



STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURTHOUSE
ALBANY, NEW YORK 12207
(518) 285-8949

JOSEPH C. TERESI
JUSTICE

JOSHUA L. FARRELL
LAW CLERK

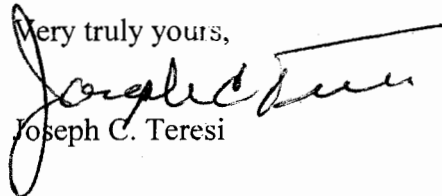
May 14, 2013

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Roger Kinsey, Esq. AAG
The Capitol
Albany, New York 12224

RE: TOWN OF MONTAUK v HON. LORRAINE CORTEZ-VASQUEZ
INDEX NO. 6703-10
RJI NO. 01-13-ST4558

Dear Counselor:

Enclosed please find the original Decision and Order, with respect to the above referenced matter.

Very truly yours,

Joseph C. Teresi

JCT/jf
Encl.
cc:

Robert A. Ficalora
PO Box 2612
Montauk, New York 11954
(w/ copy of Decision and Order)

Robert A. Ficalora
221 Ocean Terrace
Palm Beach, Florida 33480
(w/ copy of Decision and Order)

Albany County Clerk
16 Eagle Street
Room 128
Albany, New York 12207
(w/ copy of Decision and Order and original motion papers)

TOWN OF MONTAUK,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6703-10
RJI NO. 01-13-ST4558

HON. LORRAINE CORTEZ-VASQUEZ,
as Secretary of State of the State of New York
with control of, and responsibility for, the
Division of Corporations of the Department of State,

Defendant.

Supreme Court Albany County All Purpose Term, May 3, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Robert A. Ficalora
Plaintiff, Pro se
PO Box 2612
Montauk, New York 11954

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Roger Kinsey, Esq. AAG
Attorneys for the Defendant
The Capitol
Albany, New York 12224

TERESI, J.:

On October 5, 2010, Plaintiff commenced (CPLR §304[a]) this CPLR Article 78 mandamus proceeding by filing a one page Petition¹ with numerous unnumbered exhibits

¹ Although such filing was denominated a "Complaint," it should have been designated a "Petition." (CPLR §402). Similarly, the parties should have been referred to as petitioner and respondent. (CPLR §401). Such ministerial errors, however, will be disregarded pursuant to CPLR §2001. As such, the Plaintiff's "Complaint," filed October 5, 2010, will be referred to herein properly as a "Petition."

attached to it. The Petition challenges Defendant's August 11, 2010 rejection of Plaintiff's Certificate of Incorporation, and seeks an Order compelling Defendant to accept it for filing. Plaintiff did not initially file either a summons or a notice of petition with its Petition. Instead, Plaintiff waited until April 18, 2013 to obtain an Order to Show Cause, and then served it. Its affidavit of service alleges service occurred on April 18, 2013. Prior to answering, Defendant moves to dismiss. Plaintiff filed additional papers after Defendant made her motion. Because Defendant demonstrated that Plaintiff failed to comply with CPLR §306-b, this proceeding is dismissed.

CPLR §306-b provides, in pertinent part, that:

“[s]ervice of the... petition with a[n]... order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding... where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. 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 §306-b's "commencement" is defined by CPLR §304(a). Plaintiff commenced this CPLR Article 78 special proceeding upon "filing a petition in accordance with rule twenty-one hundred two of this chapter." (CPLR §304[a]).

Here, Defendant demonstrated that Plaintiff failed to serve the Petition and Order to Show Cause in accord with CPLR §306-b. As set forth above, Plaintiff filed its Petition (wrongly denominated a complaint) on October 5, 2010 and, pursuant to CPLR §304(a), commenced this proceeding. Because the applicable statute of limitations is four months (CPLR

§217[1]) and expired on December 11, 2010², CPLR §306-b required Plaintiff to serve Defendant on or before December 26, 2010. Moreover, even if CPLR §306-b's longer "one hundred and twenty days after... commencement" were applied, Plaintiff was still required to serve its pleadings by February 2, 2011. On this record, however, Plaintiff does not allege that it served Defendant until April 18, 2013, more than two years late.

Because Defendant demonstrated that Plaintiff violated CPLR §306-b's time period for service, Defendant demonstrated its entitlement to dismissal.

Moreover, because of "the extreme lack of diligence shown by plaintiff, and the long delay (more than [two years] after running of the statute of limitations) before defendant received any notice of the action" it would be an abuse of this Court's discretion to grant Plaintiff an extension to serve Defendant in the interest of justice. (Slate v Schiavone Const. Co., 4 NY3d 816 [2005]; Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95 [2001]; Richards v Off. of New York State Comptroller, 88 AD3d 1049 [3d Dept 2011]). Nor did Plaintiff proffer any good cause for its delay. (Hine v Bambara, 66 AD3d 1192 [3d Dept 2009]; Webb v Greater New York Auto. Dealers Ass'n, Inc., 93 AD3d 561 [1st Dept 2012])

Accordingly, this matter is dismissed.

This Decision and Order is being returned to the attorneys for Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

² Because the claim Plaintiff asserts herein accrued on August 11, 2010 when Defendant rejected its filing, the applicable four month statute of limitations expires December 11, 2010.

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 15, 2013
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated April 18, 2013; Complaint, undated, and numerous unnumbered exhibits attached.
2. Notice of Motion, dated April 24, 2013; Affirmation of Roger Kinsey, dated April 23, 2013, with attached Exhibits A-C.
3. Affidavit of Robert Ficalora, dated May 2, 2013, with Exhibit pages 1-59 and two checks dated May 2, 2013.