

**Henry v Kamineni**

2008 NY Slip Op 30643(U)

February 27, 2008

Supreme Court, Queens County

Docket Number: 0018846/2006

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

-----	Index
VETA HENRY,	No. 18846/06
Plaintiff,	Motion
-against-	Date April 17, 2007
SAMBASIVA RAO KAMINENI, M.D.,	Motion
MADHUKAR WADHERA, M.D.,	Cal. No. 20
MARY IMMACULATE HOSPITAL AND	Motion
SVCMC HEALTH SERVICES, INC.,	Seq. No. 1
Defendants.	Conf.
-----	Date September 18, 2007

PAPERS  
NUMBERED

Notice of Motion-Affid-Exhib.....	1-5
Cross-Motion-Affid-Exhib.....	6-10
Reply.....	11-16

Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained due to medical malpractice with respect to the defendants' care and treatment rendered to plaintiff between February 18, 2004 and March 17, 2004 at Mary Immaculate Hospital located at 152-11 89<sup>th</sup> Avenue, Jamaica, in the County of Queens, City and State of New York.

Defendants Madhukar Wadhera, M.D. (Wadhera) and Sambasiva Rao Kamineni, M.D. (Kamineni), move for an order pursuant to CPLR 3211(a)(8), 308, 306-b, 214-a and 3211(a)(5) dismissing the action with prejudice as against defendant Kamineni based upon lack of personal jurisdiction due to the failure to effectuate proper service of the summons and complaint and expiration of the applicable statute of limitations.

Plaintiff cross-moves for an order pursuant to CPLR

§ 306-b extending the time for service on the ground that plaintiff has demonstrated good cause.

Contentions of the Parties

Defendant Kamineni asserts that his answer included the affirmative defenses of lack of jurisdiction due to improper service of process and expiration of the applicable statute of limitations. He submits his affidavit wherein he states that a copy of the summons and complaint has never been delivered directly to him or to anybody acting on his behalf. A copy was never left with anybody at either his place of business or residence and he never received a copy in the mail at his residence. The only copy he has ever seen was one that was mailed in an envelope bearing an incorrect address 140-20 Queens Boulevard, Forest Hills, New York 11375. He has never maintained a place of business or a residence at that address. On December 26, 2006, said envelope and copy reached his office at 104-20 Queens Boulevard, Apt. 1Y, Forest Hills, New York 11375. No copy was ever found to be affixed to the door of his office or residence and he has never authorized anybody in any way to accept service of legal process on his behalf.

Defendant Kamineni asserts that plaintiff has never filed any proof of service upon him with the Clerk of the Court. As plaintiff has failed to properly serve him under CPLR 308 and the applicable statute of limitations has expired as well as her time to serve pursuant to CPLR § 306-b, the action should be dismissed as against him.

Plaintiff asserts that the affidavit of the process server, Linden Blackman, attested that defendant Kamineni was served on December 18, 2006 pursuant to CPLR 308(4) at 140-20 Queens Boulevard, Forest Hills, New York 11375. Said defendant listed that address with the New York State Department of Health and New York State Education Office of the Professions On-line Verification Searches. As he listed such address as his place of business in his practice profile, service at such address was proper. CPLR 308(6) defines actual place of business as including any location that the defendant, through regular solicitation or advertisement has held out as its place of business. On October 2, 2006, plaintiff was served with a notice of bankruptcy by the attorneys for defendant Mary Immaculate Hospital. As an automatic stay was in effect, the statute of limitations and the 120 days for service are tolled.

In reply, defendant Kamineni asserts that the affidavit of service is dated March 9, 2007 almost three months after the alleged attempted service on December 18, 2006. Plaintiff has failed to show that service could not have been made with due diligence so that plaintiff was not entitled to the use of the affix and mail method of service. The address listed on the website is clearly a typographical error on the part of the Department of Health. The website does list the correct telephone number for his office. No showing has been made as to any attempts to ascertain defendant's residential address. Plaintiff filed the summons and complaint on August 28, 2006 and had until December 26, 2006 to effectuate service of process. The three attempts by the process server do not show due diligence. Defendant Kamineni only received one copy which was mailed in an envelope containing an incorrect address. Contrary to the process server's statement in the affidavit, it does not bear the legend "Personal and Confidential".

Defendant Kamineni also argues that the notice of bankruptcy of defendant Hospital does not stay the instant action as against the non-bankrupt defendants. The automatic stay provisions apply only to parties in the adversary proceeding in the bankruptcy court. Therefore, the statute of limitations and the 120 day time period to effectuate service have never been tolled. Plaintiff's cross-motion seeking an extension of time to serve is without merit. The fact that plaintiff's counsel had marked his file stayed as a result of the notice of bankruptcy does not constitute good cause as the stay does not extend to the non-bankrupt defendants. In addition, the action must be dismissed as against all defendants as it is time-barred. Plaintiff's affirmation in opposition to the motion and in support of the cross-motion alleges that the care and treatment was rendered to plaintiff on or about February 18, 2004. The statute of limitations of two years and six months expired on August 18, 2006. Plaintiff did not file the summons and complaint until August 28, 2006, ten days after the expiration of statute of limitations.

In reply, plaintiff argues that the automatic stay is applicable to defendant Kamineni given the listing of the debtors on the notice of bankruptcy. The entities stated therein included physician services and surgical services. As the statute of limitations, plaintiff's complaint indicates a surgery performed by defendant Kamineni on March 11, 2004. The action was clearly commenced prior to the expiration of the two years and six months from said

date, to wit, before September 11, 2006.

Decision of the Court

The motion by defendants Wadhera and Kamineni for dismissal of the action as against defendant Kamineni is denied.

The cross-motion by plaintiff for an order pursuant to CPLR § 306b extending the time for service of process upon defendant Kamineni is granted. Plaintiff is granted an additional 120 days from the entry date of this order to serve said defendant.

Defendants/movants assert that the statute of limitations had expired on August 18, 2006, 10 days prior to plaintiff's filing of the summons and complaint. Plaintiff's complaint alleges that she was admitted to defendant Mary Immaculate Hospital (Hospital) on February 18, 2004. However, it is further alleged that she was operated on by defendant Kamineni with the aid of agents, servants and employees of defendant Hospital on March 11, 2004 and was not discharged until March 17, 2004. Clearly, the action, being commenced on August 28, 2006, was timely as to allegations within 2 ½ years prior thereto, that is, February 28, 2004.

As to the issue of whether the bankruptcy stay imposed due to the bankruptcy of St. Vincent Catholic Medical Centers, this court finds that the stay did not toll plaintiff's time to serve defendant Kamineni within the 120 days following the filing of the summons and complaint.

As noted by the court in Rosenbaum v. Dane & Murphy, Inc., 189 AD2d 760 at 761: "The automatic stay provisions of the Federal bankruptcy laws do not extend to non-bankrupt codefendants (see, Lynch v. Johns-Manville Sales Corp., 6 Cir., 710 F.2d 1194)."

In any event, this court finds that plaintiff should be granted additional time to serve defendant Kamineni pursuant to CPLR 306-b. As noted by the court in Robles v. Mirzakhmedov, 34 AD3d 554: "However, under the factual setting of this case, the plaintiff's cross-motion to extend the time to serve the summons and complaint on the defendant Luisa F. Corona should have been granted. CPLR 306-b permits the courts to extend a plaintiff's time to serve a summons and complaint upon good cause shown or in the

interest of justice. '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' (Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 105, 736 NYS2d 291, 761 NE2d 1018). The plaintiff's time to serve process should be extended, when, as here, '[the] statute of limitations had expired, service which was timely made within the 120 day period was subsequently found to have been defective and there was no prejudice to the [the defendant] who had actual notice of action' (Chiaro v. D'Angelo, 7 AD3d 746, 776 NYS2d 898)."

With respect to the factors to be considered, it was stated in Rosenzweig v. 600 North Street, LLC, 35 AD3d 705: "In determining whether to grant an extension of time to serve a summons and complaint pursuant to CPLR 306-b, due diligence is only one factor to consider along with expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiffs' request for the extension of time, and prejudice to the defendants (see, Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106, 736 NYS2d 291, 761 NE2d 1018). Some factors favoring an extension are timely service within the 120 day period allowed by CPLR 306-b which was later found to be defective and the fact the defendants had actual notice of the claim and/or of the action (see, Chiaro v. D'Angelo, 7 AD3d 746, 776 NYS2d 898; Beauge v. New York City Tr. Auth., 282 AD2d 416, 722 NYS2d 402). The determination of whether to grant the extension in the interest of justice is within the discretion of the motion court (see, Baione v. Zambrano, 22 AD3d 698, 699, 802 NYS2d 383)."

In the instant case, plaintiff did, in fact, have defendant Kamineni served with process within the 120 day time limit but such service was defective as there was a lack of due diligence prior to the resort to "nail and mail" service. County of Nassau v. Letosky, 34 AD3d 414. Plaintiff has sought the extension only about three months after the initial defective service. The complaint, verified by plaintiff, sets forth a sufficient meritorious claim. Finally, no prejudice has been shown to have been incurred by defendant Kamineni who admits that he was apprised of the claim on December 26, 2006.

Accordingly, the motion by defendants Wadhera and Kamineni for dismissal of the action as against defendant Kamineni is denied.

The cross-motion by plaintiff for an order pursuant to CPLR § 306b extending the time for service of process upon defendant Kamineneni is granted. Plaintiff is granted an additional 120 days from the entry date of this order to serve said defendant.

Dated:February 27,2008

.....  
**HON. DAVID ELLIOT**