

**Universal Bonding Ins. Co. v All  
Am. Bldg. & Dev. Corp.**

2008 NY Slip Op 31121(U)

April 15, 2008

Supreme Court, New York County

Docket Number: 0601758/2007

Judge: Carol R. Edmead

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.

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

UNIVERSAL BONDING INSURANCE

INDEX NO. 601758/07

MOTION DATE 4-15-08

MOTION SEQ. NO. 001

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

- v -

ALL AMERICAN BUILDING

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

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

Cross-Motion:  Yes  No

**FILED**  
APR 16 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion to dismiss the Complaint for failure to serve the defendants within 120 days after the commencement of the action is denied. And it is further

ORDERED that the branch of plaintiff's cross-motion to deem the Affidavits of Service upon Joseph I. Torres and Priscilla Torres timely, *nunc pro tunc*, is denied. And it is further

ORDERED that the branch of plaintiff's cross-motion for an extension of time to serve the Individual Defendants is granted, and plaintiff shall effect service upon said individuals within 45 days of the date of service of this order with notice of entry. The Court notes that at oral argument on April 15, 2008, plaintiff's counsel proffered new Affidavits of Service upon the Individual Defendants at their current addresses. Such Affidavits of Service are deemed timely filed, *nunc pro tunc*, unless the Individual Defendants move to challenge such Affidavits within 20 days of the date of this order. And it is further

ORDERED that the parties appear for a preliminary conference in Part 35 on August 5, 2008, 2:15 p.m. And it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: This constitutes the decision and order of the Court.

4/15/08

HON. CAROL EDMEAD J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
UNIVERSAL BONDING INSURANCE COMPANY,

Plaintiff,

Index No. 601758-2007

-against-

DECISION/ORDER

ALL AMERICAN BUILDING & DEVELOPMENT  
CORP., SERROT CONSTRUCTION, INC.,  
JOSEPH I. TORRES, PRISCILLA TORRES,  
JOE TORRES, SR. and ANNA TORRES,

Defendants.

-----X

MEMORANDUM DECISION

In this action for contractual and common law indemnification, defendants All American Building & Development Corp., ("All American"), Serrot Construction, Inc., ("Serrot") (collectively, the "Corporate Defendants"), Joseph I. Torres, Priscilla Torres, Joe Torres, Sr. and Anna Torres (the "Individual Defendants") (collectively, the "Individual Defendants") move pursuant to CPLR 306-b to dismiss the Complaint of the plaintiff Universal Bonding Insurance Company ("plaintiff"), for failure to serve the Summons and Complaint upon the Individual Defendants within 120 days after the commencement of this action.

According to the Complaint, Serrot entered into a contract with the New York City Housing Authority ("NYCHA"), the Project Owner, relating to a project known as "Governor Smith Houses" (the "Project"). NYCHA and State Finance Law required that Serrot provide a performance bond before proceeding with the work. Plaintiff, as Surety, executed a bond at the request of defendants, "in the penal sum of \$1,736,143.00" naming Serrot as principal and NYCHA as obligee. In consideration of the security causing the bond, the Individual

Defendants, All American and Serrot entered into a "General Indemnity Agreement" with the plaintiff on February 24, 1998 (the "Indemnity Agreement").

When Serrot failed to complete the work, plaintiff incurred \$517,393.38 in completion costs in connection with the Project. Plaintiff also incurred \$114,931.39 in professional and legal expenses in connection with the Project. To date, plaintiff sustained losses in the amount of \$632,324.77. Plaintiff's first cause of action seeks contractual indemnification based on the Indemnity Agreement, and the second cause of action seeks common-law indemnification based on the surety-principal relationship existing between plaintiff and Serrot.

#### Plaintiffs' Instant Motion

According to the Individual Defendants, plaintiff filed its Complaint on May 25, 2007. Plaintiff served the Corporate Defendants by service upon the Secretary of State. By stipulation, plaintiff extended defendants' time to answer the Complaint until October 5, 2007. Accordingly, defendants served their Answer on October 5, 2007. Thereafter, defendants amended their Answer as of right, wherein they alleged that there was no jurisdiction over the Individual Defendants due to the lack of personal service of the Complaint upon them. A print-out of the County Clerk's Index Minute Book dated November 28, 2007 indicates that no affidavits of service of the Summons and Complaint regarding the Individual Defendants were ever filed. Since service of the Summons and Complaint was not made within 120 days of commencement of the action as required under CPLR 306-b, all causes of action against the Individual Defendants must be dismissed.

Plaintiff's Opposition and Cross-Motion

Plaintiff opposes the motion and cross moves pursuant to CPLR §2001 and §2004, to cure and deem the late filing of the affidavits of service for Joseph I. Torres and Priscilla Torres, timely *nunc pro tunc*, and pursuant to CPLR §306-b for good cause shown and/or the interests of justice, an order extending plaintiff's time, *nunc pro tunc*, to serve the Summons and Complaint upon defendants Joe Torres Sr. and Anna Torres until a date not less than 60 days from the date of the Court's decision.

As to Joseph I. Torres and Priscilla Torres, a process server served these defendants on August 10, 2007 at 9 Hillcrest Avenuc, Douglaston, New York (the "Douglaston, New York address"). Service was effectuated upon these defendants by "nail and mail" service, by affixing the pleadings upon the door of their dwelling on August 9th, and mailing same on August 10th, after three unsuccessful attempts at personal delivery on August 3<sup>rd</sup>, August 6<sup>th</sup>, and August 9<sup>th</sup>. When plaintiff discovered that the affidavits of service were not filed pursuant to CPLR §308(4), plaintiff filed them on December 7, 2007. Until then, plaintiff believed that the process servers filed the affidavits of service with the Clerk. Although such affidavits were not timely filed, this late filing is a mere irregularity and does not give rise to a jurisdictional defect. The statute of limitations has not expired on plaintiff's causes of action, and there is no prejudice to these defendants in allowing the late filing.

As to Joe Torres Sr. and Anna Torres, a process server attempted to serve them on August 7, 2007 at 1160 Winterville Street, Deltona, Florida (the "Deltona, Florida address"), which was provided in the Indemnity Agreement. The process server completed affidavits of due diligence

after attempts to serve these defendants on August 7, 2007 were unsuccessful, and indicated “unknown at address” on the affidavits.

Approximately one month thereafter, on September 6, 2007 counsel for defendants requested an extension of time to answer the Complaint. Plaintiff’s counsel granted the extension. Counsel for plaintiff refrained from making a motion to extend the time to serve Joe Torres Sr. and Anna Torres, because counsel was under the impression that a jurisdictional defense would not be raised.

Since the social security numbers on the Indemnity Agreement are invalid, plaintiff’s attempts to locate Joe Torres Sr. and Anna Torres have been hindered. Further, Joe Torres Sr. appears to use four different aliases. Also, it is unclear whether Joe Torres Sr. and Anna Torres still reside together, since some recent public records list Joe Torres Sr. as being single. And, plaintiff’s counsel recently discovered two Florida addresses where these two defendants may be residing.

Such difficulty in locating Joe Torres Sr. and Anna Torres constitutes good cause for granting plaintiff additional time to serve such defendants, *nunc pro tunc*.

In addition, there will be no prejudice to these defendants as they have been on notice of this action, and are represented by counsel, who served an answer on their behalf.

In any event, an extension of time to serve the pleadings upon Joe Torres Sr. and Anna Torres should be granted in the interest of justice. Plaintiff has a meritorious claim for indemnification pursuant to the Indemnity Agreement. In addition, since the statute of limitations has not expired, plaintiff could re-commence an action against them. It would thus

serve the interests of judicial economy to grant plaintiff an extension of time to serve such defendants.

Defendants' Reply and Opposition to Cross-Motion

In opposition to the cross-motion and in further support of its motion to dismiss, defendants argue that the plaintiff's application to deem the affidavits of service upon Joseph I. Torres and Priscilla Torres timely filed, *nunc pro tunc*, lack merit. According to the affidavit of Joseph I. Torres, he and his wife separated in 1995 and have not lived together since then, and have obtained a judgment of divorce in 2000. Joseph I. Torres has not lived at the Douglaston, New York address in almost eight years, and Priscilla Torres has never lived there; Joseph moved to that address after he and his wife Priscilla had already separated in 1995. Thereafter, in April 2000, Joseph I. Torres sold the house at the Douglaston, New York address, and has not lived there since. In support, defendants attach a copy of the recorded mortgage dated March 25, 2002. Further, Joseph I. Torres denies knowing "Ms. Kanter" or having met anyone by that name. Thus, there is no basis to deem the affidavits of service as to them timely filed.

Additionally, the affidavits alleging service upon Joseph I. Torres and Priscilla Torres are demonstrably false. Defendants' counsel's legal secretary submits an affidavit attesting that when she visited the house neighboring the Douglaston, New York address, a "Luciano Daino" stated that she knew the residents of the subject address, and confirmed that Joseph Torres did not live there. Thus, as service has not been made upon Joseph I. Torres and Priscilla Torres, plaintiff must be deemed to be seeking an extension of time to serve Joseph I. Torres and Priscilla Torres since they have not been served. Further, plaintiff has demonstrated no diligence in attempting to ascertain their current addresses. Instead, plaintiff relied on an address given on a contract ten

years ago, and has submitted affidavits alleging "nail and mail" service upon said address without any attempt to ascertain its accuracy, other than dubiously citing confirmation by an alleged neighbor, a "Ms. Kanter," whose description, address, and first name are not given.

As to Joe Torres Sr. and Anna Torres, plaintiff has failed to demonstrate any due diligence in attempting to serve them. Additionally, according to the affidavit of Joseph I. Torres, "the allegations contained in the Cross-Motion regarding my parents [Joe Torres Sr. and Anna Torres] using aliases or multiple identities are unfounded and untrue."

Additionally, plaintiff failed to establish the merits of its action. The Complaint contains only self-serving statements of the plaintiff and schedules generated by the plaintiff regarding the breach thereof, and the damages alleged to have been incurred pursuant thereto, without attaching any admissible evidence of such alleged breach or damages. Thus, an extension of time for plaintiff to effectuate service is unwarranted either for cause or in the interest of justice, and the Complaint must be dismissed pursuant to CPLR §306-b.

#### Plaintiff's Reply in Support of Cross-Motion

In reply, plaintiff argues that defendants' opposition papers accentuate why plaintiff should have additional time to serve the Individual Defendants. Until receipt of defendants' opposition, plaintiff had no reason to question the service of process on Joseph I. Torres and Priscilla Torres. These defendants were served at the Douglaston, New York address listed in the Indemnity Agreement. The process server swore these defendants were properly served by "nail and mail" service after three unsuccessful attempts to serve them at this address and after confirming with a neighbor that these defendants resided at this address. That these defendants did not live there does not diminish plaintiff's right to rely upon its process server's affidavits of

service.

Moreover, the affidavit of Narine Sumrah lacks probative value as to whether defendants did not live at the Douglaston, New York address. Sumrah's averments that a person named Luciano Daino "confirmed that Joseph Torres does not live at that address" is simply hearsay. Similarly, the recorded mortgage only proves that there is a mortgage on the property, and is not proof that Joseph I. Torres did not reside at the Douglaston, New York address in August 2007 as a tenant or lessor.

Rather than hold a traverse hearing to resolve the issue of service, in the interest of judicial economy and judicial resources, the Court can grant the cross-motion and extend plaintiff's time to serve all the Individual Defendants. Extending plaintiff's time to serve will not prejudice the Individual Defendants and the statute of limitations will not run until April 2009, and even then, only for a portion of the sums sought in this action.

As to the merits, this action is based on defendants' obligation to indemnify plaintiff, a Surety, for the losses plaintiff sustained by reason of surety bonds plaintiff issued on behalf of Serrot. The Individual Defendants, along with the Corporate Defendants, executed the Indemnity Agreement. None of the defendants deny signing the Indemnity Agreement, and pursuant to paragraph 3 thereof, each defendant jointly and severally agreed to indemnify plaintiff from certain losses incurred. At the time this action was commenced, each defendant was obligated to indemnify plaintiff for \$632,324.77. Nor do the Corporate Defendants challenge this Court's jurisdiction over them. Thus, if the cross-motion is granted, the entire action will not be dismissed since the claims against the Corporate Defendants will remain. As the statute of limitations against the Individual Defendants have not expired, plaintiff is not barred from

commencing a new action against the Individual Defendants. There is no reason to have two actions pending before the same court.

Additionally, plaintiff's counsel's attempts to locate the current address for Joe Torres Sr. and Anna Torres showed that Joe Torres Sr. is also known as Jose Torres, Jose I. Torres, Joseph Torres, and Joe Robles.

#### Analysis

Pursuant to CPLR 306-b,

Service of the summons and complaint . . . shall be made within one hundred twenty days after the filing of the summons and complaint . . . . If 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.

Thus, plaintiff was required to serve the Individual Defendants within 120 days of the filing on May 25, 2007 of the Summons and Complaint, *i.e.*, no later than September 22, 2007. Having failed to do so, in order to get an extension of time to serve defendant, plaintiff must establish either that it had good cause for the failure to serve the Individual Defendants within 120 days, or that the Court should grant the extension of time to serve said defendants in the interest of justice (*State v Sella*, 185 Misc 2d 549, 713 NYS2d 262 [Supreme Court, Albany County 2000] *citing* *Busler v Corbett*, 259 AD2d 13, 14-15 [4th Dept 1999]).

To determine the existence of good cause, so as to grant an extension of time to serve the Individual Defendants with the Summons and Complaint, the following three factors are considered: (1) the reasonableness of plaintiff's efforts to effect service; (2) prejudice to the defendant due to lack of timely service; and (3) whether plaintiff moved for an enlargement of time to serve (*State v Sella*, 185 Misc 2d 549, 713 NYS2d 262 [Supreme Court, Albany County 2000]).

The interest of justice standard for extending time to serve a defendant requires a judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties; thus, a 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 (*de Vries v Metropolitan Transit Auth.*, 11 AD3d 312, 783 NYS2d 540 [1<sup>st</sup> Dept 2004]).

To establish the requisite good cause, reasonable diligence in attempting service must be shown, but the interest of justice is a broader standard, which does not require a showing of good cause, and permits the court to consider many factors (*Spath v Zack*, 36 AD3d 410, 829 NYS2d 19 [1<sup>st</sup> Dept 2007] citing *Mead v Singleman*, 24 AD3d 1142, 806 NYS2d 783 [2005]). As the Court of Appeals noted in *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95, 104, 736 NYS2d 291 [2001]), the Legislature gave the courts two separate standards by which to measure an application for an extension of time to serve (*Wideman v Barbel Trucking, Inc.*, 300 AD2d 184, 752 NYS2d 640 [1<sup>st</sup> Dept 2002]). Diligence is simply *one of many relevant factors* as “interest of justice” is intended to be an “additional and broader standard” to accommodate late service that might be due to mistake, confusion or oversight (*id.* at 104-105, 736 NYS2d 291 (emphasis added)).

It is noted, however, that the failure to timely file the affidavit of service is an irregularity that may be properly cured by deeming it filed *nunc pro tunc* (see *Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442, 668 NYS2d 177 [1<sup>st</sup> Dept 1998], citing *Paracha v County of Nassau*, 228 AD2d 422, 643 NYS2d 637 [2d Dept 1996]). Actions which have been otherwise properly commenced by service . . . “cannot thereafter be defeated simply by reason of a belated filing of proof of service” (*Paracha*

*v County of Nassau*, 228 AD2d 422, 643 NYS2d 637 [2d Dept 1996] citing *Lancaster v Kindor*, 98 AD2d 300, 306, 471 NYS2d 573 [1<sup>st</sup> Dept 1984], *affd* 65 NY2d 804, 493 NYS2d 127; *Toulouse v Chandler*, 5 Misc 3d 1005, 798 NYS2d 714 [Supreme Court, New York County 2004][where Affidavit of Service was not timely filed in this action pursuant to CPLR § 308(2), court held that “Based on CPLR provisions and caselaw, this Court is empowered to correct such a *de minimus* deficiency by deeming the Affidavit of Service filed *nunc pro tunc*, where there was no prejudice resulting from “this procedural irregularity”]).

To the extent defendants’ motion to dismiss plaintiff’s Complaint is premised on the fact that the Affidavits of “nail and mail” service upon Joseph I. Torres and Priscilla Torres were not timely filed pursuant to CPLR § 308(2), such motion is denied (*see Spath v Zack*, 36 AD3d 410, 829 NYS2d 19 [1<sup>st</sup> Dept 2007] [“Based on CPLR provisions and caselaw, this Court is empowered to correct such a *de minimus* deficiency by deeming the Affidavit of Service filed *nunc pro tunc*”]).

The Court notes that Joseph I. Torres claims that neither he nor Priscilla Torres resided at the Douglaston, New York address at the time the process server attempted service upon them. CPLR 308(4) provides that if personal service of the summons upon the defendant cannot be accomplished under CPLR 308(1) or (2) with ‘due diligence’, then service may be effected ‘by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by . . . mailing the summons to such person at his or her last known address’” (*Empire Ins. Co. v Marquez*, 168 AD2d 810, 810, 564 NYS2d 232, *lv. denied* 77 NY2d 808, 570 NYS2d 489, quoting CPLR 308[4]). The affidavit of Joseph I. Torres wherein he refutes the process server’s allegation that the summons and complaint were affixed to

the door of his residence, is sufficient to raise a question of fact as to whether the affixation requirement was satisfied as to him and his former wife, Priscilla Torres.

Yet, even assuming that service of process was defective as to such defendants, dismissal is unwarranted. The Complaint and submissions indicate that plaintiff has a meritorious contractual indemnification claim. Further, it is uncontested that the statute of limitations has not expired on plaintiff's causes of action; thus, if the action were dismissed against the Individual Defendants, plaintiff could simply recommence this action against the Individual Defendants, while maintaining a separate action against the remaining Corporate Defendants, thereby maintaining two separate actions arising out of the same occurrences and transactions. Service upon such defendants at the Douglaston, New York address provided in the Indemnity Agreement was due to plaintiff's improper assumption that the Individual Defendants still resided at such address. However, it was reasonable for plaintiff's counsel to rely upon the address of Joseph I. Torres, and by extension, his "spouse" Priscilla Torres, provided in the Indemnification Agreement, as well as the addresses of Joe Torres Sr. and Anna Torres, also provided in the Indemnification Agreement. According to plaintiff's counsel, attempts were made to locate Joe Torres Sr. and Anna Torres to no avail, due to the variations in Joe Torres Sr.'s name and because the social security numbers provided in the Indemnity Agreement were incorrect. Further, the application to serve said defendants was filed less than three months after the 120-day period expired (*cf. Posada v Pelaez*, [1<sup>st</sup> Dept 2007]). And, it appears that such defendants, who are represented by counsel, will not suffer any prejudice as a result of plaintiff's late service of the pleadings at their current address (*Wideman v Barbel Trucking, Inc.*, 300 AD2d 184, 752 NYS2d 640 [1<sup>st</sup> Dept 2002] [extension of time to serve pleadings should have been granted in interest of justice, even if plaintiffs' counsel failed to exercise diligence in his efforts

to serve defendant and even though service was improper; original pleadings gave correct name of defendant and service of wrong party was due to mistake, confusion, or oversight)). As such, in the interest of justice, the Court exercises its discretion to extend the time within which plaintiff must serve the Summons and Complaint against Joseph I. Torres and Priscilla Torres.

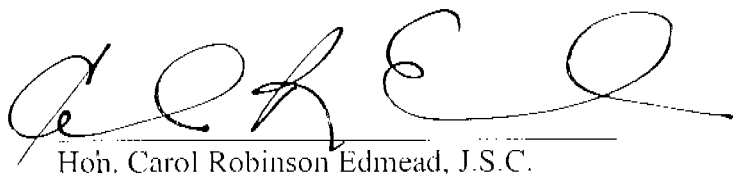
Therefore, defendants' motion to dismiss the Complaint for failure to serve the Individual Defendants within 120 days after the commencement of the action is denied. The branch of plaintiff's cross-motion to deem the Affidavits of Service upon Joseph I. Torres and Priscilla Torres timely, *nunc pro tunc*, is denied. The branch of plaintiff's cross-motion for an extension of time to serve the Individual Defendants is granted, and plaintiff shall effect service upon said individuals within 45 days of the date of service of this order with notice of entry.<sup>1</sup>

The parties appear for a preliminary conference in Part 35 on August 5, 2008, 2:15 p.m.

Plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 15, 2008



Hon. Carol Robinson Edmead, J.S.C.

**FILED**  
APR 16 2008

COURT

---

<sup>1</sup> The Court notes that at oral argument on April 15, 2008, plaintiff's counsel proffered new Affidavits of Service upon the Individual Defendants at their current addresses. Such Affidavits of Service are deemed timely filed, *nunc pro tunc*, unless the Individual Defendants move to challenge such Affidavits within 20 days of the date of this order.