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| <b>Way v Nihar Corp.</b>                                                                                                                                                                                                                                         |
| 2010 NY Slip Op 33816(U)                                                                                                                                                                                                                                         |
| November 19, 2010                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 150041/2010                                                                                                                                                                                                                                       |
| Judge: Carol R. Edmead                                                                                                                                                                                                                                           |
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 35

Index Number : 150041/2010

WAY, ELLAMAE

VS.

NIHAR CORP. D/B/A NISHI

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 150041/2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

his 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

In accordance with the accompanying Memorandum Decision, it is hereby ORDERED that the motion of the defendants Nihar Corp. d/b/a Nishi Pharmacy and Nirav Jitendra Shah for an order pursuant to CPLR §3211 (a)(5) dismissing the summons and notice of the plaintiffs Ellamae and Herman Way, is denied; and it is further

ORDERED that the cross-motion of the plaintiffs Ellamae and Herman Way for an order pursuant to CPLR §306-b, extending the time to serve defendant Nirav Jitendra Shah, is granted; and it is further

ORDERED that plaintiffs shall serve the defendant Nirav Jitendra Shah with the summons with notice pursuant to CPLR §308, within 30 days from entry of this order; and it is further

ORDERED that the motion of the defendant Nirav Jitendra Shah for an order pursuant to CPLR §3211(a)(8) dismissing plaintiffs' action as against him for lack of personal jurisdiction, is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 2, 2011, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 11/19/2010  
HON. CAROL EDMED

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/ JUDG.☐ SETTLE ORDER/ JUDG.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 35

-----X  
ELLAMAE WAY and HERMAN WAY,

Plaintiffs,

Index No. 150041/2010

-against-

NIHAR CORP. d/b/a NISHI PHARMACY and NIRAV  
JITENDRA SHAH,

Defendants.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this negligence action for an improperly dispensed prescription medication, defendants Nihar Corp. d/b/a Nishi Pharmacy (the "Pharmacy") and Nirav Jitendra Shah ("Nirav") (collectively, "defendants") move pursuant to CPLR § 3211(a)(5) for an order dismissing the claim of plaintiffs Ellamae and Herman Way ("plaintiffs"), on the ground that the claim is barred by the Statute of Limitations. Defendant Nirav separately moves for dismissal of the claim as against him, pursuant to CPLR §3211(a)(8), for lack of personal jurisdiction based on improper service. Plaintiffs oppose the motion and cross-move pursuant to CPLR §306-b and §2004 for an order extending the time to serve Nirav.

*Background Facts*

Plaintiffs allege that on February 15, 2007, defendants improperly filled a prescription by dispensing 1000 mg of Metformin instead of 500 mg of Metformin to plaintiffs.

On or about February 16, 2010, plaintiffs commenced this action against the Pharmacy and against Nirav individually, as its owner, by filing a summons with notice with the Clerk of the Court. On June 16, 2010, plaintiffs served said summons with notice on the Pharmacy

pursuant to CPLR §311 (a)(1) (personal service upon a corporation) by delivering it to the New York Secretary of State. Plaintiffs also attempted to serve Nirav at his place of business, but could not locate him as he had apparently sold his business and relocated. Plaintiffs' investigation revealed that a "Nirav Jitendra Shah" was residing in Houston, Texas. Under the assumption that it was the right "Nirav," plaintiffs retained a Texas process server, who on June 16, 2010 served "Nirav" by affixing the summons with notice to the door at 75 Kirby Drive, Apt. 133, Houston, TX, 77030, and subsequently mailing same to this address.

Defendants now move for dismissal on two grounds. First, the action is untimely as it was commenced one day after the expiration of the three-year limitation for filing personal injury and/or pharmaceutical malpractice suits. And second, the court lacks personal jurisdiction over Nirav, a resident of Queens, New York, since he was never served. And in any event, the time to serve defendant Nirav has now expired, pursuant to CPLR §306-b, providing that service of the initial pleadings be made within 120 days of filing, and plaintiffs are not entitled to extension either under a "good cause" or "interest of justice" standards delineated by the Court of Appeals.

In opposition, plaintiffs argue that February 15, 2010, was "Washington's Birthday," a public holiday. Thus, pursuant to New York State General Construction Law ("GCL") §25-a, the time of commencement was automatically extended to the next business day, February 16, 2010, and defendants concede that the action was commenced on February 16<sup>th</sup>. In support of their cross-motion, plaintiffs seek an extension of time to serve defendant Nirav, pursuant to CPLR §306-b, claiming that they were diligent in their efforts to locate Nirav, they reasonably believed they had served the "right" Nirav; they cross-moved for an extension immediately after defendants informed plaintiffs that they had served the wrong person, and Nirav cannot claim

prejudice from the delay since he acknowledged having notice of the claim as a result of the service on the Pharmacy.

### *Discussion*

#### *Statute of Limitations: CPLR §3211(a)(5)*

A defendant seeking dismissal of a [claim] pursuant to CPLR §3211(a)(5) on the ground that it is barred by the Statute of Limitations bears the initial burden of proving, *prima facie*, that the time in which to commence an action has expired (*Santo B. v Roman Catholic Archdiocese of NY*, 51 AD3d 956, 861 NYS2d 674 [2d Dept 2008]; *Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 840 NYS2d 417 [2d Dept 2007]). Once the *prima facie* is established, “the burden then shift[s] to the plaintiff to aver evidentiary facts establishing that his ... cause of action falls within an exception to the Statute of Limitations, or raising an issue of fact as to whether such an exception applies” (*Santo B. v Roman Catholic Archdiocese of NY, supra*; *John Doe No. 6 v Yeshiva & Mesivta Torah Temimah, Inc.*, 21 Misc 3d 443, 863 NYS2d 891 [Supt Ct, Kings County 2008]).

Here, defendants established that the Statute of Limitations applicable to plaintiffs’ claim is the three-year limitations period found in CPLR §214 (5) (personal injury) and in CPLR §214 (6) (malpractice, other than medical, dental or podiatric malpractice). Thus, the last day on which plaintiffs could timely commence their action would have been February 15, 2010, three years after the accrual of their claim on February 15, 2007, when defendants allegedly incorrectly dispensed the subject prescription medication.

However, pursuant to GCL §25-a,<sup>1</sup> “[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day” (*see also* NY County Law § 206-a [2]). “Public holidays” are defined in GCL §24, stating: “The term public holiday includes the following days in each year: [ . . . ] the third Monday in February, known as Washington's birthday.” Consequently, here, GCL §25-a applies to the period of time within which plaintiffs had to commence their action and extended the expiration of that period to the next business day, February 16, 2010 (*see Butchers' Mut. Casualty Co. v City of New York*, 182 Misc 809, 52 NYS2d 121 [Sup Ct, New York County 1944])[where the period within which plaintiffs could sue the City of New York for damage to property expired on January 1, a public holiday, and January 2 fell on Sunday, commencement of action on Monday, January 3, was timely]). Thus, plaintiffs’ claim against defendants is not barred by the Statute of Limitations and the branch of defendants’ motion to dismiss on this ground is denied.

*Personal Jurisdiction: CPLR §3211 (a)(8)*

*Extension of Time to Serve: CPLR §306-b*

Pursuant to CPLR §3211(a)(8), a party can move to dismiss a cause of action against a defendant on the ground that the Court lacks personal jurisdiction over the defendant. As relevant herein, CPLR §308 provides that service upon a natural person “shall be made by any of the following methods:

- (1) by delivering the summons within the state to the person to be served; or
- (2) by delivering the summons within the state to a person of suitable age and discretion

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<sup>1</sup>GCL §25-a is entitled “Public holidays. Saturday or Sunday in statutes; extension of time where performance of act is due on Saturday, Sunday or public holiday.”

at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or [ . . . ] his or her actual place of business”

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(4) by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served.”

If such service is not made within 120 days after the filing of the summons and complaint or summons with notice, 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*” (CPLR §306-b)(emphasis added).

Plaintiffs do not dispute that the court lacks personal jurisdiction over Nirav as he was never served with process. Rather, they seek extension of the time to serve the proper defendant.<sup>2</sup>

CPLR 306-b, which permits the court to grant such an extension “for good cause shown or in the interest of justice,” is applicable where service, as here, timely made within the 120-day period, is subsequently found to have been defective (*Earle v Valente*, 302 AD2d 353 [2 Dept 2003]; *Citron v Schlossberg*, 282 AD2d 642 [2d Dept 2001]). In this regard, the Court of Appeals stated that, unlike an extension premised on the showing of “good cause,” generally requiring plaintiff to show reasonably diligent efforts at service, “interest of justice” standard was intended to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d

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<sup>2</sup> It appears that in addition to CPLR §306-b, plaintiffs seek extension pursuant to CPLR §2004, which provides:

Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

95, 736 NYS2d 291 [2001]). Thus, in making its determination, the court may consider any relevant factors, “including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of the delay in service, the promptness of the plaintiff’s request for the extension of time and prejudice to the defendant” (*id.*).

In this case, considering all relevant factors, the court concludes that the extension is warranted under both prongs of *Leader, supra*. As indicated above, plaintiffs timely commenced the action, albeit on the last day before the expiration of the three-year Statute of Limitations, and timely served the summons with notice on the corporate defendant (Pharmacy) within the requisite 120-day period. The record indicates that plaintiffs also attempted to serve Nirav at his place of business, but he apparently sold the Pharmacy in 2009 and could not be located at that time. The search performed by plaintiffs’ investigator, revealed that a “Nirav” relocated to Houston, Texas. Proceeding on the mistaken assumption that it was the Nirav in Texas was the defendant sued herein, plaintiffs caused the process server to serve “Nirav” in Texas (see Affidavit of service) on June 16, 2010.<sup>3</sup> Thus, both plaintiffs and the process server had a reasonable belief that service was proper and the error was not discovered until a month later (July 27, 2010) when defendants filed the instant motion, asserting that plaintiffs served the wrong “Nirav Jitendra Shah.” In light of these facts, the court finds “good cause” for extension of time to serve defendant Nirav.

Furthermore, even though plaintiffs’ request for an extension was not promptly made until two months after defendants filed the instant motion to dismiss, Nirav failed to show any

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<sup>3</sup> The Affidavit of service shows that the service was made [pursuant to CPLR §308 (4)] by affixing the summons to the door at 75 Kirby Drive, Apt. 133, Houston, TX, 77030, and subsequent mailing to the same address.

prejudice in defending the merits of the action if plaintiffs are permitted to re-serve him. Indeed, Nirav stated in his Affidavit that he had actual notice of the instant action by virtue of the service upon the corporation and upon learning about the action from his attorney (*see Duffoo v Bertelle*, 26 Misc 3d 1237, 907 NYS2d 436 [Sup Ct, Kings County 2010]).

The cases cited by defendants are distinguishable as the actions there were commenced after the Statute of Limitations had expired, the requests for an extension were made after a significant length of time (more than 8 to 20 months) after the expiration of the 120-day period, defendants had no notice of the suit, and no reasonable excuses were offered by plaintiffs. None of those facts are present in the case at bar. As stated above, plaintiffs' action is timely, the improper service was due to a mistake, and even though the instant request for extension was filed two months after the discovery of the mistake, both defendants had notice of plaintiffs' claim at least since June 16, 2010, when the corporation was served. Thus, extension is also warranted under the "interest of justice" standard.

Thus, in light of plaintiffs' mistake in serving the "wrong" person and in the absence of prejudice to Nirav, plaintiffs' cross-motion to extend time to serve process on Nirav is granted, for good cause shown and in the interest of justice. Consequently, Nirav's motion to dismiss plaintiffs' claim as asserted against him, for lack of personal jurisdiction based on improper service, is effectively denied as academic. Plaintiffs are granted 30 days from entry of this order to serve Nirav with summons with notice pursuant to CPLR §308.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion of the defendants Nihar Corp. d/b/a Nishi Pharmacy and

Nirav Jitendra Shah for an order pursuant to CPLR §3211 (a)(5) dismissing the summons and notice of the plaintiffs Ellamae and Herman Way, is denied; and it is further

ORDERED that the cross-motion of the plaintiffs Ellamae and Herman Way for an order pursuant to CPLR §306-b, extending the time to serve defendant Nirav Jitendra Shah, is granted; and it is further

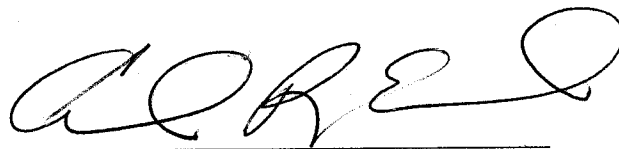
ORDERED that plaintiffs shall serve the defendant Nirav Jitendra Shah with the summons with notice pursuant to CPLR §308, within 30 days from entry of this order; and it is further

ORDERED that the motion of the defendant Nirav Jitendra Shah for an order pursuant to CPLR §3211(a)(8) dismissing plaintiffs' action as against him for lack of personal jurisdiction, is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 2, 2011, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: November 19, 2010.



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**