

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30903
G/kmb

_____AD3d_____

Argued - March 14, 2011

PETER B. SKELOS, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-06612

DECISION & ORDER

Madeline DeLorenzo, appellant, v Gabbino Pizza
Corp., etc., respondent.

(Index No. 237/09)

Lawrence D. Engle, Purchase, N.Y., for appellant.

Thomas K. Moore, White Plains, N.Y. (Gary M. Bell of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Colabella, J.), entered April 29, 2010, which, inter alia, granted the defendant's motion to dismiss the complaint pursuant to CPLR 306-b.

ORDERED that the order is affirmed, with costs.

On October 16, 2006, the plaintiff allegedly was injured when she slipped and fell on a slippery substance in a pizzeria owned by the defendant. In January 2009, the plaintiff commenced this action by filing a summons and complaint with the Westchester County Clerk.

It is undisputed that the plaintiff failed to comply with CPLR 306-b, as she failed to effect service upon the defendant within the 120-day period allowed by that statute (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101; *Calloway v Wells*, 79 AD3d 786; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26). To the extent that the plaintiff attempted to informally seek leave to effect late service of the original summons and complaint upon the defendant pursuant to CPLR 306-b, that affirmative relief should have been sought in a notice of cross motion to the Supreme Court (*see Rinaldi v Rochford*, 77 AD3d 720) and, in any event, the plaintiff did not demonstrate the existence of facts that would support the granting of such relief (*see Williams v Nassau County Med.*

April 26, 2011

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Ctr., 6 NY3d 531; *Calloway v Wells*, 79 AD3d at 787; *Redman v South Is. Orthopaedic Group, P.C.*, 78 AD3d 1147, *lv denied* 16 NY3d 707; *Rinaldi v Rochford*, 77 AD3d at 720).

The plaintiff's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the defendant's motion to dismiss the complaint pursuant to CPLR 306-b.

SKELOS, J.P., ENG, AUSTIN and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court