

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1698

CA 08-00093

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND FAHEY, JJ.

VIRGINIA FASANO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

J.C. PENNEY CORPORATION, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (MICHELE K. SNYDER OF
COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 23, 2007 in a personal injury action. The order denied defendant's motion to dismiss the action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the action is dismissed.

Memorandum: Defendant appeals from an order denying its motion to dismiss the action based on the failure of plaintiff to comply with defendant's demand for service of a complaint pursuant to CPLR 3012 (b). We agree with defendant that Supreme Court erred in denying the motion. "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" (*Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854). Here, plaintiff failed to provide any excuse for the delay (*see Moreno v Shell Oil Co.*, 67 AD2d 905), and she failed to demonstrate that she has a meritorious cause of action (*see Kordasiewicz*, 26 AD3d at 855). Thus, "it was error, as a matter of law, not to grant the motion to dismiss without condition" (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905; *see Stolowitz v Mount Sinai Hosp.*, 60 NY2d 685).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court