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Plank, LLC v Dutch Vil., LLC
2019 NY Slip Op 50188(U)
Decided on February 7, 2019
Supreme Court, Albany County
Platkin, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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<p style="text-align:center">Plank, LLC, Plaintiff,</p> <p style="text-align:center">against</p> <p style="text-align:center">Dutch Village, LLC; WESTCHESTER FIRE INSURANCE COMPANY; and JOHN DOE No.1 through JOHN DOE #10, the last ten names being fictitious and unknown to Plank intended to be any party having or claiming an interest in the premises of the complaint, Defendants.</p>

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APPEARANCES:

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Richard M. Platkin, J.

Plaintiff Plank, LLC ("Plank") moves pursuant to CPLR 306-b to extend its time to complete service of process. Defendants Dutch Village, LLC ("Dutch Village") and Westchester Fire Insurance Company ("Westchester Fire") (collectively, "defendants") oppose the motion and cross-move to: (1) confirm the expiration and automatic termination of Plank's alleged mechanic's lien; and (2) dismiss Plank's complaint or, in the alternative, stay this action pending arbitration and award.

BACKGROUND

This action arises from a construction project ("Project") owned by Dutch Village for which Plank was hired as the general contractor. The Project involved the construction of four apartment buildings for the sum of \$5,259,708. Plank alleges in its complaint that after about nine months of work on the Project, Dutch Village suddenly and without justification stopped making monthly progress payments. Dutch Village, on the other hand, contends that Plank's work was defective in significant respects.

Plank filed a mechanic's lien against Dutch Village on January 6, 2017 in the amount of \$1,877,191.72. [\[EN1\]](#) The parties then entered into a Termination Agreement on July 31, 2017 that, among other things, called for their disputes to be resolved via binding arbitration.

On January 5, 2018, one day prior to the expiration of its mechanic's lien (*see* Lien Law § 17), Plank attempted to commence this lien foreclosure action on a *pro se* basis by filing a summons and complaint with the Albany County Clerk. Ten months later, defendants were served with process via the Secretary of State.

Plank now moves pursuant to CPLR 306-b for a *nunc pro tunc* extension of time to complete service of process on defendants. According to Plank, the interests of justice would be served by granting such relief. Defendants oppose the motion and cross-move for various forms of the relief in the event the Court grants Plank an extension of time.

ANALYSIS

CPLR 306-b requires service of process to be made within 120 days of the filing of the summons and complaint. However, "a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice" ([Jung Hun Cho v Bovasso, 166 AD3d 868](#), 869 [1st Dept 2018]; *see* [Pierce v Village of Horseheads Police Dept., 107 AD3d 1354](#), 1356 [3d Dept 2013]).

"'Good cause' and 'interest of justice' are two separate and independent statutory standards. 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" ([Bumpus v New York](#)

[City Tr. Auth., 66 AD3d 26](#), 32 [2d Dept 2009] [internal citations omitted]). Inasmuch as Plank did not make any effort to serve defendants within the 120-day period following the filing of the summons and complaint (*see* Brennan Aff., ¶ 3; Roth Aff., ¶¶ 3, 10), Plank cannot obtain an extension of time on the basis of good cause shown (*see Jung Hun Cho*, 166 AD3d at 870).

Plank's lack of reasonable diligence is not, however, an absolute bar to relief under the more flexible interest-of-justice standard:

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. 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 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 (*Leader v Maroney, Ponzini [*2] & Spencer*, 97 NY2d 95, 105-106 [2001]).

In determining whether to grant an extension of time in the interest of justice, "[n]o single factor is determinative" (*de Vries v Metropolitan Tr. Auth.*, [11 AD3d 312](#), 313 [1st Dept 2004]).

For the reasons that follow, the Court finds, in the exercise of discretion, that Plank has failed to establish that an extension of the 120-day period in which to complete service of process is warranted in the interest of justice.

It is undisputed that Plank did not exercise *any* diligence in effecting service of process within the 120-day period following the filing of the summons and complaint. Further, Plank did not complete service of process until November 6, 2018, more than six months after the statutory deadline. Thus, there was both a lack of diligence and a protracted delay.

Plank blames its failure to properly and timely serve defendants on its status as a *pro se* plaintiff and its lack of awareness of the 120-day requirement of CPLR 306-b. However, as defendants observe, Plank is a limited liability company ("LLC") and, as such, must prosecute a civil action through an admitted attorney (*see* CPLR 321 [a]). Thus, the law does not permit Plank to represent itself in this Court, whether through its sole member or otherwise (*see*

Matter of Sharon B., 72 NY2d 394, 397-398 [1998]; [Michael Reilly Design, Inc. v Houraney](#), 40 AD3d 592, 593-594 [2d Dept 2007]). Accordingly, Plank's excuse for its noncompliance with CPLR 306-b flows directly from its decision to attempt to commence this commercial action in Supreme Court without the benefit of counsel, in contravention of CPLR 321 (a). [\[FN2\]](#)

Moreover, defendants assert, without contradiction, that the law firm now representing Plank in this action has represented Plank for more than two years in connection with various aspects of the underlying contract dispute (*see Breakell Aff.*, ¶ 3). The Court also is mindful that Plank is a commercial contractor that has been involved in a number of other lawsuits in this Court, including at least one action that was assigned to the undersigned for trial (*see e.g. A.E Rosen Electrical v Plank*, Index No. 7862-17; *Del Signore v Plank*, Index No. 907033-16; *Hammeroff v Plank*, Index No. 4196-10). Thus, Plank is a reasonably sophisticated commercial entity with the resources and experience to conduct its litigation matters properly and in compliance with the CPLR (*see Stegemann v Rensselaer County Sheriff's Off.*, 155 AD3d 1455, 1457 [3d Dept 2017] [observing that plaintiff had "commenced two other very similar civil actions and engaged in extensive motion practice in this case and the other two actions, despite his . . . pro se status"]).

The Court also has considered the issue of prejudice, and it finds that neither side has demonstrated substantial prejudice. Defendants claim that they will sustain prejudice by reason of making payments on a bond that was substituted for an invalid lien, but the proof they adduce fails to conclusively establish the claimed invalidity. [\[FN3\]](#) And Plank itself concedes that it will [\[*3\]](#) continue to retain all of its contractual rights and remedies as against Dutch Village and can press claims "on the same exact salient facts even if [this] action [is] dismissed" (Plank's Brief, p. 2).

Upon a balancing of all relevant factors, the Court finds that the interests of justice do not favor relieving Plank of its highly improvident decision to proceed with the commencement of complex commercial litigation on an unauthorized *pro se* basis on the eve of the expiration of its statute of limitations, despite having previously retained counsel in connection with the underlying contractual disputes and having been involved in other lawsuits in Supreme Court. And having rejected Plank's excuse for its protracted delay and lack of diligence in effecting service of process, the Court finds that the interests of justice do not otherwise favor the relief sought by Plank.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for extension of time to complete service of process is denied; and it is further

ORDERED that defendants' cross motion is granted to the extent of dismissing plaintiff's complaint pursuant to CPLR 306-b.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to defendants' counsel for filing and service; all other papers are being delivered to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: February 7, 2019

Albany, New York

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

1. Notice of Motion, dated November 5, 2018; Attorney Affirmation in Support of Motion to Extend Time to Serve Process, dated November 5, 2018, with annexed exhibits A-E;

Memorandum of Law in Support of Motion to Extend Time to Serve Process, dated November 5, 2018;

2. Notice of Cross-Motion, dated December 7, 2018; Attorney Affirmation in Support of Cross Motion to Confirm Expiration of Mechanic's Lien and Dismissal of Plaintiff's Complaint with Prejudice and in Opposition to Plaintiff's Motion to Extend Time for Service of Process, dated December 7, 2018, with annexed exhibits 1-3; Memorandum of Law, dated December 7, 2018;

3. Reply Affirmation in Support of Motion to Extend Time to Serve Process and in Opposition to Defendants' Cross-Motion, dated December 21, 2018, with annexed exhibit A; and Reply Memorandum of Law in Support of Motion to Extend Time to Serve Process and in Opposition to Defendants' Cross-Motion, dated December 21, 2018.

Footnotes

Footnote 1: A bond from Westchester Fire eventually was substituted for the lien.

Footnote 2: The Court recognizes that the defect of an LLC filing a claim *pro se* is not jurisdictional in nature and may, in appropriate cases, be cured or disregarded ([see *Hamilton Livery Leasing, LLC v State of New York*, 151 AD3d 1358](#), 1360-1362 [3d Dept 2017]).

Footnote 3: The Court similarly finds the present record inconclusive as to whether Plank possesses a meritorious claim against defendants.

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