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DORIS SASSOWER,

Plaintiff,

Index No. 29094/92
242 of 8/9/93

-against-

GANNET COMPANY, INC., GANNET
SATELLITE INFORMATION NETWORK,
INC., NANCY Q. KEEFE, DEBBIE
PINES, ELAINE A. ELLIS, CAROLE
TANZER MILLER, CAMERON McWHIRTER,
TOM ANDERSON, MICHAEL MEEK, LAURIE
NIKOLSKI, MILTON HOFFMAN, "DOES"
1-15, being GANNET editors,
EVELYN BRESLAW and ABBIE RETRILLO,

Defendants.
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BURTON S. SHERMAN, J.:

In this action for libel, defendants move for an order, pursuant to CPLR 3012, dismissing the complaint on the ground plaintiff has failed to serve the complaint in accordance with CPLR 3012[b]. Plaintiff, an attorney, cross-moves for an order denying the motion and granting her an extension of time for 90 days to permit counsel to be retained and the complaint served or alternatively, a conditional order permitting her to serve the complaint within 90 days from the service of a copy of an order by the defendants, with notice of entry.

The record reveals the summons with an "attachment" was served on defendants on or about February 22, 1993. The "attachment" contains allegations of libel by the defendants of the plaintiff. Allegedly, defendants made four separate oral and written "false and defamatory" statements regarding plaintiff's legal practice. Plaintiff alleges defendants

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published the statements on or about October 24, 1991, November 18, 1991, February 12, 1992, and February 14, 1992.

On March 9, 1993, defendants served on plaintiff a Demand for the Complaint pursuant to CPLR 3012[b]. Plaintiff did not serve the complaint within the twenty days provided by CPLR 3012[b]. Plaintiff requested additional time and defendants agreed to extend the time to April 20, 1993. However, plaintiff did not serve the complaint on April 20, 1993. She requested additional time and defendants refused.

The record reveals plaintiff has attempted to retain counsel. She contends she has made diligent efforts to find counsel who would be in a position to undertake the libel action against defendants. (i.e., "efforts have been unsuccessful due to the fact that law firms equipped to handle a matter of the magnitude of the instant case prefer to represent the media defendants, who have unlimited resources to defend themselves against their journalistic malpractice, rather than libel plaintiffs, who normally do not have such extravagant means available to them.") (Sassower Aff., In Opposition, ¶ 12).

In order to avoid a dismissal of the action for timely failure to serve a complaint, plaintiff must show a reasonable excuse for the delay, and that the action has legal merit. This requires a factual demonstration of proof by affidavit made by persons having personal knowledge of the facts sufficient to establish prima facie that plaintiff has a cause of action. (Barasch v. Micucci, 49 NY2d 594; A

& J Concrete Corp. v. Arker, 54 NY2d 870). The absence of prejudice to the defendant is not a basis to deny a dismissal motion under CPLR 3012[b]. (Verre v. Rosas, 47 NY2d 795). It is within the court's power to grant an extension of time within which to serve the complaint, where delay in service is not willful or lengthy. (See, A & J Concrete Corp. v. Arker, supra). A dismissal of an action for failure to serve a complaint is not a dismissal on the merits. A second action for the same cause may be maintained if service of the summons is made before the expiration of the statute of limitations. (Sotirakis v. United Services Automobile Ass'n, 100 AD2d 931 [2nd Dept. 1984; Joseph T. Ryerson & Son, Inc. v. Piffath, 132 AD2d 527 [2nd Dept. 1987])).

A motion to dismiss the action for failure to serve a complaint should be granted in the absence of an affidavit of merit. (McNamara v. Past Time Pub. Inc., 100 AD2d 618 [2nd Dept. 1984]; Stolowitz v. Mount Sinai Hosp., 60 NY2d 658). The affidavit of merits should contain evidentiary facts sufficient to establish a prime facie case. (Kel Management Corp. v. Roger & Wells, 64 NY2d 904, 905 [citations omitted]). The lack of an affidavit of merits requires the court to dismiss the action, as a matter of law, without condition. (Ibid).

Plaintiff maintains she has a meritorious cause of action as revealed by the "attachment" to the summons. The "attachment" consist of unsworn allegations regarding the

claim of libel. This does not fulfill the requirement for a demonstration of legal merit. Plaintiff has failed to make the required showing. Moreover, plaintiff does not dispute defendants' contention that the summons was served one week after the expiration of the one-year statute of limitations. (CPLR 215[3] [cause of action for libel is subject to the one-year statute of limitations]; Williams v. Varig Brazilian Airlines. 169 AD2d 434, appeal denied 78 NY2d 854).

Accordingly, the defendants' motion is granted and the complaint is dismissed pursuant to CPLR 3012. The plaintiff's cross-motion is denied in all respects.

Settle order.

Dated: OCT 22 1993

FILED
OCT 22 1993
COUNTY CLERK'S OFFICE

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J.S.C.