012 action, and the service of the amended complaint was a nullity, Strong's cross motion is granted and the complaint is dismissed without prejudice.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for a default judgment against defendant Detective Douglas Strong is denied in all respects; and it is further,

ORDERED that defendant Detective Douglas Strong's cross motion to dismiss the complaint is granted, without prejudice, pursuant to CPLR 306-b; and it is further,

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

ORDERED that this constitutes the decision and order of the Court.

DATED: May 2, 2014

MAY 02 2014

ENTER:

Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT