

Poventud v New York City Dept. of Educ.

2009 NY Slip Op 32881(U)

December 4, 2009

Supreme Court, New York County

Docket Number: 401378/08

Judge: Saliann Scarpulla

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.

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

PRESENT: **SALIANN SCARPULLA**
Justice

PART 52

*Maritza Poventud, individually, and as a mother
and natural guardian of Ismael Daniel
Montanez*

INDEX NO. 401 378/08
MOTION DATE 10/14/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- v -

New York City Dept. of Educ. et al.

The following papers, numbered 1 to 3 were read on this motion to/for dismissal

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

motion and cross-motion are decided in accordance
with accompanying memorandum decision.

This Constitutes Decision and Order of the Court.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/2/09

Saliann Scarpulla
SALIANN SCARPULLA *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: CIVIL TERM: PART 52

-----X

MARITZA POVENTUD, individually, and as mother
and natural guardian of ISMAEL DANIEL MONTANEZ
Plaintiff,

Index Number 401378/08
Submission Date 10/14/09
Mot. Seq. No. 001
DECISION & ORDER

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
DEVEREUX, DEVEREUX KANNER CENTER,
DEVEREUX BENETO CENTER, DEVEREUX
CARES, DEVEREUX CARES PTO, THE DEVEREUX
CHILDREN'S BEHAVIORAL HEALTH CENTER,
DEVEREUX COMMUNITY SERVICES, THE
DEVEREUX FOUNDATION, DEVEREUX SCHOOLS,
DEVEREUX SCHOOL, INC., DEVEREUX WHITLOCK
CENTER, LEO KANNER LEARNING CENTER, BRIAN
WASHINGTON and PATRICK EMERSON,
Defendants.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X

Appearances: For Plaintiff :
The Law Offices of Regina L. Darby
By Mark A. Marino, Esq.
20 Vesey Street, 3rd Floor
New York, New York 10007
212-925-5040

For Defendants Devereux:
Phelan, Phelan & Danek, LLP
By Syma S. Azam, Esq.
302 Washington Avenue Extension
Albany, New York 12203
518-640-6900

For Defendant the City of New York:
New York City Corporation Counsel
100 Church Street, 4th Floor
New York, New York 10007
212-788-0499

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Pl.'s Affirm in Supp with Exhib. Attached.....	<u>1</u>
Devereux's Notice of Cross-Mot. and Affirm. in Supp with Exhib. Attached.....	<u>2</u>

HON. SALIANN SCARPULLA, J.:

Plaintiff Maritza Poventud ("Poventud") moves by order to show cause pursuant to
CPLR 306(b) for an extension of the 120-day time period in which to serve a summons

and complaint on all Devereux defendants, Leo Kanner Learning Center, Brian Washington and Patrick Emerson (collectively "Devereux"). Devereux opposes the motion on the ground that it is not in the interests of justice to allow service on Devereux about thirty months after the filing of the complaint, and cross-moves to dismiss the complaint pursuant to CPLR 306(b).

Plaintiff Ismael Daniel Montanez ("Montanez"), now twenty-four years of age, was diagnosed with autism at the age of one-and-a-half. Poventud, Montanez's mother, brings this action alleging that Montanez suffered sexual abuse at the Devereux residential treatment facility for children with special needs. Montanez had started attending the Devereux residential facility in October 2004, on recommendation of defendant New York City Department of Education ("Department of Education").

Poventud alleges that, shortly before November 19, 2005, Montanez informed Poventud of sexual and physical abuse at the hands of certain Devereux employees. Poventud informed Devereux directors Jennifer Nash and James Hamilton of her son's complaints. Poventud was later told that an internal inquiry had not discovered any wrongdoing. Devereux also followed up by instituting a new action plan for Montanez's stay, which included significantly limiting conversations between Poventud and Montanez from every other day to one three-minute phone conversation a week. Once the restrictions were in place, Montanez stopped mentioning any abuse during his weekly phone conversations.

When Poventud arrived at Devereux on November 19, 2005 to pick up Montanez for the holidays, Montanez mentioned the names of Patrick [Emerson] and Brian [Washington] as the Devereux employee who abused him. Poventud immediately took Montanez to St. John's Hospital in Queens and alerted the police. Montanez did not return to Devereux at any time after November 19, 2005.

This action was commenced by filing the summons and complaint in Supreme Court, Kings County, Index No. 4922/07, on or about February 13, 2007. Thereafter, plaintiff's attorney moved her office and, in the midst of relocation, the file was lost, and no service of process was made on Devereux. After finding the file in August 2007, plaintiff's attorney made an application in Supreme Court, Kings County, for an ex parte order granting a ninety-day extension to serve Devereux. The Kings County Supreme Court denied the application without prejudice to renew by motion on notice. On January 24, 2008, plaintiff again attempted to file a motion to extend time for service on Devereux, but the motion support clerk rejected the proposed motion papers. Plaintiff's attorney never attempted to remedy the motion papers and re-file the motion in the Kings County Supreme Court.

On March 5, 2008, Department of Education moved for change of venue to New York County. After being served by Department of Education with the motion, which included the summons and complaint as attachments, Devereux's counsel contacted the parties and reminded them that Devereux had never been served with a summons and

complaint. Devereux, therefore, declined to appear for oral argument in the Kings County Supreme Court on April 23, 2008. Pursuant to Order of the Kings County Supreme Court (Robert J. Miller, J.), entered May 9, 2008, venue of the action was moved to New York County.

On September 2, 2009, thirty months after commencement of the action, nineteen months after the second failed attempt to extend the time to serve Devereux, and fifteen months after Devereux again reminded plaintiff that it had never been served with process, plaintiff now moves by order to show cause requesting an extension of time to serve process on Devereux. Devereux cross-moves for dismissal of plaintiff's action as against Devereux pursuant to CPLR 306(b).

Discussion

Under CPLR 306(b), plaintiff is required to serve process within one hundred twenty days of the filing of the summons and complaint. Failure to timely serve process on a certain defendant will result in dismissal of the action as to that defendant without prejudice upon motion of any party. CPLR 306(b). Dismissal under CPLR 306(b) does not toll the statute of limitations, and plaintiff's re-filed suit is subject to the timeliness requirement of the applicable statute of limitations. *See Beauge v New York City Tr. Auth.*, 282 A.D.2d 416 (2nd Dep't 2001).

To avoid dismissal of the filed initiatory pleading, plaintiff must seek leave of court for an extension of the one-hundred-twenty-day period upon a showing of good

cause for failure of service or that an extension is in the interest of justice. CPLR 306(b). The two standards are separate and distinct. *See Leader v Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105 (2001).

To establish good cause for failure to serve, plaintiff must show reasonable diligence in attempting to effect timely service, with a general law office failure constituting insufficient grounds for the extension. *See Leader*, 97 N.Y.2d at 105. Here, the proffered explanation that plaintiff's counsel lost the file when changing location of its office and later submitted deficient motion papers amounts to nothing more than general law office failure. Accordingly, plaintiff is not able to establish good cause for failure to timely serve Devereux.

The "interest of justice" standard is much broader and allows the court flexibility in exercising its discretion. *Leader*, 97 N.Y.2d at 105. In considering whether an extension of the time to serve is in the interest of justice, the court considers numerous factors that include (1) diligence in attempting the service, (2) expiration of the statute of limitations, (3) meritorious nature of the cause of action, (4) length of the delay, (5) promptness of the extension request, and (6) prejudice to the defendant. *Leader*, 97 N.Y.2d at 105-06. The burden always rests with the requesting party to establish that either the delay in receiving notice of the claim did not result in unfair prejudice to the defendant, or that the remaining factors outweigh such prejudice. *See Slate v Schiavone*

Constr. Co., 10 A.D.3d 1, 9 (1st Dep't 2004) (Friedman, J., dissenting), rev'd 4 N.Y.3d 816 (2005) (agreeing fully with Judge Friedman's dissenting opinion).

Plaintiff's counsel attempted, but failed twice to properly file a motion for the extension of time to serve in August 2007 and January 2008. After the second unsuccessful attempt, plaintiff's counsel permitted the matter to lie dormant for another nineteen months before bringing the present motion. While such a long, unexplained delay and extreme lack of diligence do not, in and of themselves, make the CPLR 306(b) extension inappropriate, they trigger a strong presumption of unfair prejudice to Devereux. *See Slate v Schiavone Constr. Co.*, 4 N.Y.3d 816, 817 (2005) (finding that an eighteen-month delay precluded the grant of CPLR 306(b) extension); *see also Hafkin v North Shore Universal Hospital*, 97 N.Y.2d 95, 107 (2001) (finding that a ten-month delay resulted in unfair prejudice); *Jervis v Teachers Ins. and Annuity Ass'n*, 279 A.D.2d 367, 368 (1st Dep't 2001) (eleven-month delay found inexcusable).

Plaintiff argues that Devereux had actual notice of plaintiff's potential claims at the earliest when Poventud complained to Devereux directors Jennifer Nash and James Hamilton of the alleged incidents of sexual abuse, and at the latest on April 22, 2008, when Devereux sent a letter, still within the statute of limitations period, to all parties that it would not appear on the change of venue motion, because it had never been served. Plaintiff also emphasizes that the statute of limitations has already expired, and absent an

[* 8]

extension to serve process, plaintiff's action will be barred as against the most relevant defendants, Devereux.

Plaintiff's argument, however, is unavailing. Plaintiff was squarely reminded, in April 2008, that the Devereux defendants had not been served. As of the time of Devereux's April 28, 2008 letter, the statute of limitations had not run, with about seven months left. Yet, plaintiff inexplicably failed to move to extend the time to serve until after the statute of limitations had lapsed. Moreover, this transitory action concerns events which allegedly occurred about four years ago. The Devereux defendants would suffer severe prejudice if the Court permitted service at this late date, because the parties' memories of the alleged incident have undoubtedly faded over this long period of time, and there is no indication that the individuals involved are still employed by the Devereux defendants.

While the Court recognizes the very grave nature of the allegations in the complaint, after a balancing of all relevant factors, the Court must deny plaintiff's application and grant Devereux's cross-motion for dismissal of plaintiff's complaint pursuant to CPLR 306(b), because plaintiff did not satisfy either "a good cause" or "the interest of justice" standard for the extension of the time to serve Devereux.

In accordance with the foregoing, it is therefore,

ORDERED that plaintiff's motion for an extension of time for service of process pursuant to CPLR 306(b) is denied; and it is further

ORDERED that the cross-motion for dismissal of plaintiff's complaint pursuant to CPLR 306(b) is granted only as against defendants Devereux, Devereux Kanner Center, Devereux Beneto Center, Devereux Cares, Devereux Cares PTO, The Devereux Children's Behavioral Health Center, Devereux Community Services, The Devereux Foundation, Devereux Schools, Devereux School, Inc., Devereux Whitlock Center, Leo Kanner Learning Center, Brian Washington and Patrick Emerson; and it is further

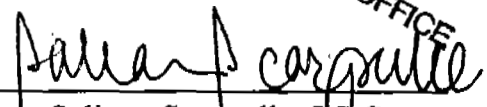
ORDERED that the action shall continue as against defendant New York City Department of Education; and it is further

ORDERED that counsel for Devereux shall serve a copy of this decision and order upon all parties and third-parties and upon the Clerk of Court (60 Centre St., Basement), who shall enter judgment in accordance with the foregoing and sever and continue the claims which are not dismissed.

This constitutes the decision and order of the Court.

Dated: December 4, 2009
New York, New York

ENTER:


Hon. Saliann Scarpulla, J.S.C.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE