

Ratner v Very Ltd.

2009 NY Slip Op 31663(U)

July 21, 2009

Supreme Court, New York County

Docket Number: 115271/08

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART 10

Index Number : 116908/2004

RATNER, MARION

vs

VERY

Sequence Number : 005

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion 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

FILED

JUL 27 2009

COUNTY CLERK'S OFFICE
NEW YORK

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

Dated: 7/21/09

J
JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

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 10

-----X
MARION RATNER and BETH ROSEN, as the
Administratrix of the Estate of Lillian Rosen,

Plaintiffs,

-against-

VERY LTD., LISA FIREMAN d/b/a STUDIO
SWEET PEA, and JOHN DOES Nos. 1
through 10,

Defendants.
-----X

Decision/Order

Index No.: 115271/08

Seq. No. : 001

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pltf's motion w/AR affid in support, exhs	1

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action. Plaintiff moves to renew its prior motion for an order pursuant to CPLR § 306-b extending *nunc pro tunc* the time to serve defendant Lisa Fireman d/b/a Studio Sweet Pea ("Fireman") with the Amended Summons and Amended Complaint in this action through and including October 12, 2007. Neither Moon Oh Corporation ("Moon") or Fireman has submitted any opposition to the instant motion, although proof of service has been provided. Accordingly, the motion is considered on default.

This action arises from an accident that occurred on September 13, 2003, causing injuries to both plaintiffs. At the time fo the accident, plaintiffs were attending a

wedding at Au Bar, a restaurant operated by defendant Very Ltd. ("Very") at leased premises located at 41 East 58th Street, New York, New York (the "Premises"). During the course of that wedding, plaintiffs were injured as a result of a defect on the staircase at the Premises, to wit: lemon leaf greenery that was allegedly negligently affixed to the handrail of same staircase inhibiting plaintiffs' ability to grasp the handrails and support themselves while using the staircase. Fireman was the florist at that wedding and affixed the lemon leaf greenery to the handrail.

This action was commenced on September 11, 2006. The Amended Summons and Amended Complaint were served, pursuant to CPLR § 308 (a) (3), upon Fireman, on September 12, 2005, at Fireman's residence address. Plaintiffs thereafter learned that Fireman claimed to have moved to another residence prior to the date upon which she was purportedly served with the Amended Summons and Amended Complaint. On October 10, 2007, beyond the statutorily authorized 120 day period by which service is to be made, plaintiffs then attempted to serve Fireman at her then current address. Plaintiffs then moved, by Order to Show Cause, for *nunc pro tunc* extension of time to serve Fireman to October 10, 2007. This case was stayed, however, upon the death of plaintiff Lillian Rosen on November 8, 2007, while that motion was *sub judice*. CPLR § 1015. That stay has since been lifted (See Order, J. Gische, 5/7/09) by the court upon the appointment of Beth Rosen as Administratrix for the Estate of Lillian Rosen.

By Order dated May 21, 2009, the court directed plaintiffs to renew its prior motion for an extension of time to serve Fireman *nunc pro tunc* by June 26, 2009. Plaintiff's instant motion is timely, and therefore, renewal is granted. Upon renewal, the court finds that plaintiffs are entitled to the relief they seek for the reasons that follow.

[* 4]

Pursuant to CPLR § 306-b, the court has the discretion to extend the time for service of a properly filed summons "upon good cause shown or in the interest of justice." Here, service upon Fireman was clearly defective since it was made beyond the 120 day time limit set forth in the CPLR. However, plaintiffs have demonstrated good cause for the court to exercise its discretion to extend plaintiff's time to serve *nunc pro tunc*. To wit, plaintiff attempted to serve Fireman within 120 days upon commencement of this action, and upon learning that Fireman did not reside at the subject address at the time service was attempted, plaintiffs served Fireman at her then current residence address. Plaintiffs then promptly moved to extend their time to serve. Furthermore, it appears that Fireman has had notice of this case for a sufficient period of time, having already appeared for her own deposition and engaging in other discovery in this matter. By failing to even oppose this application, Fireman concedes that no prejudice would result by granting the relief sought herein. For all of these reasons, the court in its discretion grants plaintiffs' motion to extend their time to serve defendant Fireman with the Amended Summons and Amended Complaint in this action through and including October 12, 2007.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion is granted in its entirety; and it is further

ORDERED that the court hereby extends plaintiffs' time to serve defendant Lisa Fireman d/b/a Studio Sweet Pea with the Amended Summons and Amended Complaint in this action through and including October 12, 2007. Fireman's answer shall be


served within twenty days from the date of service of notice of entry of this decision/order.

All parties to this action are directed to appear for a status conference on

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 17, 2009
21

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.