

DOCKET NO: HHD-CV-05-4014559-S : SUPERIOR COURT
JOHN D. FLANNERY : J.D. OF HARTFORD
VS. : AT HARTFORD
SINGER ASSET FINANCIAL
COMPANY, ET AL : SEPTEMBER 24, 2007

**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION FOR CONTINUANCE TO OPPOSE DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff John D. Flannery (“Flannery”) filed the above-captioned action in June 2005, alleging that defendant Singer Asset Financial Company (“Singer”) engaged in fraud in the purchase of annual lottery payments from lottery winners between 1999 and 2000. As a matter of law, Plaintiff has admitted that the applicable three year statute of limitations bars his claims against Singer and that he has no evidence to support any of his claims against Singer.¹ Accordingly, Defendant has moved for summary judgment on the ground that the statute of limitations bars Flannery’s claims, and there are no disputed facts relating to the merits of Flannery’s claims.

Having failed to initiate any discovery in this case in the over two years since the defendant appeared in the case, Flannery now requests, pursuant to Practice Book § 17-47, additional time to conduct discovery respond to defendant’s motion. Singer respectfully requests that the Court deny Flannery’s motion because (1) Flannery has utterly failed to meet his burden to identify the particular facts (or indeed any facts) necessary to oppose the motion, or shown that these facts are exclusively in Singer’s

¹ See Defendant’s Request for Admissions, dated December 19, 2006; Nos. 2-3), to which Plaintiff never responded. The plaintiff also failed to respond to the interrogatories and requests for production of documents served on that date as well.

control, or to show that he has attempted to discover these facts and that he has not had sufficient time to discover these facts; and (2) Flannery's tolling defense is not properly at issue in the pending Motion for Summary Judgment, case because he failed to respond to Singer's Request to Revise this defense.

Flannery has had more than sufficient opportunity to pursue discovery to support his claims, and has not identified any specific facts that could support his claims or defenses and has not provided any valid justification for his complete failure to do so. Accordingly, Singer respectfully requests that the Court deny Flannery's motion.

II. ARGUMENT

A. STANDARD OF REVIEW

A party who contends that it needs to conduct additional discovery to respond to a motion for summary judgment bears the burden of establishing, by affidavit, a valid reason why the court should postpone resolution of the motion, including precisely what facts are necessary to oppose the motion, that those facts are within the exclusive knowledge of the party moving for summary judgment, and that the non-moving party has not already had sufficient opportunity to establish those facts.² Mathis v. Chung, 2003 WL 22132438 at * 2 (Conn.Super.) (September 4, 2003) (denying request for extension of time even though discovery requests were outstanding), quoting, Peerless Ins. Co. v. Gonzalez, 241 Conn. 476, 489, 697 A.2d 680 (1997) (affirming denial of extension of time to conduct discovery even though motion for summary judgment was filed only three months after plaintiff filed suit) and Dorazio v. M.B. Foster Electric Co., 157 Conn.

² Practice Book § 17-47 provides that: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may . . . order a continuance to permit affidavits to be obtained or discovery to be had . . .".

226, 230, 253 A.2d 22 (1968); See also Connecticut General Life Ins. Co. v. Zurich American Ins. Co., 2002 WL 450381 (Conn.Super.) (February 28, 2002) (Aurigemma, J.) (denying request because the dispositive question was one of law, and defendants “have not articulated precisely why they need such discovery”); K & W Construction, LLC v. Frank Mercede & Sons, Inc., 2005 WL 407843 at * 5 (Conn.Super.) (January 13, 2005) (Schuman, J.) (denying request because the “suggestion concerning discovery is not in the required form of an affidavit setting forth the reasons for additional discovery.”). The trial court has wide discretion under Practice Book § 17-47, which is reversible error upon appeal only upon a clear showing of abuse. Peerless, 241 Conn. at 489.

A. FLANNERY HAS FAILED TO MEET HIS BURDEN TO JUSTIFY POSTPONING RESOLUTION OF SINGER’S MOTION

The affidavit of Flannery’s attorney in support of Plaintiff’s Motion for Continuance, which requests a continuance for an unspecified amount of time, so that the Plaintiff can conduct the depositions of unnamed individuals to whom he has never issued notices of deposition, regarding undisclosed facts, utterly fails to comply with the requirements of Practice Book § 17-47. The Court should deny the defendant’s motion because the supporting affidavit is completely devoid of any statement of the facts that Plaintiff claims are necessary to oppose Singer’s motion for summary judgment; of any statement these facts are within the exclusive knowledge of Singer; and of any assertion that Flannery has attempted to obtain these facts and justifying his failure to do so during the past two plus years – all of which Practice Book § 17-47 requires.

Indeed, Flannery clearly cannot identify any facts that could support denying Singer’s motion because he has imputed admitted all of the facts material to Singer’s

motion for summary judgment. Moreover, Flannery cannot justify his failure to obtain discovery of alleged facts to dispute the motion for summary judgment because he has had over two years to conduct discovery in this case, and has not issued a single set of interrogatories, request for documents, request for admissions, or notice of deposition directed to Singer. According to Plaintiff's counsel, he did not even attempt to "secure depositions" of any defense witnesses until January 2007 – which is one and a half years after he filed the action. Affidavit of Thomas Willicutts, ¶ 8.³ Plaintiff's counsel does not make any effort to explain or justify this lengthy delay.

More importantly, Plaintiff's counsel fails to identify any efforts made to obtain the specific and allegedly missing facts purportedly relevant to opposing Singer's motion for summary judgment. Indeed, according to Plaintiff's counsel, as of this date, over two years after filing the law suit, Plaintiff has still not issued a single notice of deposition to Singer. *Id.*, ¶ 11. Plaintiff's counsel implies that this was the result of the parties' alleged history of dispensing with such "formalities," but, even accepting this claim, he significantly fails to aver that he timely requested such a deposition, informally or otherwise. He also does not, as he cannot, identify any effort to obtain facts material to the pending motion through written discovery requests.

Finally, Plaintiff's failure to identify the facts relevant to the pending motion, that he purportedly intends to elicit from the unnamed individuals he "wishes" to depose, discloses that the depositions sought are nothing more than fishing expeditions. Practice Book § 17-47 does not authorize a continuance to conduct a fishing expedition. It specifically requires that Flannery present by affidavit, the specific facts and sources for

³ In fact, the depositions to which Plaintiff's counsel obliquely refers, were conducted at the request of other parties – and not at the request of Plaintiff.

which the continuance is sought.

In Mathis, supra, the trial court held that the plaintiff did not meet her burden to show that she had made a sufficient effort to obtain the necessary discovery where she had issued discovery requests to the defendant, who failed to respond, and filed a motion to compel responses, which the court granted, because she failed to seek a default when the defendant subsequently ignored the court's order. Id., at * 3. In this case, the plaintiff has clearly failed to meet his burden to justify his failure to obtain the (undisclosed) facts he claims are necessary to establish his claims and defenses. Indeed, he has flouted the entire discovery process. He has neither responded to Singer's discovery requests, nor has he made any effort, whatsoever to obtain discovery from Singer. Accordingly, the Court should deny his motion for a continuance.

B. THE ALLEGED TOLLING DEFENSE CANNOT JUSTIFY DENYING, MUCH LESS POSTPONING RESOLUTION OF, THE PENDING MOTION

The Court should deny Flannery's motion even assuming *arguendo* that Flannery had presented an affidavit that properly justified a continuation to discover facts to support his affirmative claims against Singer, because, as Flannery has admitted, the statute of limitations bars his claims against Singer as a matter of law, and Singer is precluded from relying on his tolling defense to avoid to the statute of limitations.

Specifically, Flannery's tolling defense is not properly at issue in the pending Motion for Summary Judgment, and thus cannot justify a continuance, because he failed to respond to Singer's Request to Revise this defense. On June 1, 2007, Defendant filed a Request to Revise Plaintiff's Special Defenses By Way of Avoidance, dated May 31,

2007⁴ (the “Tolling Defense”) (See Docket Entry No. 115.00 and Exhibit A attached hereto). The Plaintiff did not object to Defendant’s Request to Revise within thirty (30) days, nor did he comply with Defendant’s request as required by Practice Book §10-37(a).

The tolling defense is thus not properly before this court as a defense to the pending motion for summary judgment, and discovery related to that defense cannot justify delaying resolution of the motion for summary judgment. See *Wood v. Town of East Lyme*, 2003 WL 548497, *1 (Conn.Super.2003) (attached) (court entered a judgment of non-suit where plaintiff failed to timely or properly comply with defendant’s request to revise [complaint]- the court stated that it did not have to rule on the defendant’s pending motion for summary judgment and/or the opposition filed by plaintiff); Connecticut General Life Ins. Co., supra (denying request because the dispositive question was one of law, and defendants “have not articulated precisely why they need such discovery”) . Similar to *Wood*, 2003 WL 548497, *1 (Conn.Super.2003), the court should not consider Plaintiff’s Avoidance Defense for any purpose whatsoever- especially to justify delaying his opposition to Singer’s pending Motion for Summary Judgment.

III. CONCLUSION

For the foregoing reasons, defendant Singer respectfully requests that the Court deny plaintiff’s request for a continuance.

DEFENDANT,
SINGER ASSET FINANCE COMPANY, LLC

⁴ Singer requested that Plaintiff revise the following response to its statute of limitations special defense: (1) “the defendant aided and abetted a fiduciary in concealing from the plaintiff and/or failing to make proper disclosures to the plaintiff of the wrongdoing set forth in the plaintiff’s Complaint . . . and as a result is barred and estopped from asserting statute of limitations defenses.”

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CERTIFICATION

This is to certify that a copy of the foregoing was faxed on September____, 2007 to
all parties and pro se parties of record as follows:

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Not Reported in A.2d, 2003 WL 548497 (Conn.Super.)

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.
Sarah WOOD,
v.
TOWN OF EAST LYME.
No. 552603.
Feb. 10, 2003.

Barry Ward, New London, for Sarah and Alfred Wood.

Waller, Smith & Palmer, PC, New London and O'Keefe, Phelan & Jackson, Hartford, for
Town of East Lyme and William P. Mulholland.

D. MICHAEL HURLEY, J.T.R.

*1 The court is unable to render a decision on the defendants' motion for summary judgment because there is no valid complaint in the file on which the motion for summary judgment can be granted. Instead, the court grants the defendants' motion for nonsuit (# 116) and motion for judgment of nonsuit (# 122). A review of the procedural history of this action will make the reasons for such a holding apparent.

On November 17, 1999 the defendants filed a request to revise the complaint (# 110). Pursuant to Practice Book § 10-37, the plaintiffs had thirty days in which to file an objection to the defendants' request. The plaintiffs filed no such objection within the required time limits. Pursuant to Practice Book § 10-37(a), the defendants' request was thus deemed automatically granted, and the plaintiffs were then required to file a revised complaint containing the revisions requested by the defendants within thirty days. The plaintiffs failed to file a revised complaint with the court within the thirty days prescribed by § 10-37(a).

On August 19, 2002, the defendants filed a motion for nonsuit for failure to file a revised complaint (# 116) and a motion for summary judgment (# 117).^{FN1} The defendants moved for nonsuit on the ground that the plaintiffs failed to file a revised complaint, as required by Practice Book § 17-31.

FN1. The motion for summary judgment was argued by the parties at short calendar on October 15, 2002.

On August 29, 2002 the plaintiffs filed a revised complaint (# 120). This revised complaint did not contain all of the revisions requested by the defendants. Shortly thereafter, on September 3, 2002, the plaintiffs filed a "Cover Sheet for Objection to the Request to Revise" (# 121) and attached their objection. The objection, however, is dated December 11, 1999. Both of these documents were filed over two and a half years beyond the time period permitted established by Practice Book § 10-37.

The defendants then filed a motion for judgment of nonsuit (# 122) on September 17, 2002. This was followed by the plaintiffs' objection to the defendants' motion for nonsuit.^{FN2} The plaintiffs admit therein that the objection to the defendants' request to revise was not filed timely with the court. Several pleadings followed, including the plaintiffs' objection to the motion for summary judgment (# 125), the plaintiffs' supplemental memorandum of law in objection to the motion for summary judgment (# 126), and finally, a second revised complaint (# 127). This second revised complaint, again, does not incorporate all of the revisions requested by the defendants and required by operation of law.

FN2. This pleading is not labeled with a log number, but has been date-stamped by the clerk's office.

Based on the foregoing, the court grants the defendants' motion for nonsuit and the motion for judgment of nonsuit. In light of entering judgment of nonsuit against the plaintiffs, it is not necessary for the court to rule on the defendants' motion for summary

judgment.

Conn.Super.,2003.

Wood v. Town of East Lyme

Not Reported in A.2d, 2003 WL 548497 (Conn.Super.)

END OF DOCUMENT

Wood v. Town of East Lyme 2003 WL 548497, *1 (Conn.Super.,2003)