

NO. FBT-CV15-6054375-S

PAUL LIONETTI	:	SUPERIOR COURT
PLAINTIFF	:	
	:	JUDICIAL DISTRICT OF
v.	:	AT BRIDGEPORT
	:	
WESTERN CONNECTICUT	:	
STATE UNIVERSITY	:	
DEFENDANT	:	February 1, 2016

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

This lawsuit arises from a student disciplinary proceeding. Plaintiff's complaint alleges that the University violated his due process rights under both the United States Constitution and the Connecticut Constitution when conducting his disciplinary proceeding. (Compl. Count 1 & 2.) Plaintiff was a former resident advisor and student at Western Connecticut State University. (Compl. ¶ 7.) The University charged Plaintiff with violating the Student Code of Conduct after his ex-girlfriend filed a complaint against him. (Compl. ¶ 8.) The disciplinary proceeding dealt with allegations of actual or threatened physical assault or abuse, threatening behavior, intimidation or coercion; intimate partner violence; and behavior or activity which endangers the health, safety, or well-being of oneself or others. (Compl. ¶ 4.) The University followed its procedures in conducting the disciplinary hearing. The University, amongst other things, gave Plaintiff written notice of the charges alleged against him, gave him an opportunity to be heard by the disciplinary committee, and gave him an opportunity to question witnesses through the chair of the disciplinary panel. The disciplinary committee found against the Plaintiff and Plaintiff appealed the committee's decision. (Compl. ¶ 3.) Through his appeal, Plaintiff was able to successfully modify the discipline that the disciplinary committee had imposed. (Compl. ¶ 20.)

Before proceeding any further, this Court must first determine whether Plaintiff has established jurisdiction over the University. As outlined below Plaintiff has not established jurisdiction over the University.

II. STATEMENT OF PERTINENT FACTS

The relevant facts to resolving this motion are the dates on which certain acts transpired.

- Plaintiff signed the writ of summons and complaint on November 15, 2015. (Summons and Complaint, Dkt. # 100.30.)
- December 22, 2015 is the return date stated on the summons and complaint. *Id.*
- The Plaintiff returned the writ of summons and complaint (process) to court on January 4, 2016. (File Date on Docket.)
- Both Plaintiff and the University filed their appearances on January 4, 2016. *Id.*

Plaintiff has thus clearly failed to return process to the Clerk of the Superior Court at least 6-days prior to the return date as required by Conn. Gen. Stat. § 52-46a.

III. ARGUMENT

a. Motion to Dismiss Standard

By this motion, brought pursuant to Practice Book § 10-31, an action may be dismissed for insufficiency of process. Plaintiff failed to comply with Conn. Gen. Stat. § 52-46a, and therefore, this action should be dismissed.

“[A] motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.” (Internal quotation marks omitted.) *Santorso v. Bristol Hospital*, 308 Conn. 338, 350 (2013). “The grounds which may be asserted in [a motion to dismiss] are ... lack of jurisdiction over the person ... insufficiency of process [and] insufficiency of service of process.” *Ziska v. Water Pollution Control Authority*, 195 Conn. 682, 687 (1985). “[W]hen a particular method of serving process is set forth by statute, that method must be followed ... Unless service

of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction ... Failure to comply with the statutory requirements of service renders a complaint subject to a motion to dismiss on the ground of lack of personal jurisdiction ... Facts showing the service of process in time, form, and manner sufficient to satisfy the requirements of mandatory statutes in that regard are essential to jurisdiction over the person.” (Citation omitted; internal quotation marks omitted.) *Morgan v. Hartford Hospital*, 301 Conn. 308, 400–01 (2011).

b. This Court may dismiss an action where the plaintiff fails to return process in accordance with a mandatory statute.

Conn. Gen. Stat. § 52-46a states in relevant part that “[p]rocess in civil actions . . . shall be returned . . . to the clerk of [the superior court] at least six days before the return day.” This statute is mandatory and failure to comply with its requirements as to the time when process shall be served renders the proceeding voidable and subject to abatement. *Rogozinski v. American Food Service Equipment Corp.*, 211 Conn. 431, 433 (1989).

In *Rogozinski*, the dispositive issue was “whether the trial court erred in dismissing the plaintiffs’ action for failure to return process within the six day period required by General Statutes § 52-46a.” *Id.* at 432. Examination of the record disclosed that the writ and summons bore a return date of April 26, 1988. *Id.* The record further reflected that the process was stamped as received in the clerk’s office on April 21, 1988, less than six days before the stated return date. *Id.* The defendants moved to dismiss the action for failure to return the process in a timely manner and the trial court granted the defendant’s motion. *Id.* On appeal, the Supreme Court transferred the matter to itself and affirmed the Superior Court’s decision. *Id.* The plaintiff claimed that the trial court should not have granted the motion to dismiss because of the

language of Conn. Gen. Stat. § 52-123¹. *Id.* Plaintiff argued that the late return of process was a "circumstantial error" and thus should not have been dismissed. *Id.* The Supreme Court disagreed and noted that Conn. Gen. Stat. "§ 52-123 and its predecessors have been uniformly limited in their application to defects in the writ. Meanwhile, there is uncontroverted authority to the effect that defects in the process are voidable and therefore subject to abatement." *Id.* at 435. The Supreme Court thus affirmed the Superior Court's decision dismissing the complaint because it was returned five days before the return of service date instead of six days before as required by the statute.

Here, this Court should similarly dismiss Plaintiff's complaint. Plaintiff should have returned process to the Superior Court six days before the return date of December 22, 2015, i.e., on or before December 16, 2015. Instead, Plaintiff returned process on January 4, 2016. Plaintiff has thus failed to comply with the statute and the failure to effect service of process in accordance with applicable statutes creates a jurisdictional defect. *See, Commissioner of Transp. v. Connemara Court, L.L.C.*, 46 Conn. Sup. 623, 634 (Super. Ct. 2000) (service of process on party in accordance with statutory requirements is prerequisite to court's exercise of in personam jurisdiction over that party). The Court can dismiss this complaint. *See, Rana v. Ritacco*, 236 Conn. 330, 339 (1996) ("[o]nce an action has been brought by service of process on the defendant, a trial court may thereafter dismiss the action for failure to return the service of process within the mandated time period.")

The University asks that the Court dismiss Plaintiff's complaint and this motion is timely. Pursuant to Practice Book § 10-30, a defendant may waive his or her right to challenge the

¹ General Statutes § 52–123 provides: “circumstantial defects not to abate pleadings. No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court.”

court's personal jurisdiction by failing to file a motion to dismiss within 30-days after the date the defendant files an appearance. The University filed an appearance on January 4, 2016 and has filed this motion prior to February 3, 2016. While the University would have typically filed an appearance two days after December 22, 2015, the University could not file an appearance because no legal proceeding existed until Plaintiff returned process to the Court. The 30-day count down begins after the appearance is filed and thus this motion is timely. *See, Lynch v. Patrons Mutual Ins. Co. of Connecticut*, No. CV960561029, 1996 WL 661822 (Superior Court, November 5, 1996, Sullivan, J.) (attached hereto) (dismissing complaint when process was not returned 6-days prior to the return date and explaining that the 30-day period does not commence until an appearance is filed and after process has been returned to the court.)

The Court should also dismiss this complaint because proper service of process is not some mere technicality. "Proper service of process gives a court power to render a judgment which will satisfy 'due process' under the 14th amendment of the federal constitution and equivalent provision of the Connecticut constitution and which will be entitled to recognition under the 'full faith and credit' clause of the federal constitution." *Hibner v. Bruening*, 78 Conn. App. 456, 458 (2003) *citing* 1.R. Bollier, N. Cioffi, K. Emmett, J. Kavanewsky & L. Murphy, Stephenson's Connecticut Civil Procedure (3d Ed. 1997) § 11(b), p. 20. As this matter stands, Plaintiff has not established personal jurisdiction over the University and this Court should dismiss this complaint.

IV. CONCLUSION

Based on the foregoing, the University respectfully requests that this Court grant this motion and enter its order dismiss this action.

WESTERN CONNECTICUT STATE
UNIVERSITY

GEORGE JEPSEN
ATTORNEY GENERAL

BY: /s/Walter Menjivar
Walter Menjivar
Assistant Attorney General
Juris No. 436605
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5210
Fax: (860) 808-5385
Walter.Menjivar@ct.gov

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, this 1
day of February, 2016 to:

Paul M. Cramer
Law Offices of Paul M. Cramer, LLC.
1100 Kings Highway East
Fairfield, CT 06825

/s/Walter Menjivar
Walter Menjivar
Assistant Attorney General

1996 WL 661822

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of **Connecticut**.

Daniel E. **LYNCH**, Conservator
of the Estate of Annabell Osborne

v.

PATRONS MUTUAL INSURANCE
COMPANY OF **CONNECTICUT**.

No. CV960561029.

|
Nov. 5, 1996.

Before SULLIVAN, DORSEY and WALSH, JJ.

**MEMORANDUM OF DECISION
ON MOTION TO DISMISS**

SULLIVAN, Judge.

*1 This is an action by the plaintiff conservator against the defendant insurer seeking reimbursement for damages and losses to the home and the personal property of the ward caused by the breaking of water pipes due to a malfunction of the oil burner in the home. The complaint alleges that the policy was in full force and effect, that the premiums had been paid, and that the casualty occurred.

The defendant moves to dismiss the action on the basis that “the plaintiff failed to return the complaint to the Clerk of the Superior Court at least six (6) days before the Return Date in violation of [General Statutes § 52-46a](#).”

The file reflects the following sequence of events. The complaint was signed April 14, 1996. The complaint bore a return day of May 21, 1996. The complaint was served by the sheriff on April 19, 1996. The defendant, by its attorneys, forwarded to the court its appearance on April 29, 1996, twenty-two days prior to the return day.

The clerk's office, having first stamped in the appearance, thereafter, on May 28, 1996, coincidentally the same day

as the actual return of process, returned the appearance to the defendant. The reason for returning the appearance is not set forth on the appearance slip, which was later refiled. However, the court form, attached to this motion as “Exhibit A,” states “12. Our records do not disclose a case captioned or returnable as the enclosed.” This transmittal form is signed by the Assistant Clerk and dated May 28, 1996.

The complaint was returned to Court late in the day, 4:23 p.m., on May 28, 1996, seven days after the return date.

On May 22, 1996, the day after the listed return day, the defendant had transmitted to the plaintiff “the defendant's May 22, 1996 Interrogatories and Requests for Production within the time provided under the Rules of Practice.” The defendant, on June 27, 1996 by motion dated June 26, 1996 filed a Motion for Nonsuit against the plaintiff for failure of the plaintiff to respond to the Interrogatories and Production which it had served on the plaintiff on May 22, 1996, per the above quotation from the motion for nonsuit. The defendant also retransmitted to the Court its appearance, which is stamped as received by the Court on June 27, 1996, which is the same day as the aforesaid motion for nonsuit. The appearance and the motion for nonsuit are stamped in within two minutes of each other.

The next day, June 28, 1996, the defendant filed with the Clerk of the Court this motion to dismiss. This motion to dismiss was obviously filed within thirty days of the filing of the formal appearance document, which had originally been returned by the Clerk of the Court because the complaint had not been returned to Court as of the date of original transmittal. The record is clear that the process was not returned to the Court within six days prior to the return day, as specified by [General Statutes § 52-46a](#).

To add to the complexity of the circumstances the defendant had attempted to file its appearance on April 26, 1996, almost four weeks prior to the Return Date.

*2 Although Section 66 of the Practice Book states that “an appearance for a party should be filed on or before the second day following the return day,” filing so far in advance of the return date should lead to a reasonable expectation that the process will not yet have been returned to court, and hence that an appearance form may well ultimately be returned by the Clerk. The Court acknowledges the defendant's contention that defendants have no practical way of knowing whether process has been returned to Court,

so as to accept an appearance, without engaging in the impractical procedure of contacting the clerk's office each day, in perpetuity, to determine whether the process has been returned so as to be able to file an appearance.

The Court accepts the defendant's contention that the rejection of the formal appearance by the clerk is tantamount to nonfiling, and the record cannot be read so as to conclude that the formal appearance form was actually filed and accepted by the Court on the attempted filing date of April 29, 1996, so as to cause the 30-day period to commence to run from that date. See *Van Mecklenburg v. Pan American World Airways, Inc.*, 196 Conn. 517, 519 (1985).

Practice Book Section 142 provides “Any defendant, wishing to contest the Court's jurisdiction, may do so by filing a motion to dismiss within thirty days of the filing of an appearance.”

Late return of process is not a “circumstantial error,” as referred to in [General Statutes § 52-123](#), and hence that statute would not preclude the dismissal of this action. The plaintiffs argue that the late return of process was a ‘circumstantial error’ within the meaning of [§ 52-123](#) and, therefore, this matter should not have been dismissed. We do not agree.

Rogozinski v. American Food Service Equipment Corporation, 211 Conn. 431, 433 (1989).

The failure of the plaintiff to return the writ to court, in accordance with the dictates of [General Statutes § 52-46a](#) causes the process to be abatable.

“The failure to meet the statutory requirements for the return of process rendered the case subject to dismissal.” *Arpaia v. Corrone*, 18 Conn.App. 539, 541 (1989).

The Court expresses some concern about the procedural dilemma presented by this case. It does not appear that late return of process affects subject matter jurisdiction, but rather falls into the category of in personam jurisdiction.

“[General Statutes § 52-46a](#) states in relevant part that ‘process in civil actions ... shall be returned ... to the clerk of [the superior court] at least six days before the return day’. ‘This statute is mandatory and failure to comply with its requirements as to the time when process shall

be served renders the process *voidable* and subject to abatement.” *Rogozinski v. American Food Service Equipment Corporation*, *supra*, p. 433. (Emphasis added.)

“An improperly executed writ or citation does not, therefore, affect subject matter jurisdiction of the trial court. As a defect in having the court acquire personal jurisdiction over the defendant, an improperly executed citation may be waived by the defendant. *Brunswick v. Inland Wetlands Commission*, 222 Conn. 541, 551 (1992).

*3 Practice Book Section 142 allows a defendant to file a motion to dismiss within thirty days of the filing of a general appearance. Practice Book Section 223 allows the defendant to file Interrogatories “without leave of the court at any time after the return day,” and to allow the filing of a motion for nonsuit based upon a claim of in personam jurisdiction thereby theoretically invoking the court's jurisdiction for failure to respond to Interrogatories, which is incongruous with a claim of lack of in personam jurisdiction.

Nonetheless, Practice Book Section 112 does not place either the transmitting of interrogatories or the filing motions for nonsuit into the mandatory sequence of pleadings such as to preclude the filing of a motion to dismiss, and so as to cause preclusion or waiver of the right to file this motion to dismiss under the provisions Practice Book Section 113.

Hence the concept of activity constituting an appearance, without the necessity of the filing of a formal appearance form in the manner set forth in Practice Book Section 64, as is discussed in early [Connecticut](#) cases (see *Schoonmaker v. Albertson & Douglas Machine Co.*, 51 Conn. 387, 393, 394 (1993), does not appear to be applicable to the present circumstances.

For the reasons set forth herein, the late return of the process to court, together with the filing of the motion to dismiss within a day after the filing and acceptance by the court of the defendant's appearance, causes the court to conclude that it has no discretion but to dismiss the action.

Consequently, the motion to dismiss is granted.

All Citations

Not Reported in A.2d, 1996 WL 661822