Dowell v City of New York
2014 NY Slip Op 33286(U)
December 12, 2014
Supreme Court, New York County
Docket Number: 158752/12
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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COLEEN DOWELL,

Plaintiff,

-against-

DECISION/ORDER
Index No. 158752/12
Seq. No. 003

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-P)..
ANSWERING AFFIDAVITS........	....
REPLYING AFFIDAVITS........	....

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

Plaintiff moves, pursuant to CPLR 2221(d), CPLR 2221(e) and CPLR 5015(a), for leave to reargue that portion of this Court's decision and order dated May 2, 2014 which granted defendant Detective Douglas Strong's cross-motion to dismiss the complaint against him (without prejudice) and, upon reargument, granting plaintiff an extension of time to serve her initial summons and complaint upon Det. Strong; or in the alternative, granting leave to reargue and/or renew so much of this Court's decision and order which granted Det. Strong's cross-motion and, upon reargument or renewal, vacating this Court's decision of May 2, 2014, and allowing plaintiff to re-file a motion

[* 2]

pursuant to CPLR 306-b, or granting plaintiff an extension of time to serve her initial summons and complaint upon Det. Strong or granting modification and/or vacatur of so much of this Court's decision and order that is inconsistent with a so-ordered stipulation dated December 10, 2013 which, inter alia, permitted plaintiff to file a motion for a default judgement against Det. Strong. No party has opposed this motion.

Factual And Procedural Background:

This action arises from an incident on February 16 and 17, 2012 in which plaintiff Colleen 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"), Det. 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 Det. Strong's birthday. At approximately midnight on February 17,

[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 the exhibits annexed to plaintiff's motion for a default judgment against Strong, which is Exhibit D hereto.

Hernandez led plaintiff to a room in the back of Parilla in which there was a bed. Det. Strong followed plaintiff and Hernandez into the room and, after Hernandez left, Det. Strong allegedly committed a sexual assault.

Plaintiff did not serve Det. Strong with the initial complaint in the 2012 action, which set forth 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, Det. Strong, "Parilla Grill Rest. Inc.", Hernandez, and the John Does.[3] The supplemental summons and amended complaint were personally served on Det. Strong pursuant to CPLR 308 on March 22, 2013. Ex. E. Neither the motion papers nor the court file indicate that Det. 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 Det. Strong's Cross Mot. (Ex. K hereto). In the complaint in the 2013 action, plaintiff represented, inter alia, that the 2012 action "was dismissed (as against [Det.] Strong) by operation of law on or about April 9, 2013 for failure to file proof of service on [him]." *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

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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."

Court to move for a default judgment against Strong in the 2012 action. *Id.* This Court notes, however, that it questioned why plaintiff did not move for a default judgment against Strong only when plaintiff's counsel asserted that valid service of the summons and complaint had been made on Det. Strong. It later became clear, upon a review of all the documents and papers in this matter, that counsel's assertion had no basis in fact.

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 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 [Det.] Strong within 120 days of filing." Ex. B to Det. Strong's Cross-Mot. (annexed hereto as Ex. N), 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 Det. Strong with the initial complaint in the 2012 action. *Id.*, at par. 9. By orders dated January 15, 2014, this Court (Chan, J.) denied plaintiff's motion for consolidation and granted both motions to dismiss, with costs assessed against plaintiff's attorney.

This Court's decision and order dated May 2, 2014 denied plaintiff's motion for default and granted defendant Det. Strong's cross-motion to dismiss pursuant to CPLR 308-b. Ex. A hereto. This Court reasoned that there was no service of the initial complaint in the 2012 action on Det. Strong. In so holding, this Court noted that, pursuant to CPLR 3215(f), a default judgment can only be granted where the applicant can show proof of service and it was undisputed that Det. Strong was never served with the initial summons and complaint in the 2012 action. This Court further found that, pursuant to CPLR 3025(a), service of the amended complaint was a nullity because "[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." Here, the service of the amended complaint failed to fall within any of the specified time periods set forth in CPLR 3025(a). Thus, it is clear that the only pleading in the 2012 action which was properly served on Det. Strong was the amended complaint, which was a nullity. This Court also denied plaintiff's request for an extension of time to serve the initial summons and complaint on Det. Strong because the request for this relief was improperly raised for the first time in her reply memorandum. *See Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21-22 (1st Dept 2002).

Position of the Plaintiff:

Plaintiff asserts that this Court overlooked or misapprehended controlling case law when it 1) decided not to consider her informal request for an extension of time to serve her initial summons and complaint pursuant to CPLR 306-b; and 2) granted Det. Strong's cross motion to dismiss the complaint. Plaintiff also seeks renewal of Det. Strong's cross motion based on the so-ordered stipulation dated December 10, 2013, which reflects that this Court directed plaintiff to move for a default judgment.

Conclusions of Law:

Reargument

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the proper motion."

Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). In N.Y. Prac, § 254, at 449 (5th ed), Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

That branch of plaintiff's motion seeking reargument is denied. This Court did not overlook or misapprehend any matter of law or fact in dismissing the complaint against Det. Strong. It is undisputed that Det. Strong was not served with the initial summons and complaint in the 2012 action. Further, service on Det. Strong of the amended summons and complaint in the 2012 action was a nullity since the complaint was not properly amended.

Although plaintiff asserts that this Court should have allowed her additional time, in the interest of justice, to serve Det. Strong pursuant to CPLR 306-b, this Court disagrees. Whether to grant additional time pursuant to CPLR 306-b is a matter of discretion. *See generally McKenny v Beth Abraham Family of Health Servs.*, 99 AD3d 630 (1st Dept 2012). The "interest of justice" standard allows a court to consider reasonable diligence in attempting service as "one of many relevant factors." *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). The standard "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." *Id.*, at 105. Aside from diligence in attempting to serve process, relevant factors may include the "expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant." *Id.*, at 105-106.

Here, plaintiff has submitted no proof regarding the diligence, if any, of her efforts to serve

Det. Strong with the initial pleadings in the 2012 action.[4] Nor does plaintiff explain why Det. Strong was not served with process until he received the amended complaint in the 2012 action, which was a nullity. Additionally, the five-year Statute of Limitations against Det. Strong will not expire until 2017 so plaintiff has ample time to effectuate proper service without judicial intervention. *See* CPLR 213-c. Therefore, reargument is not warranted on the ground that this Court refused to allow plaintiff an extension of time, in the interest of justice, to serve Det. Strong.

Renewal

That branch of plaintiff's motion seeking renewal is denied as well.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (e)(3).

In support of her motion to renew, plaintiff relies on the so-ordered stipulation dated December 10, 2013. She maintains, in essence, that the stipulation reflects that this Court directed her to move for a default against Det. Strong because service of process on him was proper. However, as noted above, although counsel represented to this Court that proper service had been

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[4]Although plaintiff relies on *Slate v Schiavone Constr. Co.*, 10 AD3d 1 (1st Dept 2004) for the proposition that this Court should grant him an extension of time in the interest of justice, that case is distinguishable since plaintiff therein made an attempt to serve the defendant within the statutorily prescribed 120-day period. *Id.*, at 4. This Court further notes that *Slate* was reversed, and the complaint therein dismissed, based on the Court of Appeals' finding of "extreme lack of diligence shown by plaintiff" which delayed defendant's notice of the action until more than a year and a half after the running of the statute of limitations. *Slate v Schiavone Constr. Co.*, 4 NY3d 816, 817 (2005).

effectuated on Det. Strong, plaintiff's motion for a default judgment did not contain the requisite proof of such service. Thus, plaintiff's motion for a default was properly denied and Det. Strong's cross motion to dismiss properly granted.

In any event, plaintiff's renewal motion must be denied given her failure to set forth any reason why the so-ordered stipulation upon which she now relies was not submitted in connection with the underlying motions. *See* CPLR 2221 (e)(3).

Therefore, for the reasons set forth above, it is hereby:

ORDERED that plaintiff's motion is denied in all respects; and it is further,

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

Dated: December 12, 2014

DEC 1 2 2014

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED

JUSTICE OF SUPREME COURT