Davis v McDougall
2007 NY Slip Op 33393(U)
October 15, 2007
Supreme Court, New York County
Docket Number: 0113882/2006
Judge: Eileen Bransten
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[*1]

SCANNED ON 10/22/2007

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

PRESENT: Eileen Bransten PART 6

Index Number : 113882/2006

DAVIS, MAURICE

VS

MCDOUGALL, CARL M.D.

Sequence Number : 001

DISMISS ACTION

INDEX NO. 113882/06

MOTION DATE 7/31/06

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for dismiss based on untimely service

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 10-15-07

Eileen Bransten J.S.C.

HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

MAURICE DAVIS,

Plaintiff,

-against-

Index No. 113882/06
Motion Date: 7/31/07
Motion Seq. No.: 01

CARL MCDOUGALL, M.D., CARL MCDOUGALL, M.D., P.C., MANHATTAN GI ASSOCIATES, INC., JOEL BRUCE FIELDMAN, M.D., JOEL BRUCE FIELDMAN, M.D., P.C., JANE DOE #1 and JANE DOE #2, said names being fictitious and unknown to plaintiff,

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COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

----------X

PRESENT: EILEEN BRANSTEN, J.

Defendant Carl McDougall, M.D., P.C. ("McDougall P.C.") moves to dismiss the complaint of plaintiff Maurice Davis ("Ms. Davis") for failure to timely effect service pursuant to CPLR 306-b. Ms. Davis opposes the motion and submits that there is good cause or it would be in the interest of justice for this Court to extend her time to serve.

Background

On September 26, 2006, Ms. Davis commenced this action. She alleges that on September 26, 2005, she went to McDougall, P.C. for a colonoscopy and "during the course of this examination, defendants Joel Bruce Fieldman, M.D., Jane Doe #1 and Jane Doe #2 began beating [her], including punches to her jaw and head." Affirmation in Support of Defendant Carl McDougall, M.D., P.C.'s Motion to Dismiss ("Supp."), Ex. A, at ¶ 11. Ms.

Davis asserts that Dr. Carl McDougall was present during "some of the physical attacks * * * and took no action to prevent [them]." *Id.*, at ¶ 12. Ms. Davis sets forth a claim for battery and further contends that Dr. McDougall "performed a medical procedure upon [her] without her consent." *Id.*, at ¶ 17. She also maintains that McDougall P.C. and other defendants failed to properly supervise employees. *Id.*, at ¶ 22.

On February 26, 2007, McDougall P.C. served its Verified Answer containing an affirmative defense based on improper service. Supp., Ex. C.

On April 27, 2007--within 60 days of service of the Answer--McDougall P.C. made this motion to dismiss based on plaintiff's failure to timely effect service. In support of its motion, McDougall P.C. relies on a letter from the Department of State, Division of Corporations that sets forth a February 5, 2007 service date, which is almost two weeks after plaintiff's 120-day service deadline. Supp., Ex. B.

In response, Ms. Davis concedes that service was untimely. Without cross-moving for an extension of time to serve, plaintiff urges that there "is good cause for this Court to extend her time to serve. Additionally, [she maintains] it is in the interest of justice to extend her time." Plaintiff's Affirmation in Opposition ("Opp."), at ¶ 2.

Plaintiff asserts that she "suffered a horrific attack on her person at defendant's offices while there for a medical procedure." Opp., at ¶ 3. She submits that:

> "This motion is an attempt by defendant to obtain an easy out of this case. Defendant based its motion upon plaintiff having effectuated service only

> twelve days after the 120-day period. This was a minimal delay in effectuating service, and has resulted in no demonstrable prejudice to defendant.
>
> "As to good cause, [plaintiff's counsel] did attempt to arrange service of the Summons and Complaint through an attorney service within the 120-day period. However, the company * * * contacted failed to do so, and [counsel] contacted another company which did effectuate proper service on defendant. As a result, plaintiff did exercise good faith in attempting to serve defendant.
>
> "As to the interests of justice, plaintiff's claims are meritorious. Defendant has offered no affidavit denying the allegations of the complaint, and defendant's denials of the averments of the complaint should be rejected as self-serving."

Opp., at ¶¶ 3-5.

Plaintiff urges that her 12-day delay cannot constitute "extreme lack of diligence" and that defendant cannot argue it suffered any "real prejudice." *Id.*, at ¶ 6.

Because Plaintiff has not sufficiently demonstrated good cause or that the interest of justice militates an extension of time to serve, McDougall P.C.'s motion to dismiss is granted.

Analysis

CPLR 306-b requires that service of the summons and complaint "shall be made within one hundred twenty days after the filing of the summons and complaint." It is uncontested that the 120-deadline was not met here.

The statute, however, authorizes a court to grant an extension of time to serve "upon good cause shown or in the interest of justice."

Plaintiff entirely misconstrues CPLR 306-b and has not established entitlement to an extension of time to serve. By failing to substantiate the basis for her tardiness and by failing to show that her action has merit, she has given McDougall P.C. "an easy out of this case."

Without providing this Court with a scinitilla of evidence supporting her excuse, plaintiff alleges that the delay in service was caused not by her laxity but rather because of a delinquent unnamed "attorney service." There is absolutely no evidence of any contact with an "attorney service" before the 120-deadline lapsed or of timely retention of such a service. All that has been presented is plaintiff's counsel's self-serving statement, which itself is insufficient to warrant excusing the statutory time frame. Indeed, the lack of any proof of a timely effort to serve, leads to the inference that plaintiff was not diligent in attempting to meet the statutory deadline.

The "interest of justice standard," moreover, contemplates accommodation of late service due to a mistake, confusion or oversight, so long as there is no prejudice to the defendant. *Leader v. Maroney*, 97 N.Y.2d 95, 104-105 (2001).

> "[It] 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 makings its determination, including expiration of the Statute of Limitations, the meritorious nature of the causes of action, the length of the delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Id., at 105-106 (emphasis added).

There is not much for this Court to carefully analyze here. Plaintiff only offers a conclusory, unfounded excuse for her--albeit minimal--delay in serving McDougall P.C., compelling the conclusion that there was no diligence. In addition, plaintiff did not seek an extension of time to serve once the deadline passed. She only asked that her delay be excused in response to McDougall P.C.'s motion to dismiss.

Furthermore, plaintiff has made absolutely no effort to demonstrate the merit of her case. Her complaint is not verified and there is no affidavit offered in support of her allegations. McDougall P.C. does not have to show that the case lacks merit. Its sole responsibility is to establish that service was untimely and it did so.

Plaintiff wholly misunderstands the burden in establishing entitlement to an extension of time to serve. She missed the statutory deadline and it is up to her to save her own case by showing either that there is good cause for her delay or that it would be in the interest of justice for this Court to ignore the 120-day deadline and authorize late service. She has done neither.

In conclusion, allowing an extension of time to serve under these circumstances would make a mockery out of CPLR 306-b. It would sanction non-compliance with CPLR 306-b's 120-day rule whenever there is a minimal delay despite the lack of any showing of good cause or justification for an extension in the interest of justice. It would allow service of the summons and complaint within 132 days of filing simply because of a lack of prejudice.

This Court cannot and will not expand the statute in such a manner and excuse plaintiff's laxity.

Accordingly, it is

ORDERED that McDougall P.C.'s motion to dismiss is granted and the Clerk of the Court is directed to enter judgment in that defendant's favor; it is further

ORDERED that the remainder of the action shall proceed.

This constitutes the decision and order of the court.

Dated: New York, New York
October 15, 2007

ENTER

Hon. Eileen Bransten

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