SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 36
Justice

JOHN SLATE,

INDEX NO. 118811/00

Plaintiff(s),

MOTION DATE

-against-

MOTION SEQ. NO. 002

SCHIAVONE CONSTRUCTION COMPANY,

MOTION CAL. NO.

Defendant(s).

The following papers, numbered 1 to were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Upon the foregoing papers,

Defendant moves, pursuant to CPLR 3211 (a) (8), for dismissal of the complaint against it.

This is a personal injury action, wherein plaintiff alleges that he was injured in a construction site accident on September 3, 1997.

On October 5, 2000, service of process was attempted upon defendant at "40th St & 11th Ave, New York, NY" by delivery of the summons and complaint to "'John' Thomas," the alleged "Managing Agent" of defendant.

Defendant bases this motion on the following assertions: (1) defendant is a New Jersey corporation, with its principal place of business in Secaucus, New Jersey, and has never maintained an office or place of business in New York; (2) the address shown on the affidavit of service and on the summons was a work site, not an office; (3) the only personnel of defendant at the work site were construction workers, not corporate officers with authority to accept service on behalf of the corporation; (4) defendant has never received the complaint, correspondence, or other notice of any kind concerning this action from New York's Secretary of State (plaintiff never served the Secretary of State); and (5) a search of defendant's records by defendant's insurance coordinator failed to bring to light any information concerning a "'John' Thomas"; no one with that name was an authorized agent of defendant for service of process; and on October 5, 2000, the date of the alleged service, no one with that name was an employee of defendant. Defendant supports these assertions with the affidavit of its insurance coordinator, who attests that she is "the individual who is and was at the time in question to be notified of any and all attempts to serve legal process upon Schiavone" (Payumo 5/21/02 Aff., ¶ 3).

Plaintiff alleges that his counsel undertook the representation of plaintiff after a prior attorney had commenced a

Workers' Compensation claim on his behalf. Plaintiff's new counsel "assumed" that the address for defendant (40th Street and 11th Avenue) in the prior attorney's records was correct, and attempted service upon defendant there. An affidavit of service by the process server indicated that defendant's managing agent, John Thomas, whose physical description was given, had been served. On January 10, 2001, plaintiff sent a default letter by certified mail to defendant, at the same address. When the return receipt card came back without a signature, plaintiff's counsel did not consider the lack of signature unusual, and believed "in good faith" that the letter had been received by defendant.

Plaintiff's counsel asserts that the statement of defendant's insurance coordinator, that defendant has never maintained a place of business in New York, is "a blatant falsehood" (Cascione 7/3/02 Affirm., ¶ 6). He bases this statement upon a search for defendant in a "Business Directory," which allegedly disclosed both Manhattan and Bronx addresses and phone numbers for defendant. According to plaintiff's counsel, "The Manhattan telephone number is now disconnected but the Bronx number ... rings and is answered SCHIAVONE" (*ibid.*).

Plaintiff acknowledges that there was a "flaw" in the service of process upon defendant, but asks that the court either hold a traverse hearing to determine whether defendant was properly served

in this matter, or, instead of holding a traverse hearing, that the court permit plaintiff to make late service upon defendant, pursuant to CPLR 306-b, and direct plaintiff to re-serve defendant (by serving defendant's attorney).

Service upon a corporation may be pursuant to (1) CPLR 311 (a) (1), which requires personal service upon "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service"; (2) Business Corporation Law § 306 (a), which permits service upon a registered agent; or (3) Business Corporation Law § 306 (b), which permits service upon the Secretary of State.

No showing whatsoever has been made that plaintiff attempted service upon defendant by service upon a registered agent or upon the Secretary of State.

It is well-established that "[n]otice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Macchia v Russo*, 67 NY2d 592, 595 [1986]), and that "[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" (*Raschel v Rish*, 69 NY2d 694, 697 [1986]; *see also, Matter of 72A Realty Assoc. v New York City Envtl. Control* Bd., 275 AD2d 284, 286 [1st Dept 2000]). "The burden of establishing the propriety of service rests upon the

party asserting jurisdiction" (*Matter* of 72A *Realty* ***Assoc.*** ***v*** *New* ***York*** *City Envtl. Control Bd.*, 275 AD2d at 286).

Plaintiff has not met his burden. Plaintiff attests that, "[d]uring the time that I worked [at the 40th Street/11th Avenue site,] Schiavone Construction had an office at the job location and I told my first attorney that they could be contacted there. I understood that a Manhattan work site is where a Schiavone supervisor was served with process in my case" (Slate 7/2/02 Aff., ¶ 3).

Plaintiff was injured while working as a laborer for a subcontractor at the site, where defendant was the general contractor (*id.*, ¶ 2). There was no basis for his counsel to assume either that plaintiff would be familiar with the requirements of proper service upon a corporation, or that plaintiff would know who the proper person would be for service of process in a company for whom he did not work.

In addition, plaintiff's counsel should have at least questioned whether a **"supervisor"** at a job site was a person authorized to accept service of process, pursuant to CPLR 311 (a) (1) (*see Fashion Page, Ltd.* ***v*** *Zurich Ins.* Co., *50* NY2d 265, 272 [1980] **["Delivery** of the summons to the officials or employees designated by the Legislature fulfills the statutory aim (of giving the corporation notice of the suit) since their 'positions are such

as to lead to a just presumption that notice to them will be notice to the ... corporation' (citation omitted)"]).

Plaintiff's counsel attests that Manhattan and Bronx addresses and phone numbers were found for defendant by means of a search of a "Business Directory,'! but he fails to give any information concerning the "Business Directory," or why he considers that the directory's information is more accurate than that provided in a sworn statement by one of defendant's employees. Nor does plaintiff's counsel either provide an affidavit by the person who made the phone call to defendant's alleged Bronx number, or aver that he made the phone call himself. Hence, the inference in the affirmation of plaintiff's counsel, that defendant has a place of business in New York, is based on nothing but inadmissible, unsubstantiated hearsay.

No issue of fact has been presented which would justify conducting a traverse hearing to resolve the matter ***(see e.g. Colon v Beekman Downtown Hosp.***, 111 AD2d 841, 841-842 [2d Dept 1985]).

CPLR 306-b provides, in relevant part, that "[i]f service is not made upon a defendant within the time provided in this section, the court, ***upon*** *motion,* shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service [emphasis added]." Plaintiff has not moved for an extension of time to make proper

service upon defendant. Instead, his counsel merely attests, in his affirmation (Cascione 7/3/02 Affirm., ¶ 6), that plaintiff "deserves" this relief.

> The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant.
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> The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative -- the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served.

(Leader ***v Maroney, Ponzini & Spencer,*** **97** NY2d **95, 105-106,** 106 [2001]; *see also Watler* V ***Riccuiti,*** 282 AD2d 741, **741** [2d Dept 2001] [court "improvidently exercised its discretion" in denying CPLR 306-b motion "in the interest of justice"]).

Plaintiff in this case was a construction worker, employed by a subcontractor, who was injured on the job. He alleges, among other things, that defendant, the general contractor at the site, violated Labor Law § 240 (1), and that that violation was the proximate cause of his injury.

"Labor Law § 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (***Bland*** v ***Manocherian,*** 66 NY2d 452, 459 [1985]). The purpose of the statute is "to protect workers by placing the 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 NY Legis Ann, at 470), instead of on workers, who 'are scarcely in a position to protect themselves from accident' (***Zimmer*** v ***Chemung County Performing Arts***, 65 NY2d 513, 520 [1985])" (Kyle v ***City of New York,*** 268 AD2d 192, 195 [1st Dept 20001 [internal quotations omitted]).

Here, plaintiff is at risk of losing the opportunity to bring his case before this court, and possibly obtain relief intended by the Legislature for construction workers who are injured at unsafe work sites, simply because his attorney made a patently unwise assumption concerning defendant's address, and then failed to

pursue even a cursory investigation into the address's validity when indications that the address might be incorrect arose.

Sadly, it is not unheard of in this court that a "deserving" party is at risk of losing the opportunity to obtain relief because of the failures of his or her counsel ***(see e.g. Wolkstein v Morgenstern,*** 261 AD2d 170, 170 [1st Dept 1999] [counsel's "misconduct"]; ***Rankin v Miller,*** 252 AD2d 863, 865 [3d Dept 1998] [plaintiff's counsel directed to pay defendant $4,000 for counsel's failure to comply with discovery demands]; ***Evans v International Ins.*** Co., 168 AD2d 374, 375 [1st Dept 1990] [counsel's "erroneous advice"]; ***Scanlon v The Rhodes School,*** 76 AD2d 813, 813 [1st Dept 1980] [counsel sanctioned $200 for "disregard of obligation" to comply with demand for bill of particulars]; ***North East Appraisals v Fink,*** 75 AD2d 672, 673 [3d Dept 1980] [counsel's "neglect"]; ***Odess v Medical Ctr., Teamster Local 1034,*** 67 AD2d 941, 942 [2d Dept 1979] [action saved for client, while monetary sanction imposed upon attorney for "neglect"]).

If this court were to grant defendant's motion, plaintiff would be severely prejudiced, in that his opportunity to have his claim adjudicated would be eradicated. Defendant has not demonstrated that it would be prejudiced in any way if this action were to proceed on the merits.

Therefore, in the interests of justice, this court deems plaintiff's "request" for relief pursuant to CPLR 306-b a motion for such relief, and the motion is granted.

However, counsel for plaintiff is cautioned that his plan to effect "service upon [defendant's] counsel" (Cascione 7/3/02 Affirm., ¶ 7) would be yet another failure to properly represent his client. Service upon a corporation's attorney is "insufficient to acquire personal jurisdiction over the defendant. The attorney [is] not a person authorized to accept service *(see,* CPLR 311[1])" *(Chow* v *Kenteh Enters. Corp.,* 169 AD2d 572, 572 (1st Dept 1991]).

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the motion for an extension of time to effect service, pursuant to CPLR 306-b, is granted in the interests of justice, on the condition that counsel for plaintiff personally pay a monetary sanction of $500 to defendant, and effect proper service upon defendant within 20 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that counsel for plaintiff shall provide proof to this court of his compliance with the directive concerning payment of the monetary sanction within 25 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that, in the event that the sanction is not timely paid, or proper service is not timely effected, the motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: 10/11/07

MARILYN SHAFER J.S.C.

Check one: **[ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION**