

Blue Lagoon LLC v Roth

2024 NY Slip Op 34051(U)

October 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 520776/2016

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

KINGS COUNTY CLERK
FILED

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BLUE LAGOON LLC,

Plaintiff,

Decision and order

- against -

Index No. 520776/2016

MOSHE ROTH,

Defendant,

October 10, 2024

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #2 and #3

The defendant has moved seeking to vacate a default judgement dated July 1, 2019. The defendant has cross-moved seeking an extension of time in which to serve the defendant. The motions have been opposed respectively and papers submitted by the parties. After reviewing all the arguments this court now makes the following determination.

On January 23, 2007 the defendant Moshe Roth executed a note wherein he borrowed \$185,120. This lawsuit was commenced in March 2017 by filing a motion for summary judgement in lieu of a complaint. On March 1, 2017 the defendant was served with process by serving the defendant's father at the defendant's address located at 1568 43rd Street in Kings County. On July 1, 2019 a judgement was entered in the amount of \$270,295.42.

The defendant now seeks to vacate the default on the grounds he was never served with process. First, he asserts there is no proof he was ever served with the summons. Moreover, the affidavit of service concerning the notice of motion fails to indicate the apartment number of the defendant's residence. Thus, service was

improper and the default must be vacated. The plaintiff opposes the motion and alternatively seeks to re-serve the defendant.

Conclusions of Law

CPLR §3213 states that where appropriate the plaintiff "may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (id). In Fattarusso v. Levco American Improvement Corp., 144AD2d 626, 535 NYS2d 62 [2d Dept., 1988] the court held that a summons must be served along with the notice of motion. The court stated the fact "the plaintiff proceeded by way of motion for summary judgment in lieu of complaint does not dispense with the jurisdictional requirement that a summons be served" (id). The affidavit of the process server does not indicate whether the summons was likewise served along with the notice of motion and the plaintiff does not argue in support of that contention. Thus, upon the presentation of the documents the motion seeking to vacate the default for the failure to perform proper service is granted.

Turning to the cross-motion pursuant to CPLR §306-b seeking to file a summons at this juncture, it is well settled that an extension of time may be granted where the plaintiff establishes reasons either "upon good cause shown or in the interest of justice" (Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 736 NYS2d 291 [2001]). A plaintiff that fails to attempt service at

all, as a matter of law, cannot establish 'good cause' to effectuate late service (Valentin v. Zaltsman, 39 AD3d 852, 835 NYS2d 298 [2d Dept., 2007]). In this case, though, service was attempted and efforts were undertaken to locate the defendant. In fact service was effectuated at a location which the process server discovered was the defendant's residence. The mere fact there may have been omissions regarding the apartment number within the affidavit does not undermine the fact service was attempted. Therefore, the element that there was diligence in attempting service was satisfied (Spath v. Zach, 36 AD3d 410, 829 NYS2d 19 [1st Dept., 2007]). Therefore, the plaintiff has established good cause.

Turning to the interest of justice requirement, it is true that such standard is broader and easier to satisfy (Mead v. Singleman, 24 AD3d 1142, 806 NYS2d 783 [3rd Dept., 2005]). This standard necessitates a review of many factors including the nature of the action, the expiration of the statute of limitations, the length of the delay, the prejudice to the defendant and the length of time it took plaintiff to seek the request to extend (Leader, supra). Preliminarily, it must be pointed out that in order to receive an extension based upon the interest of justice it is generally true that an attempt at service must be demonstrated (see, Chiaro v. D'Angelo, 7 AD3d 746, 776 NYS2d 898 [2d Dept., 2004]).

Therefore, an application of the above mentioned principles to the facts of this case stand in favor of granting the extension. First, although the case was initially filed many years ago there has been no specific delay in seeking the request to effectuate service pursuant to CPLR §306-b (State of New York Mortgage Agency v. Braun, 182 AD3d 63, 119 NYS2d 522 [2d Dept., 2020]). Moreover, the defendant has not demonstrated how he would suffered any prejudice by this extension (Bhatara v. Kolaj, 222 AD3d 926, 203 NYS3d 345 [2d Dept., 2023]). Moreover, there has not been any serious dispute as to the potential merits of plaintiff's cause of action (see, Lippett v. Education Alliance, 14 AD3d 430, 789 NYS2d 11 [1st Dept., 2005]). Lastly, such extensions may be granted even if the statute of limitations has expired (Marzan v. Petit-Frere, 220 AD3d 852, 198 NYS3d 714 [2d Dept., 2023]). Therefore, based upon all the factors presented, this court grants the plaintiff an extension of time of ninety days from receipt of this order in which to serve the defendant (see, Tikvah Enterprises LLC v. Neuman, 80 AD3d 748, 915 NYS2d 508 [2d Dept., 2011]).

So ordered.

ENTER:



 Hon. Leon Ruchelsman
 JSC

DATED: October 10, 2024
 Brooklyn N.Y.

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