

<b>Henricks v Global Brands, Inc.</b>
2007 NY Slip Op 32786(U)
September 5, 2007
Supreme Court, New York County
Docket Number: 0112276/2006
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LEHNER  
EDWARD H. LEHNER Justice

PART 19

CHARLES HENRICKS

INDEX NO. 112276/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

- v -

GLOBAL BRANDS, INC.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

\_\_\_\_\_ motion is decided in accordance  
with accompanying memorandum decision

**FILED**  
SEP 06 2007  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: SEP 05 2007

Jsh  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19**

-----X  
CHARLES HENRICKS, d/b/a STARKEY &  
HENRICKS,

Plaintiff,

Index No.  
112276/06

-against-

GLOBAL BRANDS, INC.,

Defendant.

**FILED**  
SEP 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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**LEHNER, EDWARD H., J.:**

Before the court is a motion by plaintiff for an order pursuant to CPLR 306-b extending the time for him to effect service of the summons and complaint, and a cross-motion by defendant to dismiss the action.

The summons and complaint were filed in this court on September 1, 2006. Therein plaintiff seeks to recover \$47,796.75 for printing services rendered between July 20, 1999 and November 1, 2000 in connection with a proposed public offering by defendant. The affidavit of service filed on September 5, 2006 avers that Ryan Donihue, an young attorney no longer associated with plaintiff's law firm (tr. p. 8), effected service on September 1, 2006 "via first class delivery" upon defendant "c/o New York Department of State, Division of Corporations, 41 State Street, Albany, NY 12231."

When no answer was received, plaintiff moved on March 8, 2007 for a default judgment. Although there was no opposition to the motion, the application was denied by order dated April 5, 2007 on the grounds that when service is made upon the Secretary of State, BCL § 306 requires that delivery be made personally. This motion by plaintiff for an extension was made on July 17, 2007.

While CPLR 306-b requires service within 120 days of the filing of the summons and complaint, it provides that if service is not made within such period, the court may “upon good cause shown or in the interest of justice, extend the time for service.” In the leading case interpreting this section, the Court of Appeals held in *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 (2001), that while to demonstrate “good cause,” a plaintiff must show “reasonably diligent efforts at service as a threshold matter,” in considering the “interest of justice” (p. 105):

“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.”

The court further stated that (p. 106):

“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.”

See also, *Lugo v. GE Capital Auto Lease*, 36 AD3d 409 (1<sup>st</sup> Dept. 2007); *DeVries v. Metropolitan Transit Authority*, 11 AD3d 312 (1<sup>st</sup> Dept. 2004).

Here, considering the above facts, plaintiff has clearly failed to demonstrate “good cause” as it has not shown that it made reasonable efforts to properly effect service upon defendant. Regarding the “interests of justice” standard, while the invoice dated October 30, 2000 shows that the great majority of plaintiff’s services were rendered prior to September 1, 2000, and thus would be barred by the six-year statute of limitations of CPLR 213, on May 10, 2004 Herbert Paul, defendant’s chief financial officer (who is also a lawyer), sent a letter to plaintiff stating the following:

“As I mentioned to Peter, we were prepared to convert the open obligation to a note payable making collection much easier and to start a payment program. Attached is a check in the amount of \$5,000, representing the first installment. When I receive a signed copy by you, we will make arrangements for a like-check to be sent to you on the 15<sup>th</sup> of each month.”

A few days earlier, on May 4, 2004, defendant sent the following e-mail to plaintiff:

“I spoke to Herb and agreed with the plan that we anticipate we can begin to pay \$5,000 per month. We are trying our best and this is really the best we can do. You will receive all your money, most other creditors will not. If Herb and Peter can get the papers done quickly we can make a payment by the end of May. Thanks for your understanding”

Although these communications do not specify the amount of the remaining

indebtedness, they do acknowledge a debt and an agreement to make further payments. As such, they tend to demonstrate that plaintiff's claim would not be time barred. In *Roth v. Michelson*, 55 NY2d 278 (1982), the court wrote (p. 281):

“It is a long-standing common-law rule that, if part payment of a debt otherwise outlawed by the Statute of Limitations is made under circumstances from which a promise to honor the obligation may be inferred, it will be effective to make the time limited for bringing an action start anew from the time of such payment ....”

In *Lew Morris Demolition Co., Inc. v. Board of Education*, 40 NY2d 516 (1976), it was stated (p. 521):

“In order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder ....”

See also, *Hon Fui Hue v. East Broadway Mall, Inc.*, 4 NY3d 790 (2005); *Vicki B. v. David H.*, 57 NY2d 427, 429 (1982) (“The part payment of a debt renews the Statute of Limitations because it constitutes a new implied promise to pay.”)

Thus, since: it would appear that plaintiff's claim is not barred by the Statute of Limitations and has merit; the delay has not been extensive; the failure to effect proper service was due to an error of an inexperienced lawyer; and no prejudice has been shown, the motion of plaintiff is granted and he is given until October 31, 2007 to effect proper

service on defendant. Defendant's motion to dismiss is denied.

This decision constitutes the order of the court.

Dated: September 5, 2007

  
\_\_\_\_\_  
J.S.C.

**FILED**  
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