

Yellen v Berg

2018 NY Slip Op 32512(U)

October 1, 2018

Supreme Court, New York County

Docket Number: 155123/17

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X
RICHARD L. YELLEN and RICHARD L. YELLEN
& ASSOCIATES, LLP,

Plaintiffs,

INDEX NO. 155123/17

MOTION DATE

- v -

MOTION SEQ. NO. 1

JAY H. BERG & CORNICELLO, TENDLER
& BAUMEL-CORNICELLO, LLP,

Defendants.

DECISION AND ORDER

-----X
Defendants move pursuant to CPLR 3211(a)(8) and (b) for an order dismissing the action. Plaintiffs oppose and, by notice of cross motion, move pursuant to CPLR 306-b for an order extending their time to serve the summons with notice on defendants. Defendants oppose the cross motion.

On June 5, 2017, plaintiffs filed a summons with notice. (NYSCEF 1). On June 8, 2017, defendants demanded a complaint pursuant to CPLR 3012(b) through the court's e-filing system and by sending it by first-class mail. (NYSCEF 2). On June 28, 2017, plaintiffs e-filed a complaint. (NYSCEF 3).

Pursuant to CPLR 306-b, service of a summons with notice must be made within 120 days after the action is commenced. Pursuant to CPLR 3012(b), if a complaint is not served with a summons, the defendant may serve a written demand for one and must do so within the time provided in CPLR 320(a) for an appearance. Service of the complaint must be made within 20

days after service of the demand. A defendant appears by serving an answer or a notice of appearance or by making a motion which has the effect of extending the time to answer, and such appearance must be made within 20 days after service of the pleadings. (CPLR 320[a]).

Plaintiffs concede that they improperly served the summons with notice on defendants by electronically filing it with the court. They argue, however, that defendants' service of a demand for a complaint before they were served with the summons with notice and before the expiration of plaintiffs' time to serve it is also improper, and that defendants appeared in the action and consented to e-filing by e-filing their demand for a complaint. Moreover, after the complaint was served on them by e-filing within the required 20-day period, defendants retained it without objection, and that, therefore, defendants waived any defect in plaintiffs' failure to serve the summons with notice on them. (NYSCEF 20).

Defendants deny having consented to the e-filing of the complaint and allege without dispute that neither the summons with notice nor the complaint were ever personally served on them. (NYSCEF 27).

A party's service of a demand for a complaint before it is served with the summons with notice is premature and a nullity, and thus does not affect the plaintiff's time to serve a complaint pursuant to CPLR 3012(b). (*Wimbledon Fin. Master Fund, Ltd. v Weston Cap. Mgt. LLC*, 150 AD3d 427 [1st Dept 2017]; *Ryan v High Rock Dev., LLC*, 124 AD3d 751 [2d Dept 2015]).

While plaintiffs timely served their complaint despite defendants' premature service of a demand for it, they never served defendants with the summons with notice within 120 days of its e-filing. Rather, they served defendants with their complaint, and there appears to be no case law, and none cited by the parties, that addresses the consequences of filing a summons with notice, of serving a demand for the complaint before service of the summons with notice, and the

service of a complaint before or instead of serving a summons with notice. No authority exists, therefore, for defendants' argument that plaintiffs' failure to serve the summons with notice in these circumstances is fatal to this action.

Moreover, plaintiffs e-filed the complaint on June 28, 2017, and no further action was taken by either side until defendants filed their motion to dismiss the complaint on April 6, 2018, whereby defendants retained the complaint without objection for approximately 10 months. Having done so, they waive any objection to its alleged improper service. (*See Haygood v Rochester Genl. Hosp.*, 249 AD2d 943 [4th Dept 1998] [although plaintiff did not serve complaint within 20 days of defendant's demand for it, he mailed copy of it to defendant's attorney who retained it for one month before moving to dismiss, thereby waiving objection to service]; *see also Chin v Yard*, 40 AD3d 590 [2d Dept 2007] [defendant waived late service of complaint by accepting and retaining it, without objection, before moving to dismiss complaint approximately eight months later]; *Chiulli v Coyne*, 210 AD2d 450 [2d Dept 1994] [although plaintiff's service of amended complaint without leave of court was nullity, defendants waived objection thereto by failing to reject complaint]).

In any event, by e-filing their demand for a complaint, defendants are reasonably deemed to have consented to e-filing, and thus service on them of the complaint by e-filing was not only proper but required by the court's rules on e-filing as set forth in 22 NYCRR 202.5-bb. (*See Batra v Elec. Land Svces., Inc.*, 41 Misc 3d 1211[A], 2013 NY Slip Op 51544[U] [Sup Ct, Westchester County 2013], *affd on other grounds* 136 AD3d 723 [2d Dept 2016] [when defendants appeared in case by e-filing notice of appearance or demand for complaint in response to summons with notice, their attorneys thus consented to e-filing, permitting service of complaint to be made on them by e-filing]). Similarly, in *Obstfeld v Thermo Niton Analyzers*

LLC, the defendants e-filed a demand for a complaint and the plaintiffs then served the complaint on them by e-filing. Defendants moved to dismiss, arguing that as they had not yet appeared in the action, service on them of the complaint by e-filing only was improper. The court denied the motion to dismiss, finding that while defendants' e-filing of a demand for a complaint did not constitute an appearance in the action, the defendants consented to e-filing and therefore, pursuant to 22 NYCRR 202.5-bb(2), service of papers was required to be made on defendants by electronic filing. (27 Misc 3d 1209[A], 2010 NY Slip Op 50633[U] [Sup Ct, Kings County 2010]).

The complaint is thus deemed to have been served on defendants by the e-filing of the complaint; no further service is required. In light of this result, I do not address defendants' arguments as to the merit of the complaint.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied; it is further

ORDERED, that plaintiffs' cross motion for an extension of time to serve the complaint on defendants is denied as academic; it is further

ORDERED, that defendants file and serve an answer to the complaint within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on December 9, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

10/1/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE


BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE