

SCAK

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 22**

**Present: HON. WILLIAM R. LaMARCA
Justice**

JOBEXPO.COM, Inc.,

Plaintiff,

-against-

**PAUL LIEN, DAVID KALT, RMDS, INC.,
LIZ DONDE and JOHN DOES #1-5,**

Defendants.

**Motion Sequence #005
Submitted November 23, 2005**

INDEX NO: 17326/03

The following papers were read on this motion:

| | |
|---------------------------------------|----------|
| Notice of Motion..... | 1 |
| Affirmation in Opposition..... | 2 |
| Reply Affirmation..... | 3 |

Requested Relief

Defendants, PAUL LIEN, DAVID KALT RMDS, INC. and JOHN DOES # 1-5 move for an order, pursuant to CPLR §3012(b), dismissing the action for failure to file and serve a complaint. Plaintiff, JOBEXPO.COM, opposes the motion which is determined as follows:

Background

A full factual background of this matter is set forth in the Short Form Order of the Court, dated March 7, 2005, which, *inter alia*, granted summary judgment to certain

Connecticut defendants on the ground that minimum contacts with the State of New York did not exist. In essence, JOBEXPO.COM is a company that produces job fairs nationally by engaging employers to participate in a fair at a selected site. It states that the "defendants" are former employees of the company who either left voluntarily or were fired and who each signed a restrictive covenant with JOBEXPO.COM not to compete for a period of time after their departure in the fall of 2003. JOBEXPO.COM asserts that after the defendants left, it discovered that they had joined together to steal its' business and clients, in violation of the restrictive covenant agreements, by engaging in tortious interference with the company. JOBEXPO.COM states that defendants illegally copied their data base and computer components and started a direct competing business with the company, utilizing the stolen information. JOBEXPO.COM alleges that defendants' actions constitute a breach of contract and a business tort.

Counsel for the moving defendants asserts that, despite numerous extensions of time and the extension of every courtesy to plaintiff's counsel, he has failed to provide defendants with a verified complaint despite demand being made, has moved for a default judgment and for summary judgment without issue being joined and has forced defendants to incur nearly \$4,000.00 in legal fees to defend what he characterizes as a "frivolous lawsuit". He urges that there be an unconditional dismissal of this action together with an award of counsel fees.

In opposition to the motion, counsel for plaintiff relates that since the Preliminary Conference, held on April 6, 2005, he has had a serious flare up of his Multiple Sclerosis illness which has caused the progression of this matter to be delayed from the late spring until the present time. He states that, after undergoing experimental treatments at Stony

Brook Hospital, his health has dramatically improved and he is prepared to proceed in this matter and annexes a copy of the verified complaint, verified by the President of JOBEXPO.COM. He urges that the defendants be made to answer for their business torts against plaintiff and that discovery be directed to proceed.

The Law

“To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action (citations omitted).” *Chmielnik v Rosenberg*, 269 AD2d 555, 703 NYS2d 754 (2nd Dept. 2000); see also, *Kel Management Corp. v Rogers & Wells*, 64 NY2d 904, 488 NYS2d 156, 477 NE2d 456 (C.A.1985); *Balgley v Cammarata*, 299 AD2d 432, 749 NYS2d 732 (2d Dept. 2002). To establish a meritorious cause of action, “a plaintiff must provide the court with an affidavit of merit or a verified complaint in lieu thereof (citations omitted).” *Ward v Quick*, 249 AD2d 943, 672 NYS2d 581 (4th Dept. 1998); see also, *Kel Management Corp. v Rogers & Wells*, supra; *A&J Concrete Corp. v Arker*, 54 NY2d 870, 444 NYS2d 905, 429 NE2d 412 (C.A.1981). “[I]n most types of actions a verified complaint will fulfill the requirement of an affidavit of merit” *Curcio v Sax*, 16 AD3d 1093, 791 NYS2d 744 (4th Dept. 2005) citing *Ward v Quick*, supra, and *Grant v City of North Tonawanda*, 225 AD2d 1089, 639 NYS2d 193 (4th Dept. 1986).

Discussion

It is not disputed that plaintiff is in default with respect to its obligation to file and serve a complaint, despite defendants' demand, repeated extensions of time and this Court's directives. Nevertheless, plaintiff has now served a complaint, verified by

JOBEXPO.COM's president, and adequately explained its delay, to wit; plaintiff's counsel's long running serious illness along with his experimental medical treatments. Under these circumstances, defendants' application to dismiss this action is denied.

Nevertheless, in light of plaintiff's repeated extensive delays in serving its complaint, which clearly caused defendants significant costs, plaintiff may file and serve its verified complaint on condition that plaintiff's attorney personally pay defendants the sum of \$1,500.00 within 20 days of service of a copy of this order with notice of entry. CPLR 3012[d]; see, *Gordineer v Gallagher*, 160 AD2d 672, 553 NYS2d 449 (2nd Dept. 1990); see also, *Kremer v Kremer*, 150 AD2d 759, 542 NYS2d 24 (2d Dept. 1989).

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendants' motion to dismiss the complaint is denied and plaintiff is directed to file and serve the verified complaint upon the condition set forth above; and it is further

ORDERED, that counsel for the parties shall appear for a previously scheduled Certification Conference before the undersigned on March 20, 2006 at 9:30 A.M. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: February 21, 2006



WILLIAM R. LaMARCA, J.S.C.

ENTERED

FEB 27 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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