

Losquadro v Sabbatini

2008 NY Slip Op 31272(U)

April 29, 2008

Supreme Court, New York County

Docket Number: 0107887/2007

Judge: Alice Schlesinger

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

IA Part 16
IA Part 1

PRESENT: ALICE SCHLESINGER

PART _____

Index Number : 107887/2007

LOSQUADRO, LINDA

VS.

SABBATINI, PAUL

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motlon to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motions are determined in accordance with the accompanying memorandum decision.

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

FILED

MAY 05 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: April 29, 2008 APR 29 2008

Alice Schlesinger
ALICE SCHLESINGER, S.C.

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

-----X
LINDA LOSQUADRO, as Representative of the
Estate of MARGARET McGAHY, deceased;
LINDA LOSQUADRO, as Representative of the
Heirs and Distributees of MARGARET McGAHY,
deceased; and WILLIAM McGAHY, individually,

Plaintiffs,

-against-

PAUL SABBATINI, M.D., JAKOB DUPONT, M.D.,
RUTH PATRICK, R.N., and MEMORIAL-SLOAN
KETTERING CANCER CENTER,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 107887/07
Motion Seq. No. 001

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendant Jakob Dupont, M.D., has moved for an order to dismiss this action pursuant to CPLR §3211(a)(8), alleging that he was not properly served. Plaintiffs have cross-moved for an order pursuant to CPLR §306-b extending their time to effect proper service.

According to the affidavit of service, service was made in two ways: (1) by leaving the summons and complaint with a Ms. Jabowski, a person of suitable age and discretion at Memorial-Sloan Kettering Cancer Center with a mailing to Dr. Dupont at that address; and (2) by leaving the pleadings with a person of suitable age and discretion (a "co-tenant") at a residence in Pelham, followed by a mailing to Dr. Dupont at that address. CPLR §308 requires service at the "actual" place of business or "actual" dwelling place. Defense counsel asserts that service is defective because Dr. Dupont has relocated to California and no longer works at Memorial or lives in Pelham. Dr. Dupont has submitted an affidavit attesting to his relocation.

In their cross-motion, plaintiffs assert a good faith basis for serving Dr. Dupont in New York, pointing to records from the Department of Motor Vehicles which continued to list the Pelham address even after this motion was made. Plaintiffs' counsel asserts that he first learned of the relocation when his office received a telephone call in October 2007 in response to a default letter sent to Dr. Dupont in New York which was apparently forwarded to California by the Postal Service. Thereafter, in November 2007, Dr. Dupont appeared through counsel and served an answer. Although defendant preserved the jurisdictional defense in his answer, plaintiffs did not serve Dr. Dupont in California believing, based on counsel's active participation in discovery, that it was unnecessary.

Discussion

CPLR §306-b requires a plaintiff to serve a defendant within 120 days after filing the summons and complaint. If service is not made within that time, the statute directs that "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."

As the Court of Appeals has confirmed: "An extension of time for service is a matter within the court's discretion." *Leader v Maroney, Ponzini & Spencer, et al.*, 97 NY2d 95, 101 (2001), citing Mem. of Off. of Ct. Admin. No. 97-67R, reprinted in 1997 NY Legis. Annal at 318-19. The statute gives the court "two separate standards by which to measure an application for an extension of time to serve." 97 NY2d at 104. After examining the legislative history in detail, the *Leader* court concluded that the Legislature had intended the interest of justice standard to be "more flexible" than the good cause standard, specifically noting that:

Since the term "good cause" does not include conduct usually characterized as "law office failure," proposed CPLR 306-b provides for an *additional and broader standard, i.e.,* the "interest of justice," to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant.

97 NY2d at 104-05, quoting Bill Jacket, L 1997, ch 476, at 14 (with added emphasis).

When applying the interest of justice standard, a court is empowered to consider "any factor relevant to the exercise of its discretion." *Id.* at 106. As the Court of Appeals emphasized in *Leader*: "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." *Id.* at 106. In affirming decisions by the Appellate Division, Second Department, granting a 306-b extension in two of the cases reviewed in *Leader*, the Court of Appeals held that the court had correctly excused a brief delay in service caused by law office failure where defendant had made no showing that it would be prejudiced by an extension of time to serve. *Id.* at 106-07. In the third case reviewed, the court affirmed the Appellate Division's denial of an extension where plaintiff had offered no explanation for its three-year delay in completing service, and where the delay had deprived the defendant of notice for an extended time, "leading to an inference of substantial prejudice." *Id.* at 107.

Applying *Leader* and the interest of justice standard, the First Department modified the lower court and granted plaintiff an extension of time to serve pursuant to CPLR §306-b in *De Vries v Metropolitan Transit Authority, et al.*, 11 AD 3d 312 (2004), a personal injury action commenced by a bus passenger. Among the factors considered by the court were the following: plaintiff had served a notice of claim on respondents within 90 days of her

injury, she had timely commenced the action and attempted service within the statutory period (albeit unsuccessfully), and respondent had made no showing of prejudice in the event plaintiff was granted leave to re-serve. 11 AD3d at 313-14; *see also, Goldstein v Columbia Presbyterian Medical Center, et al.*, 1 AD3d 188 (First Dep't 2003)(granting a 306-b extension in the interest of justice in light of evidence that defendant had actual notice of the claim and would not be prejudiced by the extension).

Wholly unavailing is defendant's effort in his Reply Memorandum (at p 7) to limit 306-b extensions to situations where the statute of limitations has expired. While the expiration of the statute of limitations was a factor considered by the First Department in *Murphy v Hoppenstein, et al.*, 279 AD2d 410 (2001) and *Salamon v Charney, et al.*, 269 AD2d 256 (2000), cases relied on by plaintiffs, that single factor was not dispositive. On the contrary, both courts considered various factors and applied the flexibility encouraged by the Legislature to grant extensions in the interest of justice.

Conclusion

Considering all the circumstances here, the Court finds that plaintiffs are entitled to an extension of time, in the interest of justice, to serve defendant Dr. Dupont in California. Plaintiffs timely served defendant in New York, albeit improperly, but relied on government records and proceeded in good faith when attempting that service. The delay in seeking this extension to re-serve is not significant. What is more, Dr. Dupont did receive notice of the litigation and retained counsel to vigorously defend him. He has participated in discovery and has not established, nor even alleged, that any prejudice will result from extending plaintiff's time to complete proper service.

Accordingly, it is hereby

ORDERED that defendant's motion is denied and plaintiff's cross-motion is granted, and plaintiff's time to serve defendant Dr. Dupont at the California address provided in the moving papers is extended for forty days from defendant's service on plaintiff's counsel of a copy of this decision with notice of entry.

This constitutes the decision and order of this Court.

Dated: April 29, 2008 **APR 29 2008**



J.S.C.
ALICE SCHLESINGER

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