

**Padilla Constr. Servs., Inc. v Russo, Scanardella &
D'Amato, P.C.**

2009 NY Slip Op 31249(U)

May 28, 2009

Supreme Court, Nassau County

Docket Number: 15903/08

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**PRESENT: HON. WILLIAM R. LaMARCA
Justice.**

PADILLA CONSTRUCTION SERVICES, INC.,

**Motion Sequence #1
Submitted March 9, 2009**

Plaintiff,

-against-

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**RUSSO, SCANARDELLA & D'AMATO, P.C.,
ROBERT J. SCAMARDELLA, ESQ., ALFREDO
CONTI, ESQ. and LAWRENCE P. SCHNAPF, ESQ.,**

Defendants.

The following papers were read on this motion:

Notice of Motion.....1

Counsel for plaintiff, PADILLA CONSTRUCTION SERVICES, INC. (hereinafter referred to as "PADILLA"), moves for an order, pursuant to CPLR §306-b, granting plaintiff an extension of time for service of process on defendants, RUSSO, SCAMARDELLA & D'AMATO, P.C. (hereinafter referred to as "RSD"), ROBERT J. SCAMARDELLA, ESQ., ALFREDO CONTI, ESQ. and LAWRENCE P. SCHNAPF, ESQ., of the annexed Summons with Notice, filed in the office of the Nassau County Clerk on August 25, 2008, until the date of actual service on January 30, 2009, and for an order amending the Summons to include 299 MAIN STREET, LLC., 19 LIBERTY, LTD., SAMUEL PADILLA and

ALEXANDER HOLUKA, as additional plaintiffs in the action, and to conform the language of the notice portion of the Summons to that of a second Summons on Notice dated and filed in the office of the Nassau County Clerk on January 29, 2009. An Affidavit of Service reflects that counsel for RSD, SCAMARDELLA and CONTI, and *pro se* defendant, SCHNAPF, were duly served with the instant motion on February 11, 2009, but no papers are submitted in opposition to the motion, which is determined as follows:

This is a legal malpractice action which arises from the defendants' representation of plaintiffs in the purchase of real property located at 299 Main Street, Westbury, New York. SAMUEL PADILLA, President of PADILLA and of 19 LIBERTY, LTD, of which ALEXANDER HOLUKA is the Secretary-Treasurer, purchased the subject property from its prior owner, 2632 Realty Development Corp. (hereinafter referred to as the "Seller"), with the understanding that the Seller was working out a remediation plan with the New York State Department of Environmental Conservation (hereinafter referred to as the "DEC"), for the on-site cleanup of the property. In an affidavit, SAMUEL PADILLA states that he and Mr. HOLUKA had used the RSD firm for legal services since 1993, and had worked with SCAMARDELLA, a partner in the firm, and with CONTI, an associate at the firm under the direction of SCAMARDELLA. SAMUEL PADILLA claims that, in 2005, he retained the firm and Mr. SCHNAPF, an attorney in New York City who specializes in environmental law, to assist with the acquisition of the property in light of the environmental contamination at the site. SAMUEL PADILLA states that plaintiffs were willing to take on the costs of the on-site cleanup, but made it very clear to defendants that the purchase documents had to protect the corporate entities and plaintiffs personally from any liability to any party for off-site work or expenses. SAMUEL PADILLA states that, based upon

assurances from defendants, that the Seller had agreed to the condition limiting plaintiffs' responsibility to environmental remediation "at the Premises" only, plaintiffs' closed on the property, on January 5, 2006, after the Order of Consent with the DEC was finalized, to which 299 MAIN STREET, LLC. and 19 LIBERTY LTD were added as parties so that they would be entitled, upon completion of the remediation work, to a "No Further Action" letter and a "Covenant Not to Sue" from the State. SAMUEL PADILLA asserts that, on January 5, 2006, 299 MAIN STREET, LLC. and 19 LIBERTY LTD, signed a purchase money mortgage for the property, and that SAMUEL PADILLA and HOLUKA signed a personal guaranty to the Seller for the obligations on the mortgage, all based upon defendants' advice and representations that their interests were protected, and that the agreements expressly limited the purchaser's responsibility for the environmental conditions at the property to only requiring plaintiffs to comply with the DEC approved Remediation Plan contained in the Consent Order.

It appears that defendants continued to represent plaintiffs well past the closing and that their final bill was rendered on February 23, 2007, with a letter acknowledging the conclusion of the matter, with invoices paid on January 30, 2007 and March 19, 2007, respectively. Subsequently, however, an attorney for the Seller informed plaintiffs that the State had filed a motion to add the Seller as a defendant in the State action to recover costs expended in the remediation of contaminated groundwater emanating from the New Cassel Industrial Area [where the property is located] and that, based upon the Contract, Mortgage and Guaranty, it was Seller's position that 299 MAIN STREET, LLC, 19 LIBERTY LTD., PADILLA and HOLUKA were obligated to defend and indemnify the Seller in the State claim. SAMUEL PADILLA states that the Seller relied upon a section of the Contract

which states that the purchaser would be responsible for the “environmental conditions: at the property”, which they interpreted to include environmental contamination that enters the property from off site and then leaves the property.

Moving plaintiffs state that, after they notified defendants of the threatened litigation, and demanded that defendants sign tolling agreements and agree to hold plaintiffs harmless in the event of any claim by the Seller, SCAMARDELLA acknowledged plaintiff's letter and advised that the firm's malpractice carrier was being put on notice, but refused to comply with plaintiffs' requests. Thereafter, plaintiffs retained Oleh Dekajlo, Esq. to file a summons with notice to prevent the tolling of the statute of limitations on the malpractice claim, which was filed with the Nassau County Clerk, on August 25, 2008. Despite counsel Dekajlo's request, on September 30, 2008, that each defendant accept service of the summons with notice, “without necessity of formal service of process”, it appears that it was not until January 28, 2009, when present counsel, Frederick Eisenbud, met with prior counsel Dekajlo, that he learned that the original Summons with Notice had not been served on defendants. Thereafter, on January 30, 2009, the original summons with notice was served on the defendants, and, as a precaution, a new Summons with Notice, dated January 29, 2009, was filed and served on January 30, 2009, which also named 299 MAIN ST. LLC, 19 LIBERTY LTD, SAMUEL PADILLA and ALEXANDER HOLUKA as additional plaintiffs. Counsel for plaintiffs urges that, in the interest of justice, pursuant to CPLR §306-b, the Court should extend the time to serve the original summons and complaint until January 30, 2009, the date of actual service, and, pursuant to CPLR §3025(a), deem the original summons amended to add the above noted plaintiffs, and to conform the language of the original notice to that of the January 29, 2009 Summons on Notice. It is

SAMUEL PADILLA's position that the very possibility that the corporate entities as well as the principals may be brought by the Seller into the State's cost recovery action as third-party defendants demonstrates that defendants have not protected plaintiffs' rights as they were hired to do, which is in direct contradiction of plaintiffs intent and instructions to defendants.

CPLR §306-b provides that service of process shall be made within 120 days after the filing of the summons and complaint. This Court has the authority to extend the time to make service of a complaint pursuant to CPLR §306-b which provides, in pertinent part that "[i]f service is not made upon the 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, extend the time for service." (See, *Busler v Corbett*, 259 AD2d 13, 696 NYS2d 615 [4th Dept. 1999]; see also, *Beavage v N.Y. City Transit Authority*, 282 AD2d 416, 722 NYS2d 402 (2nd Dept. 2001).

The statute allows an extension in two (2) circumstances - - ie., 1) when good cause is shown, or 2) in the interests of justice. The proper interpretation of the statute is set forth in *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 736 NYS2d 291, 761 NE2d 1018 (C.A. 2001), in which the Court of Appeals stated:

Applying these fundamental principles of statutory construction here, it is clear that with the amendment to CPLR 306-b, the Legislature gave the courts two separate standards by which to measure an application for an extension of time to serve. The two are stated separately, joined by the word "or" (CPLR 306-b). They cannot be defined by use of the same criteria; otherwise, one would have been sufficient. . . 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. Unlike a 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 cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time and prejudice to the defendant.

The statutory provision authorizing the amendment of pleadings reflects a liberal attitude and directs that leave to amend "shall be freely given" (CPLR § 3025, subd.[b]), in the Court's discretion. Permission to amend is to be restricted only by the imposition "as may be just" *Tucker v Tucker*, 55 NY2d 378, 449 NYS2d 683, 434 NE2d 1050 (C.A. 1982). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit". *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 (2nd Dept. 2008).

Based on the foregoing, and there being no opposition, it is the Court's judgment that plaintiffs have demonstrated an entitlement to the requested relief. The Court finds that under both standards of CPLR §306-b, a sufficient showing of merit has been made and the length of delay in service is not sizeable, nor has prejudice to the defendants been established. The amendment of the Summons with Notice shall be permitted as well. Accordingly, it is hereby

ORDERED, that PADILLA's motion is granted, without opposition, and, for good cause shown and in the interests of justice, plaintiff's time to serve the original Summons with Notice is extended, *nunc pro tunc*, until January 30, 2009, the date of actual service; and it is further

ORDERED, that PADILLA's motion to amend the original Summons with Notice, to include 299 MAIN STREET, LLC., 19 LIBERTY, LTD., SAMUEL PADILLA and

ALEXANDER HOLUKA, as additional plaintiffs in the action, is granted, and the language in the original Summons with Notice shall be conformed to the language of second Summons with Notice, filed January 29, 2009; and it is further

ORDERED, that the caption shall henceforth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**PADILLA CONSTRUCTION SERVICES, INC.,
299 MAIN STREET, LLC., 19 LIBERTY, LTD.,
SAMUEL PADILLA and ALEXANDER HOLUKA,**

Plaintiffs,

-against-

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**RUSSO, SCANARDELLA & D'AMATO, P.C.,
ROBERT J. SCAMARDELLA, ESQ., ALFREDO
CONTI, ESQ. and LAWRENCE P. SCHNAPF, ESQ.,**

Defendants.


and it is further

ORDERED, that counsel for plaintiff shall file and serve a complaint within twenty (20) days from the date of this order, together with an amended Summons with Notice, as directed herein.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 28, 2009



WILLIAM R. LaMARCA, J.S.C.

ENTERED

JUN 04 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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