SHORT FORM ORDER **INDEX NO.: 611937/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PUBLISH

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 11/16/18
Mot Seq #: 004 - MG
Mot Seq #: 005 - Mot D

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ALAN WUNDERLICH,

Plaintiff,

-against-

LIBERTY MEADOWS, LLC., DEMETRIUS TSUNIS & ENRICO SCARDS,

Defendants,

and

THE HOWARD O. WUNDERLICH REVOCABLE LIVING TRUST, THE ADELINE E. WUNDERLICH REVOCABLE LIVING TRUST & ADELINE E. WUNDERLICH,

Nominal Defendants.

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Concerning the parties' motions, the Court considered the following:

1. Notice of Motion & Affirmation in Support dated July 1, 2017;
2. Affirmation in Opposition dated July 19, 2017;
3. Notice of Motion & Affirmation in Support dated October 18, 2017 and supporting papers;
4. Affirmation in Opposition dated November 6, 2017 and supporting papers; it is

ORDERED that the parties pending applications are consolidated in the interest of judicial economy for the purposes of this decision and order; and it is further

ORDERED that plaintiff's motion to extend time to serve nominal defendants with the pleadings pursuant to CPLR 306-b, having been duly considered, is hereby **granted** as follows; and it is further

ORDERED that plaintiffs motion to strike defendants' pleadings for failure to comply with prior disclosure orders and requests, upon due consideration, is hereby **denied to the extent**

that following the service and appearance of the nominal defendants in this action, and their active participation in the same and defense of the action, all parties are hereby directed to identify witnesses to be produced for examination before trial, and to further exchange availability of said witnesses **on or before November 9, 2018;** and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry by overnight mail, return receipt requested on counsel for all parties **no later than June 15, 2018.**

Familiarity with the relevant facts and circumstances between the parties and governing plaintiff's dispute against defendants is assumed, as this Court has rendered several decisions concerning this litigation to date.

Succinctly stated, the nature of plaintiff's action seeking specific performance against defendants Liberty Meadows LLC, Tsunis & Scarda arises from a failed real estate transaction concerning the sale and transfer of a certain condominium unit in a community located in Port Jefferson, New York constructed by defendants.

Presently the parties each have made their own separate application governing the conduct of discovery in this matter.

I. Extend Time to Serve Pleadings on Non-Appearing Parties

Plaintiff has moved seeking an extension of time to serve nominal defendants, his mother, and his parents revocable living trusts, with a copy of the pleadings in this action. Plaintiff bases his request on the grounds that prior determinations of this Court have held that nominal defendants were signatories to the purchase and sale agreements whereby defendants agreed to convey, transfer and confer title to the condo at issue. Plaintiff has taken issue with this contention and has appealed this matter to the Appellate Division, Second Department. That notwithstanding however, moving under CPLR 306-b, plaintiff seeks a 90-day extension of time to serve nominal defendants who reside in Florida, and gain jurisdiction of this Court over them in New York.

Defendants have opposed this application in part. Defendants argue that a 90-day extension of time is too long and unwarranted on these facts since defendants have maintained since the commencement of this action that the nominal defendants were necessary parties who should have appeared *ab initio*.

"The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" and New York's appellate courts have clearly cautioned that the absence of proper service of process, renders a resulting default judgment was a nullity (***Pearson v. 1296 Pac. St. Associates, Inc.***, 67 AD3d 659, 660, 886 NYS2d 898 [2d Dept. 2009]). Stated another way "[i]t is 'axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void' " and thus on an application falling under CPLR 5015(a)(4), a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (***Hossain v. Fab Cab Corp.***, 57 AD3d 484, 485, 868 NYS2d 746, 746 [2d Dept. 2008][internal citations omitted]). Where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived (***Cadlerock Joint***

Venture, L.P. v. Kierstedt, 119 AD3d 627, 628, 990 NYS2d 522, 524 [2d Dept. 2014]).

CPLR 306–b permits the courts to extend a plaintiff's time to serve a summons and complaint upon good cause shown or in the interest of justice. "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (***Leader v. Maroney, Ponzini & Spencer***, 97 NY2d 95, 105, 736 NYS2d 291 [2001]; ***Robles v. Mirzakhmedov***, 34 AD3d 554, 554–55, 824 NYS2d 406, 407 [2d Dept. 2006]).

New York trial courts are thus instructed that when considering whether to grant an extension of time to effect service beyond the 120–day statutory period in the interest of justice, the court may consider the plaintiff's diligence, or lack thereof, along with other relevant factors, including the expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiff's request for the extension of time, and any prejudice to the defendant, noting that this determination of whether to grant the extension in the interest of justice is generally within the discretion of the motion court (***Siragusa v. D'Esposito***, 116 AD3d 837, 837, 983 NYS2d 624, 625 [2d Dept. 2014]).

An extension of time pursuant to CPLR 306–b may be granted in the interest of justice without a showing of "reasonably diligent efforts at service as a threshold matter" (***Leader v. Maroney, Ponzini & Spencer***, 97 NY2d 95, 105, 736 NYS2d 291, 761 N.E.2d 1018); ***Valentin v. Zaltsman***, 39 AD3d 852, 835 NYS2d 298, 299 [2007]). The statute clearly gives the court the discretion to grant an extension of time to serve "upon good cause shown *or* in the interest of justice" (emphasis supplied). ***Scarabaggio v. Olympia & York Estates Co.***, 278 AD2d 476, 476, 718 NYS2d 392, 393 (2000); *certified question answered, order aff'd sub nom.* ***Leader***, 97 NY2d 95, 761 NE2d 1018 (2001).

Accordingly, in order to establish that plaintiff was entitled to an extension of time to effect such service, the plaintiff was required to show either good cause for failing to timely serve the appellants or that an extension of time should be granted in the interest of justice. ***Riccio v. Ghulam***, 29 AD3d 558, 560, 815 NYS2d 125, 127 (2006).

On the proper standard and showing, New York appellate courts have cautioned that "[t]he phrase 'interest of justice' implies conditions 'which assist, or are in aid of or in the furtherance of, justice [and] bring about the type of justice which results when law is correctly applied and administered' after consideration of the interests of both the litigants and society (***United States v. National City Lines***, 7 F.R.D. 393, 397 [internal quotations omitted]; *see* ***Bernstein v. Strammiello***, 202 Misc. 823, 120 NYS2d 490). ***Hafkin v. N. Shore Univ. Hosp.***, 279 AD2d 86, 90, 718 NYS2d 379, 382 (2000); *aff'd sub nom.* ***Leader v. Maroney, Ponzini & Spencer***, 97 NY2d 95, 761 NE2d 1018 (2001).

Notwithstanding this, the Court is also cognizant that "the interest of justice" standard, being boarder than the "good cause" standard, allow the Court according to its inherent discretion to acknowledge the following factors: the expiration of the applicable statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of plaintiff's request for an extension, and the prejudice suffered by defendant in granting the application for extension (***Bumpus v. New York City Tr. Auth.***, 66 AD3d 26, 32, 883 NYS2d 99, 100 (2d Dep't 2009); *see also* ***Rosenzweig v. 600 North Street, LLC.***, 35 AD3d 705, 826 NYS2d 680 (2d Dep't 2006).

The Second Department has approved similar applications noting that plaintiff's time to serve process should be extended, when, as here, "[the] statute of limitations had expired, service which was timely made within the 120–day period was subsequently found to have been defective and there was no prejudice to [the defendant] who had actual notice of action" (***Chiaro v. D'Angelo***, 7 AD3d 746, 776 NYS2d 898 [2d Dept. 2004]).

Here, the Court **grants** plaintiff's application in its entirety. Based on the particular and unique facts and circumstances surrounding each parties' contentions against the other, the Court believes that justice would be served by allowing plaintiff to obtain jurisdiction over the nominal defendants, signatories to the agreements *sub judice*.

Therefore, it is

ORDERED that plaintiff shall serve nominal defendants with a copy of the pleadings by any method of service reasonably calculated to apprise them of the pendency of this action and of their need to appear in the same pursuant to CPLR 308 (2), (3) or (4) **no later than 60 days** from the entry of this decision and order.

II. Motion to Strike Pleadings

Presently this matter is in the discovery phase. The parties appeared for preliminary conference and a Preliminary Conference Order issued on May 3, 2017 governing disclosure in the action. To date, plaintiff seeks outstanding discovery beyond the deadlines originally set forth in the PC Order, to wit, the production defendants' witnesses or representative for depositions. Defendants have been reluctant to produce these witnesses, primarily because of the pendency of plaintiff's application to serve and obtain jurisdiction of the nominal defendants. Put differently, defendants argue that the nominal defendants, once they appear in this matter, will have their own substantive rights to conduct discovery and disclosure and would likely seek to depose defendants' witnesses as well. Thus, to obviate unnecessary or unduly repetitive production of witnesses for depositions, defendants have sought to delay depositions until such time that the nominal defendants have been served and appeared in the matter. Given this posture, plaintiffs have sought an order striking defendants' answer, and further an order releasing the bond obtained by plaintiff as a mechanism for satisfaction and recovery by defendants, in the event that this Court erroneously awarded plaintiff provisional remedies.

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' " (***Astudillo v MV Transp., Inc.***, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus it has often been said that for "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Jones v LeFrance Leasing Ltd. Partnership***, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

Generally, "public policy strongly favors the resolution of actions on the merits whenever

possible, the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious" (***Desiderio v Geico Gen. Ins. Co.***, 153 AD3d 1322, 1322, 61 NYS3d 309, 311 [2d Dept 2017]). On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]). Therefore, the drastic remedy of striking a pleading is warranted where a party's failure to comply with court-ordered disclosure is willful and contumacious (***Mangru v Schering Corp.***, 90 AD3d 621, 622, 933 NYS2d 897 [2d Dept 2011]). Such a determination of whether to strike a pleading lies within the sound discretion of the trial court (***JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehicles***, 119 AD3d 903, 903, 990 NYS2d 577, 578 [2d Dept 2014]).

It is clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; ***Henry v Datson***, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; ***Stone v Zinoukhova***, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]).

Here, the Court disagrees with plaintiff's approach concerning party depositions in this matter. While plaintiff is clearly within his right to obtain party depositions, the unique circumstances of this Court warrant a delay in defendants' witness production to allow for the nominal defendants to appear and participate in the defense of this action. At the first instance, it is clear there is a relationship between plaintiff and the nominal defendants. The nature of the claims and defenses presently put forth by the parties also demonstrate their important given the status of nominal defendants as parties to the condo purchase and sale agreements operative in this matter. Moreover, judicial economy is best served here by allowing the nominal defendants to be served with legal process, answer, appear and participate in the litigation, rather than compel defendants to submit to party depositions, which could be duplicative given the possibility that the nominal defendants are likely to seek the same or similar disclosure of them once they appear in the matter.

Thus, plaintiff's application to strike defendants' answer for willful and contumacious conduct pursuant to CPLR 3126is hereby **denied** as given the circumstance presently presented, this Court is not persuaded that defendants' conduct or discovery posture is particularly obstinate, unreasonable or disobedient.

Instead, the Court treats plaintiff's application as one to compel disclosure pursuant to CPLR 3124, and in that vein, directs that all parties shall be prepared to exchange witness availability for party depositions to occur **no later than November 9, 2018;** and it is further

ORDERED that that aspect of plaintiff's motion to vacate, set aside or release the undertaking or bond obtained previously in this matter is **denied without prejudice with leave to renew** on the proper submission of papers and at the proper juncture. This Court notes that the balance of plaintiff's application deals with discovery. Disclosure in this matter is not complete and the relevant and material facts have yet to be conclusively found or determined,

particularly with two separate appeals pending before the Second Department. Thus, this Court leaves for another day the propriety of releasing plaintiff's bond or its continued validity to the extent those questions remain inextricably linked or interwoven with the respective claims and defenses of each party.

The foregoing constitutes the decision and order of this Court.

Dated: May 7, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**