

**Kordisch v Brenner**

2009 NY Slip Op 32564(U)

October 30, 2009

Supreme Court, Queens County

Docket Number: 24032/08

Judge: Bernice D. Siegal

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Present: Honorable Bernice D. Siegal  
Justice

Part 5

-----X  
LILLI KORDISCH and STEFAN KORDISCH,

Plaintiff,

-against-

JO ANN BRENNER and ANDREW BRENNER,

Defendant.  
-----X

Index No. 24032/08  
Motion Date: 3/31/09  
Calendar No. 19  
Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion for an order pursuant to CPLR 3211(b) dismissing the seventh affirmative defense of defendants, Jo Ann Brenner and Andrew Brenner, asserting a lack of personal jurisdiction over the defendants, or in the alternative, an order pursuant to CPLR 306(b), in the interest of justice, extending the time for service and for an order pursuant CPLR308(5), directing service upon the defendants by service upon defendants' insurance carrier or upon their attorneys.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affidavit in Opposition-Exhibits.....	5-7
Reply.....	7-9

Upon the foregoing papers, it is ORDERED that this motion is decided as follows:

Plaintiffs move for an order pursuant to CPLR §3211(b) dismissing the seventh affirmative defense of defendants, Jo Ann Brenner and Andrew Brenner, asserting a lack of personal jurisdiction over the defendants, or in the alternative, an order pursuant to CPLR §306(b), in the interest of justice, extending the time for service and for an order pursuant CPLR 308(5), directing service upon the defendants by service upon defendants' insurance carrier or upon their attorneys.

The court notes that defendants originally moved to dismiss plaintiffs' complaint pursuant to CPLR §3211 (a) (8), arguing improper service on both respective defendants under CPLR § 306-b and CPLR §308(1), (2), and (4). Plaintiffs opposed defendants' motion to dismiss, arguing that service was proper on Ms. Brenner because four previous attempts were made to personally serve her at her residence; no telephone directory or "skip trace" listed her residence or business; and the process server obtained the outdated address from a deed, which he used to mail her the summons and complaint. Moreover, plaintiffs argued that at Mr. Brenner's address found by "skip trace," the process server delivered the summons and complaint to a man calling himself "K. Cardin," who stated he did not know Mr. Brenner. Plaintiffs submit (1) an affidavit of service by mail to Ms. Brenner and (2) an affidavit of service from the process server stating the summons and complaint were given to "K. Cardin," a red-haired male, age 45, weighing approximately 190 pounds and standing six feet tall. Accordingly, a decision and order of this court dated July 6, 2009, granted defendants' motion to dismiss solely to the extent that a traverse hearing was to be held before this court.

Subsequent to the issuing of the July 6, 2009 order, the parties notified this court that plaintiffs had submitted the within motion on the same day as the above mentioned motion. However, despite the court system indicating that the within motion was decided, a review of the court records indicate that due to a clerical error the within motion was never actually decided.

Accordingly, as the court has already ruled on the issues of

service to the extent of setting the matter down for a traverse hearing, the lone issue before this court is whether we should grant plaintiffs' request for extension of time to serve pursuant to CPLR §306(b). Section 306(b) provides that "[i]f 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 the defendant, or upon good cause shown or in the interest of justice, extend the time for service."

The extension of time provision under CPLR §306(b) may be applicable where service was timely made within the 120 day period but is subsequently found to be defective. (See *Earle v. Valente*, 302 AD2d 353 [2<sup>nd</sup> Dept. 2003]; *Citron v. Schlossberg*, 282 AD2d 642 [2<sup>nd</sup> Dept. 2001].) In determining whether to grant an extension of time in the interests of justice, the Court must weigh factors such as plaintiff's diligence in serving defendant, the expiration of the statute of limitations, the merits of the claim, the length of delay in service, the promptness of plaintiff's motion, and prejudice to defendant. (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001].)

Plaintiffs established that a search was conducted as to the location of the defendants and that the four attempts of service were made upon defendant Jo Ann Brenner, on four different dates and at four different times of day and seven attempts of service were made upon defendant, Andrew Brenner, on different dates and times. This investigation together with the numerous attempts at service reach are deemed to meet the reasonable diligence standard required for "good cause shown."

Moreover, defendant Jo Ann Brenner admitted that she received the Summons and Complaint by mail despite it being mailed to the wrong address. Significantly, in opposition to Plaintiffs' motion, defendants failed to assert that they will suffer prejudice if plaintiff's motion to extend time to serve is granted. In the case at bar, the plaintiff attempted service upon the defendants from October through November of 2008 and defendants filed an answer in December of 2008, by their attorney. Indeed, the motion for the extension of time to serve was made within 120 days of commencement of the within suit.

Accordingly, Plaintiffs have shown that, in the interests of justice, they should be granted an extension of time to serve (see *Leader v. Maroney, Ponzini & Spencer*, 276 AD2d 194 [2<sup>nd</sup> Dept. 2000], aff'd 97 NY2d 95 [2001]).

In addition, plaintiff moves for an order pursuant to CPLR §308(5), directing service upon the defendants by service upon defendants' insurance carrier or upon their attorneys. Plaintiff presented sufficient evidence that service on the defendants would be impracticable, as they made numerous unsuccessful attempts at different times to serve the defendants. (See *Kelly v. Lewis*, 220 AD2d 485 [2<sup>nd</sup> Dept. 1995].) Therefore, the Court authorizes plaintiff to serve the defendants by service upon defendants' insurance carrier or upon their attorneys pursuant to CPLR §308(5).

For the reasons set forth above, plaintiffs' motion is granted, in the interest of justice, and plaintiffs are given leave to reserve the Summons and Complaint upon Jo Ann Brenner and Andrew Brenner, by serving defendants' insurance carrier or upon their

attorneys pursuant to CPLR § 308(5), together with a copy of this order, in accordance with the applicable provisions of the CPLR within sixty (60) days from the date of entry of this order. Accordingly, the decision and order of this court dated July 6, 2009, which granted defendants' motion to dismiss solely to the extent that a traverse hearing was to be held before this court, is hereby vacated and the traverse hearing scheduled for December 9, 2009 is hereby marked off the court's calendar.

Dated: October 30 , 2009

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Bernice D. Siegal, J.S.C.