SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 158604/2015
RODRIGUEZ, CARLOS
vs.
STATE FARM FIRE AND CASUALTY
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO: _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s): _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

~~Upon the foregoing papers, it is ordered that~~ this motion is

decided in accordance with the annexed decision dated Aug 3, 2016.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Aug 3, 2016

Sherry K. Heitler J.S.C.
HON. SHERRY KLEIN HEITLER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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CARLOS RODRIGUEZ,

Plaintiff,

-against-

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., STATE FARM FIRE AND CASUALTY COMPANY, and KEVIN LEONG INSURANCE AGENCY, INC.,

Defendants.

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Index No. 158604/15
Motion Sequence 001

DECISION & ORDER

HON. SHERRY KLEIN HEITLER

Defendants State Farm Mutual Automobile Insurance Co., State Farm Fire and Casualty Company ("State Farm Defendants"), and Kevin Leong Insurance Agency, Inc. ("The Leong Agency") (collectively, "Defendants") move pursuant to CPLR 306-b, CPLR 3211(a)(8), and CPLR 3012(b)[1] for an order dismissing this action in its entirety. Plaintiff Carlos Rodriguez ("Plaintiff") opposes and cross-moves for an order declaring that he timely served the summons in this action upon The Leong Agency, an extension of time to serve the summons upon the State Farm Defendants, and an extension of time to serve a complaint upon all of the Defendants.

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[1]CPLR 306-b provides in relevant part that "[s]ervice of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding . . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

CPLR 3211(a)(8) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . the court has not jurisdiction of the person of the defendant".

CPLR 3012(b) provides that "[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action."

Plaintiff initiated this action by filing a summons with notice in the New York County Clerk's Office on August 19, 2015. Pursuant to CPLR § 306-b, the summons should have been served upon all of the Defendants within 120 days of such filing, or no later than December 17, 2015. Plaintiff served the summons upon defendant The Leong Agency by personal service on January 5, 2016.[2] It appears that the two remaining defendants were not served. Nevertheless, on January 22, 2016, all Defendants[3] filed a Notice of Appearance and Demand for Complaint.[4] Pursuant to CPLR 3012(b), Plaintiff was required to respond to Defendants' demand within 20 days thereof, or no later than February 11, 2016. To date, no complaint has been filed or served.

The summons with notice indicates that the nature of this action is "To Recover for losses from October 29, 2012 pursuant to a policy for $50,000.00, not $20,000.00".[5] According to Plaintiff, property was stolen from his apartment during hurricane Sandy that was covered under an insurance policy issued by the Defendants. Plaintiff claims the policy was for $50,000, while Defendants have purportedly claimed the policy was only for $15,000.[6]

Defendants argue that Plaintiff's failure to timely serve the summons as required by CPLR 306-b and to respond to their Demand for Complaint as required by CPLR 3012(b) requires the dismissal of this action. Plaintiff opposes on the grounds that the summons with notice was filed

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[2] Defendants' exhibit 2.

[3] All Defendants are represented herein by Rivkin Radler, LLP.

[4] Defendants' exhibit 3; *see also* CPLR 320(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."); CPLR 320(b) ("Subject to the provisions of [CPLR 320(c)] an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under [CPLR 3211] is asserted by motion or in the answer as provided in rule 3211").

[5] Defendants' exhibit 1.

[6] See affidavit in support of cross-motion by Carlos Rodriguez, sworn to May 31, 2016, wherein he avers: "[s]omeone stole my Michael Jordan autographed jersey, which is what I had insured with State Farm. The value of the jersey is over $25,000 as a limited edition, so there was no sense for me to insure the item for less than what it was worth. Why would I do that?" (¶3)

timely within the statute of limitations, the late service upon defendant The Leong Agency was due to law office failure and should be excused in the interests of justice, cases should be resolved on their merits, and there is no prejudice here because all Defendants are represented by the same counsel.

CPLR 306-b "authorizes an extension of time for service [of process] in two discrete situations: 'upon good cause shown' or 'in the interest of justice.'" *Henneberry v Borstein*, 91 AD3d 493, 495 (1st Dept 2012) (*citing Leader v Maroney*, 97 NY2d 95, 104 [2001]).

"To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. . . . Good cause will not exist where a plaintiff fails to make any effort at service . . . or fails to make at least a reasonably diligent effort at service. . . . By contrast, good cause may be found to exist where the plaintiffs failure to timely serve process is a result of circumstances beyond the plaintiffs control . . . ." *Bumpus v New York City Tr. Auth.*, 66 AD3d 26 (2d Dept 2009) (internal citations omitted). In *Pandolfi v Langer*, 2011 NY Misc. LEXIS 3277, *7-8 (Sup. Ct. Nassau Co. July 6, 2011, Asarch, J.), the court held that good cause was shown to merit late service of process where the plaintiff attempted to serve the defendant at its place of business on two separate occasions but an individual claiming to be the defendant was ultimately served instead.

Plaintiff's counsel asserts that he is a solo practitioner who serves all papers himself, and concedes that the "late service was due to law office failure".[7] Good cause does not include activity characterized as law office failure (*Leader*, 97 NY2d at 104) but courts may excuse law office failure under the interest of justice standard. Whether a party is entitled to such relief (*Leader*, 97 NY2d at 105-06):

> requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other

[7] Chun Affirmation, ¶ 6.

relevant factor in making its determination, including 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 defendant.

These factors arguably weigh in favor of excusing Plaintiff's minor delay with respect to The Leong Agency, having missed the deadline by only 19 days, and in favor of granting the requested extension *nunc pro tunc* so as to deem Plaintiff's service upon The Leong Agency as timely. With respect to the State Farm Defendants, however, Plaintiff has yet to serve the summons, and did not move for an extension of time to do so until after Defendants moved for dismissal, almost six months after the deadline to serve expired. In terms of prejudice, it is unclear what causes of action Plaintiff seeks to assert since no complaint has been filed. Given these facts and circumstances, Plaintiff has not shown that an extension of time within which to serve the two State Farm Defendants is warranted in the interests of justice. *See Cassini v Advance Publs., Inc*, 125 AD3d 467 (1st Dept 2015); *Webb v Greater N.Y. Auto. Dealers Assn., Inc.*, 93 AD3d 561, 562 (1st Dept 2012); *Waggaman v Vernon*, 123 AD3d 1110, 1111 (2d Dept 2014); *Randall v Professional Radiology*, 2008 NY Misc. LEXIS 10957, *7 (Sup. Ct. Kings Co. Dec. 1, 2008, Jackson, J.).

Even were the court inclined to deem Plaintiff's service upon The Leong Agency as timely and to grant Plaintiff an extension of time within which to serve the State Farm Defendants, Plaintiff does not deny receiving the Demand for Complaint and offers no explanation for failing to respond thereto.[8] "[A] party opposing a CPLR 3012(b) motion to dismiss based upon law office failure is obligated to submit an affidavit of merit containing evidentiary facts sufficient to establish a prima facie case." *Kel Management Corp. v. Rogers & Wells*, 64 NY2d 904, 905 (1985). Plaintiff's affidavit merely states that "I never signed for a $15,000.00 policy. I originally signed for a $50,000.00 policy, and the gentleman who assisted me with the policy from State Farm is a witness and will testify if given a chance." Rodriguez Affidavit, ¶ 3. The policy to which Plaintiff

[8] Based on the parties' positions at oral argument, law office failure may have been involved.

refers is not annexed to the moving papers and Plaintiff has not identified the agent who allegedly assisted him. Such unsupported hearsay statements are not sufficient to meet Plaintiff's burden.

The court will not consider Plaintiff's untimely contention, raised for the first time in reply,[9] that it was difficult to serve the State Farm Defendants because they are not listed on the New York State Department of State website for service of process and are not licensed to do business in New York. The State Farm Defendants' registration status with the Department of State does not absolve Plaintiff from having to respond to the Demand for Complaint, especially given the fact that it lists their counsel's name, address, and telephone number. In any event, Plaintiff has not submitted any documentary evidence to substantiate its search claims and has not set forth any other steps it took towards locating the State Farm Defendants (i.e., insurance department inquiries).

In light of the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is granted; and it is further

ORDERED that Plaintiff's cross-motion is denied; and it is further

ORDERED that Plaintiff's action is dismissed without prejudice and with leave to re-file; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATE: Aug 3, 2016

SHERRY KLEIN HEITLER, J.S.C.

[9] See *PK Rest., LLC v Lifshutz*, 138 AD3d 434, 438 (1st Dept 2016); *Access Nursing Servs. v Street Consulting Group*, 137 AD3d 678, 678 (1st Dept 2016); *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 (1st Dept 1995); *Azzopardi v American Blower Corp.*, 192 AD2d 453, 453-54, (1st Dept 1993); *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 (1st Dept 1992); *Dannasch v Bifulco*, 184 AD2d 415, 416-17 (1st Dept 1992).