

STATE OF VERMONT
WINDSOR COUNTY, SS

Charles Lavalla
Ann Lavalla
Plaintiff

v.

Chittenden Corporation
Defendant

SUPERIOR COURT
Docket No. 682-9-09 Wrcv

DECISION ON MOTION TO DISMISS

This action arises out of a slip and fall occurring March 17, 2006 when Charles Lavalla allegedly fell at a Chittenden Bank branch office in Newfane, Vt. The action was commenced by filing in the Windham Superior Court on March 16, 2009 with Docket Number 139-3-09 Wmcv. The complaint names Charles Lavalla as a plaintiff and also names Ann Lavalla, his wife, for loss of consortium claims. Although not required to commence the action (V.R.C.P. 3) a summons which reflects Charles Lavalla as the only plaintiff was filed along with the complaint. No summons on behalf of Ann Lavalla has been filed with Court.

A motion for an extension of time to complete service was made by Charles Lavalla on May 15, 2009. No motion to extend the time for service was filed by Ann Lavalla. On May 18, 2009, the Court granted the extension of time for service, providing for an additional thirty days to complete service. Also on May 18, 2009 the summons and complaint was served upon Chittenden Corporation. The return of service was filed with the Court on May 20, 2009.

On May 27, 2009, Chittenden Corporation appeared in the action and filed a motion to dismiss alleging the statute of limitations had expired before service was completed. Plaintiffs oppose the motion and all parties have filed supplemental pleadings directed at the issue, the last of which was filed June 26, 2009.

On September 24, 2009 the Windham Superior Court issued an entry order transferring the case to Windsor Superior Court due to the recusal of the presiding judge. The file was transferred to Windsor Superior Court and assigned Docket Number 682-9-09 Wrcv. On April 21, 2010 the pending motion to dismiss was brought to the attention of the undersigned.

Chittenden correctly argues that a three-year period of limitations applies to personal injury actions. 12 V.S.A. § 512(4). In order to avoid being barred by the statute of limitations, an action must be timely filed and service of the summons and complaint

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timely made. *Weisburgh v. McClure Newspapers, Inc.*, 136 Vt. 594 (1979); *Bethel Mills v. Whitcomb*, 116 Vt. 357 (1950).

In this case, the cause of action accrued on September 17, 2006. Accordingly, the action was required to be commenced no later than September 17, 2009, since that date was not a weekend or a holiday. *Powers v. Chouinard*, 138 Vt. 3 (1979). The complaint (and a summons on behalf of Charles Lavalla) was filed on September 16, 2009, one day before the expiration of the statute of limitations. This action was commenced within the three year limitations period when the complaint was filed with the Court. 12 V.S.A. § 466; V.R.C.P. 3.

Nonetheless, proper and timely service was required to be made in order to effectively toll the statute of limitations as of the filing date. *Weisburgh v. McClure Newspapers, Inc.*, 136 Vt. 594 (1979). V.R.C.P. 3 provides for 60 days from the time of filing to serve the summons and complaint. Given the filing of this matter on March 16, 2009, service was required to be made no later than May 15, 2009. V.R.C.P. 6.

On the final day to make service Plaintiff Charles Lavalla requested an extension of time to obtain service. Although the Court did not act upon the request until after the time for service had expired, *Bessette v. Department of Corrections*, 182 Vt. 1 (2007) makes it clear that a court may grant a request for extension if the request is made before the time for service has expired. Defendant's argument that it had a vested right to dismissal upon the expiration of the 60 day time to accomplish service has been squarely rejected in *Bessette*.

As Charles Lavalla made a timely request for extension, and as such extension was granted, Charles Lavalla was not required to complete service by May 15, 2009. The service made on May 18, 2009, the same day the Court granted the earlier request for extension, was therefore timely. As to the claims made by Charles Lavalla, the Motion to Dismiss is **DENIED**.

A claim for loss of consortium is a derivative claim; it is dependent upon the success of the underlying claim. The Vermont Supreme Court has described consortium as a derivative claim "rooted in time, place, and circumstance to [the] ... injury." *Derosia v. Book Press, Inc.*, 148 Vt. 217, 220 (1987). Although derivative, loss of consortium claims are independent causes of action. *Hay v. Medical Center Hospital of Vermont*, 145 Vt. 533 (1985).

Here, presumably through oversight, the request for an extension of time for service was made only by Charles Lavalla. That request was promptly granted by the Court. There is no discernable reason why the Court would have granted an extension for one plaintiff and denied it for the other had both requested an extension. Further, the service on the Defendant would have been exactly the same as what occurred here had both plaintiffs requested the extension; there would have been one service of the complaint upon the Defendant as was done on May 18, 2009.

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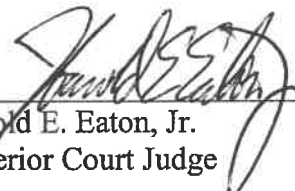
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The Rules of Civil Procedure are to be construed and administered so as to secure the just determination of every action. V.R.C.P. 1. Where, as here, the request for extension was timely made concerning the underlying tort, the spouse's derivative claim for loss of consortium, brought in the same complaint, need not have also sought a request for extension for service. There is no independent purpose to be served by such an additional request. Only one service of the complaint on the Defendant was required and that service put the Defendant on timely notice of both claims. Therefore as to the claims of Ann Lavalla, the Motion to Dismiss is also **DENIED**.

Dated at Woodstock this 4th day of May, 2010.



Harold E. Eaton, Jr.
Superior Court Judge

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