COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-892

MARIE CHERY

vs.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Marie Chery, appeals from a decision and order of the Appellate Division of the District Court Department affirming the judgment dismissing her G. L. c. 93A, claim (count II) against the defendant, Metropolitan Property and Casualty Insurance Company (Metropolitan), and denying her motion for summary judgment.[1] On appeal, she claims Metropolitan waived its right to raise the affirmative defense that Chery failed to comply with the demand letter provisions of G. L. c. 93A. She also raises a variety of alternate claims. We affirm.

Chery claims that the statutory requirement of waiting 30 days after sending a G. L. c. 93A demand letter before filing an action can be overlooked under these circumstances. We

[1] We previously affirmed summary judgment in favor of Metropolitan on count I of Chery's complaint. See Chery v. Metropolitan Property & Cas. Ins. Co., 79 Mass. App. Ct. 697 (2011) (Chery I).

disagree. The language of G. L. c. 93A does not support Chery's claim. Instead, the statute plainly requires the demand letter shall be sent at least thirty days before filing suit. See G. L. c. 93A, § 9(3), inserted by St. 1969, c. 690 ("At least thirty days prior to the filing of any such action, a written demand for relief . . . shall be mailed or delivered to any prospective respondent"). As Chery only waited nine prior to filing her complaint, instead of the thirty days Metropolitan was entitled to, it follows that she did not comply with the statute.[2] See York v. Sullivan, 369 Mass. 157, 164 (1975) ("thirty-day requirement is a prerequisite to an action under § 9"); Spilios v. Cohen, 38 Mass. App. Ct. 338, 342 (1995) (demand letter "must be sent thirty days before the commencement of the action"). Moreover, Chery's complaint was defective as well, as she failed to adequately plead her compliance with G. L. c. 93A.[3] See Kanamaru v. Holyoke Mut. Ins. Co., 72 Mass. App. Ct. 396, 407-408 (2008) ("[P]laintiff must . . . plead that [s]he has complied with this requirement as a prerequisite to suit").[4] Therefore, as Chery has not complied with the

[2] In 2011, over four years after filing the suit at issue, Chery attempted to file a second c. 93A action. This second action was dismissed as the statute of limitations had by that time run. See G. L. c. 260, § 5A.

[3] Chery's motion filed in August, 2008, to amend her complaint was denied. Chery has not appealed from that order.

[4] Chery also suggests that giving Metropolitan the statutory thirty days would have been futile, or, alternatively, that her

substantive or procedural requirements of c. 93A, we find no error by the judge in dismissing the case.

Chery next claims that Metropolitan has waived its right to defend on the grounds that she failed to comply with the c. 93A demand letter requirements. We disagree. Metropolitan sufficiently pleaded this affirmative defense in its initial responsive pleading. Chery nevertheless suggests that Metropolitan has waived this defense because it failed to include it in its first motion for partial summary judgment. This argument also fails. Chery's noncompliance with c. 93A was not an issue in that motion, thus Metropolitan was not required to raise it at that juncture.[5] Indeed, the motion dealt with other issues, including the amount of Chery's damages, and Metropolitan was not required to raise all its unrelated defenses merely to avoid waiving them. See Mass.R.Civ.P. 56(b), 365 Mass. 824 (1974) (Party may move for summary judgment on "all or any part" of the claims against it).

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failure to wait thirty days should be excused because Metropolitan suffered no prejudice as a result. We do not discuss these unsupported arguments except to say that neither of them has merit. See Zora v. State Ethics Commn., 415 Mass. 640, 642 n.3 (1993).

[5] The two cases Chery cites as supporting this proposition, Weiler v. PortfolioScope, Inc., 469 Mass. 75, 92-94 (2014), and American Intl. Ins. Co. v. Robert Seuffer GmbH & Co. KG., 468 Mass. 109, 118-119 (2014), address the validity of a defendant's waiver of personal jurisdiction. That question differs from the one before us here. As Chery herself argues, compliance with the requirements of G. L. c. 93A is not jurisdictional.

Finally, Chery claims that the matter at issue in Chery I, i.e., the computation of Chery's damages, remains a genuinely disputed issue. Because that is so, she asserts, the judge erred in entering summary judgment in favor of Metropolitan. However, given our conclusion that the case was properly dismissed in light of Chery's failure to comply with the requirements of c. 93A, we need not address that question.[6]

Decision and order of Appellate Division dated March 17, 2014, affirmed.

By the Court (Grainger, Meade & Fecteau, JJ.[7]),

Clerk

Entered: May 7, 2015.

[6] Because Chery has not prevailed on her c. 93A claim, she is not entitled to damages or attorney's fees under that statute. See Hannon v. Original Gunite Aquatech Pools, Inc., 385 Mass. 813, 827-828 (1982).

[7] The panelists are listed in order of seniority.