

**Towers v A-1 Quality Limousine Serv. LLC**

2011 NY Slip Op 30314(U)

January 25, 2011

Sup Ct, Nassau County

Docket Number: 1811/10

Judge: Karen V. Murphy

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Short Form Order

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

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**MICHAEL TOWERS,**

**Plaintiff(s),**

**-against-**

**Index No. 1811/10**

**Motion Submitted: 11/23/10  
Motion Sequence: 001, 002**

**A-1 QUALITY LIMOUSINE SERVICE LLC, A-1  
QUALITY LIMOUSINE SERVICE LLC d/b/a THE  
PARTY RIDE, PARTY RIDE TRANSPORTATION  
INC., PARTY RIDE TRANSPORTATION INC.  
d/b/a THE PARTY RIDE and JOHN DOE (fictitious  
name, true name unknown, said person being the  
operator of the motor vehicle at the time of plaintiff's  
accident alleged herein),**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

In the first motion sequence, plaintiff moves this Court unopposed for an Order amending the papers and proceedings in this action to insert the true name of "John Doe" (Augustino Oliviero), directing the corporate defendants (collectively, "A-1") to disclose the last known address of Augustino Oliviero, and for permission to serve Augustino Oliviero with a proposed supplemental summons and amended verified complaint, or direct the corporate defendants to accept service on his behalf.

In the second motion sequence, dated eight days after the first sequence, plaintiff moves this Court unopposed for an Order amending the papers and proceedings in this action to reflect various alternate spellings of the name Augustino Oliviero, previously identified as “John Doe,” and for permission to serve the proposed supplemental summons and amended verified complaint upon him.

Although plaintiff has brought his motions pursuant to CPLR § 1024, he is also seeking permission to serve the driver with the proposed supplemental summons, which is, in effect, an application to extend the time for service pursuant to CPLR § 306-b.

This action arises from an incident that allegedly took place on October 17, 2009. Plaintiff claims that the operator of the limousine/vehicle-for-hire in which he was riding “slammed” on the brakes, causing plaintiff to suffer an injury to his arm. The action was commenced by plaintiff on January 27, 2010, by filing the summons and verified complaint with the Nassau County Clerk. Issue was joined by A-1 on or about February 12, 2010.

Plaintiff does not allege that he attempted to serve “John Doe,” but states that he was unable to ascertain the true name of the driver who operated the vehicle at the time of the incident on October 17, 2009. Plaintiff simply states that his attempts to learn the driver’s name were “rebuffed” by A-1, and there was no accident report made. In the verified complaint, plaintiff identified “John Doe” as the “operator of a certain 2007 GMC vehicle with plate number 95006PA from the State of New York at the time of plaintiff’s accident . . .” Additionally, plaintiff identified the vehicle as “vehicle number ‘46,’” and identified the place of occurrence of the incident giving rise to plaintiff’s injuries, as well as the manner in which the injuries were sustained.

On April 29, 2010, plaintiff served a combined demand upon the corporate defendants for, *inter alia*, the name and last known address of the operator of the vehicle involved in the incident giving rise to this action.<sup>1</sup> In the combined demand, plaintiff included two photographs of the driver in order to aid A-1 in identifying him.

A-1 did not respond to plaintiff’s combined demand until October 7, 2010. In its discovery response, A-1 referred to the driver as “employee/driver Augustino Oliviero.” In its response, A-1 included a “Reservation Driver Ticket” listing “Agostino Oliveira” as the driver. A-1 did not provide the driver’s last known address until October 14, 2010, when it referred to him as “Agostino Olivero.”

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<sup>1</sup>A-1 has since provided the last known address of its driver; therefore, plaintiff’s request to compel A-1 to provide such information is denied as moot.

After receiving the varied spellings of the driver's name, plaintiff states that he conducted "research and investigation" that revealed the multiple spellings of the driver's name listed in the instant motion.

Plaintiff's first motion sequence was made four days after A-1 responded to the combined demand, and plaintiff's second motion sequence was made five days after A-1 provided the driver's last known address and a spelling variation of the driver's name.

The statute of limitations for this personal injury action is three years, pursuant to CPLR § 214(5). Thus, plaintiff has commenced this action and moved for the requested relief well in advance of the expiration of the statute of limitations.

CPLR § 1024 provides for the commencement of an action against an unknown party, and that, if the true name becomes known, "all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."

"Parties are not to resort to the 'Jane Doe' procedure unless they exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name, and despite such efforts, are unable to do so (*Bumpus v. New York City Transit Authority*, 66 A.D.3d 26, 883 N.Y.S.2d 99 [2d Dept., 2009]).

In this case, plaintiff has exercised due diligence, and has succeeded in identifying the driver by name, including ascertaining his last known address, well before the expiration of the relevant statute of limitations. Moreover, the description of the "John Doe" party contained in the verified complaint is sufficient to apprise the party that he is the intended defendant. Thus, the granting of the relief requested pursuant to CPLR § 1024 is appropriate in this case, and all prior proceedings shall be deemed amended accordingly.

Turning now to plaintiff's request for permission to serve the driver under his true names and aliases, the court recognizes, "as a practical matter, it is not always easy or even possible for plaintiffs naming 'Jane Doe' defendants to meet the service expectations of CPLR § 306-b" (*Bumpus, supra* at 31). The Bumpus Court envisioned circumstances virtually identical to those at bar, where the 120-day period would be violated, but the "harshness" of 306-b could be ameliorated by a finding of "good cause," or the application of an "interests of justice" analysis (*Id.*).

As described in *Bumpus*, and as is the case here, plaintiff commenced the action against two or more defendants including the unknown driver. The corporate defendants interposed an answer and plaintiff then served discovery demands upon them, requesting information identifying the unknown party. The corporate defendants in this case did not reply in a timely fashion, waiting until October 2010 to supply the information, some five

months after plaintiff's demand for discovery. By then, the 120-day period for service upon the driver was expired by some four and one-half months.

The 120-day service provision of CPLR § 306-b can be extended by a court, upon a showing of good cause, or in the interests of justice. "Good cause" and "interests of justice" are two separate statutory standards. In order to establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (*Bumpus, supra* at 31-32).

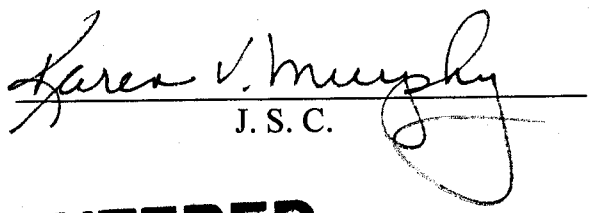
In this case, plaintiff has not stated that he attempted service upon the driver, either as a "John Doe," or in the driver's true name. Thus, plaintiff has failed to establish "good cause" for an extension of the 120-day service provision.

Under the "interest of justice" standard, however, the Court finds that plaintiff is entitled to an extension of the 120-day service deadline. While plaintiff's lack of due diligence in attempting to serve the driver as a "John Doe," despite the fact that plaintiff possessed quality color photographs of the driver and knew where he worked, that factor, standing alone, is outweighed by the other factors in the Court's interest of justice analysis (see *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 94, 761 N.E.2d 1018, 736 N.Y.S.2d 291 [2001]). Upon learning the driver's true name(s), plaintiff promptly moved this Court for permission to amend the pleadings and proceedings, and to serve the driver in his true name(s). The untimeliness of A-1's response to plaintiff's discovery demands was not within plaintiff's control. Additionally, the length of the delay in seeking service is not particularly egregious under the circumstances of this case, and there is nothing in the submissions suggesting that plaintiff's complaint lacks facial merit.

Balancing all of the factors in this case, including the fact that the statute of limitations has not yet run, the Court has determined that an extension of ninety (90) days from the date of this Order to effect service of the supplemental summons and amended verified complaint upon the driver is appropriate.

The foregoing constitutes the Order of this Court.

Dated: January 25, 2011  
Mineola, N.Y.

  
J. S. C.

**ENTERED**  
4 FEB 01 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE