

Tymus v England

2007 NY Slip Op 33492(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0112509/2006

Judge: Eileen Bransten

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

Index Number : 112509/2006
TYMUS, TINA
 vs.
ENGLAND, ARTHUR, M.D.
 SEQUENCE NUMBER : 001
 DEFAULT JUDGEMENT

PART 6

INDEX NO. 112509/06
 MOTION DATE 9/11/07
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

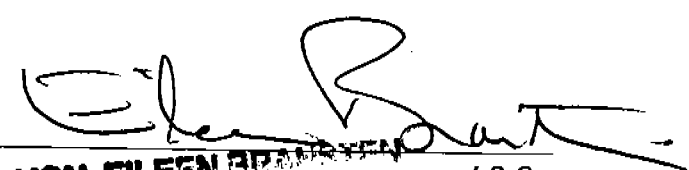
Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED
 OCT 26 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

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

Dated: 10-24-07


HON. EILEEN BRENNAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X

TINA TYMUS

Plaintiff

Index No.: 112509/06
Motion Date: 9/11/07
Motion Sequence Nos: 001, 002

- against -

ARTHUR ENGLARD, M.D.

Defendant

FILED
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-----X

PRESENT: EILEEN BRANSTEN, J:

Motion Sequences Numbers 1 and 2 are consolidated for disposition.

In Motion Sequence Number 1, Plaintiff Tina Tymus ("Ms. Tymus") seeks a default judgment pursuant to CPLR 3215(a) against Defendant Arthur Englard, M.D. ("Dr. Englard"). Dr. Englard opposes the motion, and cross-moves under CPLR 306-b to dismiss the complaint for lack of personal jurisdiction. In Motion Sequence Number 2, Ms. Tymus moves this Court pursuant to CPLR 306-b for leave to re-serve Dr. Englard or in the alternative for a declaration that the prior service was sufficient.

BACKGROUND

Prior to and including March 8, 2004, Dr. Englard rendered advice, care, and medical treatment to Ms. Tymus in the allergy, clinical immunology, and internal medicine fields. Ms. Tymus contends that the medical care she received was careless and negligent, and not

in accordance with accepted care-standards. *Id.*, ¶ 14. In particular, she avers that Dr. England, individually and through his employecs, provided an inadequate and incomplete medical evaluation; improperly diagnosed her condition; injected her with an overdose of allergy medication; and failed to discern other treatment options. *Id.* at 4-5, ¶ 16. Accordingly, Ms. Tymus commenced the instant medical malpractice action on September 7, 2006 by filing a summons and complaint in New York County Supreme Court. *See*, DiEdwards Aff in Support of Cross-Motion (“DiEdwards Aff”), Ex B.

Ms. Tymus attempted to timely serve Dr. England personally with the summons and complaint on December 30, 2006; January 4, 2007; and January 5, 2007. *See*, Marschhausen Aff, Ex B. When the process server was unable to personally serve Dr. England, he affixed it at and mailed it to his last known business address of 2 West 67th Street, New York, New York 10023 on January 5, 2007. *See*, Marschhausen Aff in Opp’n to Cross Motion (“Marschhausen Opp’n”), Ex A. Dr. England attests that he did not receive notice of this action until May 30, 2007. *See*, DiEdwards Aff, Ex A.

Ms. Tymus moves for a default judgment on liability under CPLR 3215(a) because Dr. England failed to appear, answer, or move with respect to the summons and complaint aside from his response and cross-motion herein. In opposition, Dr. England argues that Ms. Tymus failed to effectuate service within the statutorily prescribed 120-day time frame,

thereby warranting the complaint's dismissal pursuant to CPLR 306-b. In response, Ms. Tymus argues that Dr. Englard was properly served, and seeks leave to re-serve him in the event service was not proper.

ANALYSIS

“Service of the summons and complaint * * * shall be made within one hundred and twenty days after the filing of the summons and complaint.” *CPLR 306-b*. CPLR 308(4) authorizes service by “affixing the summons to the door of either the actual place of business or dwelling place and by mailing [it].”

Here, Ms. Tymus's process server attests that he attempted to personally serve Dr. Englard on three separate occasions at his office, only to find neither he nor a person of suitable age and discretion to accept service there. *See, Marschhausen Aff, Ex B*. Moreover, he attests that thereafter he affixed the summons and complaint on Dr. Englard's office door and mailed copies to him on January 5, 2007. *See, Marschhausen Opp'n, Ex A*. Indeed, this would comply with CPLR 306-b because both the affixation and mailing occurred within the statutorily-mandated 120-day time frame, albeit on said period's last day.

In response, Dr. Englard attests that he never received the summons and complaint in the mail, nor did he find it affixed to his office door. *See, DiEdwards Aff, Ex A*. He insists

that he first learned of this action when Ms. Tymus served him with the motion for a default judgment. *Id.*

Ms. Tymus asks this Court to either declare that the prior service was proper or grant leave for additional time to serve. The issue of whether service was proper can not be decided on conflicting affidavits. A traverse hearing is the proper venue to resolve the conflict presented here, where it would be incumbent upon Ms. Tymus to establish proper service. *See, e.g., Ananda Capital Partners, Inc. v. Stav Electrical Systems, Ltd.*, 301 A.D.2d 430 (1st Dept. 2003) (dispute as to service requires traverse hearing); *Holmes v. K & M Jewelry, Inc.*, 94 A.D.2d 657, 658 (1st Dept. 1983) (plaintiff must sustain validity of service at hearing).

However, a traverse hearing would be costly and time-consuming. If Ms. Tymus does not prevail, she can always seek a CPLR 306-b time-extension to serve. In the interest of efficiency, this Court will offer Ms. Tymus the option of either pursuing either a traverse hearing or re-serving Dr. England under CPLR 306-b.¹

¹ A default judgment is only available pursuant to CPLR 3215 upon a showing of proper service. *See, CPLR 3215(f)*. If Ms. Tymus were to prevail at a traverse hearing, she could then seek a default judgment upon establishing proof of liability. *See, Guzzetti v City of New York*, 32 AD 3d 234 (1st Dept 2006). If she chooses this course, Dr. England may, in turn, seek to vacate the default. *See, CPLR 5015(a)*.

CPLR 306-b authorizes the court to grant the plaintiff an extension of time to serve the summons and complaint “in the interest of justice.” The interest-of-justice standard permits late service due to a mistake, confusion, or oversight, so long as there is no prejudice to the defendant. *See, 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 making 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.

Here, Ms. Tymus contends that service was proper, her process server attests to that, and she timely moved for a default judgment. The first time she learned that service may not have been effected was in connection with this motion. Shortly thereafter, she moved for an extension of time to serve. Moreover, Dr. Englard has actual knowledge of the lawsuit and has not adequately demonstrated that he would be prejudiced if Ms. Tymus serves him for what she avers will be a second time. Under these circumstances, an “interest-of-justice” extension is warranted.

Thus, in the interest of justice, Ms. Tymus' motion for an extension of time to serve Dr. Englard is granted. In the alternative, she may seek a traverse hearing to determine if the prior service was sufficient. Ms. Tymus is ordered to commence either within 30 days of the date of this Decision and Order.

Accordingly, it is

ORDERED that Ms. Tymus' motion for a default judgment is DENIED; and it is further

ORDERED that Dr. Englard's cross-motion for dismissal is DENIED; and it is further

ORDERED that within 30 days from the entry of this Decision and Order, Ms. Tymus is to either commence a traverse hearing to resolve the issue of whether she properly served Dr. Englard or re-serve him pursuant to CPLR 306-b. If she elects to pursue a traverse hearing, the issue would therefore be referred to a special referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the

parties to serve as referee, shall determine the aforesaid issue, and a copy of this order with notice of entry shall be served on the Clerk of the Trial Support Office (Room 158) to arrange a date for the reference to a special referee. Ms. Tymus is to notify the Court as to which option she chooses.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 24, 2007

ENTER



Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN

FILED
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