

**Boye v Rubin & Balin, LLP**

2011 NY Slip Op 30545(U)

March 7, 2011

Supreme Court, New York County

Docket Number: 115987/09

Judge: Louis B. York

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

**LOUIS B. YORK**  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 2

Index Number : 115987/2009

**BOYE, FRANK**

vs.

**RUBIN & BAILIN, LLP**

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

~~Answering Affidavits — Exhibits~~ Cross-motion - EXHIBITS

Replying Affidavits

Affid in opp. to cross-motion

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

~~NOTION OF MOTION~~  
~~WITH ACCOMPANYING MEMORANDUM DECISION.~~

**FILED**

MAR 10 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/7/11

L. York  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

----- x  
FRANK BOYE,

Plaintiff,

Index No. 115987/09

-against-

RUBIN & BALIN, LLP, f/k/a  
RUBIN, BAILIN, ORTOLI  
MAYER and BAKER LLP,  
ERIC VAUGHN-FLAM P.C. and  
ERIC VAUGHN-FLAM, ESQ.,

Defendants,  
----- x

LOUIS B. YORK, J.:

**FILED**

MAR 10 2011

NEW YORK  
COUNTY CLERK'S OFFICE

This decision addresses the motion of defendant Eric Vaughn-Flam, Esq. (hereafter Vaughn-Flam) to dismiss the action as against him due to lack of personal jurisdiction under CPLR § 3211(a)(8) and the cross-motion by plaintiff Frank Boye (hereafter Plaintiff) requesting an extension of time to complete service of process on Vaughn-Flam pursuant to CPLR § 306-b or in the alternative to deem service timely *nunc pro tunc*. For the reasons discussed infra, Vaughn-Flam's Motion to Dismiss is granted and Plaintiff's Cross-Motion requesting an extension of the time to complete service is denied.

**Facts**

On November 13, 2009, Plaintiff commenced the present action. According to Plaintiff's Verified Complaint dated March 6, 2010, Vaughn-Flam, along with defendants Rubin & Bailin, LLP and Eric Vaughn-Flam P.C., represented the plaintiff in the matter of Boyes v. Amory, Jurden and Jurden Associates, Docket No. 06 CV 2163 in the U.S. District Court of the Southern District of New York. As part of that representation, the defendants prepared and filed a

complaint on behalf of Plaintiff on March 20, 2006. Prior to the conclusion of that action, defendants made a motion to withdraw as attorneys for Plaintiff, which was granted on or about November 14, 2006. Plaintiff contends that while representing him, the defendants negligently failed to render competent legal service and breached their fiduciary duty to Plaintiff.

On March 9, 2010, Plaintiff served defendants Rubin & Bailin, LLP and Eric Vaughn-Flam P.C. through the Secretary of State pursuant to New York Partnership Law § 121-1505 and Business Corporation Law § 306 respectively. Plaintiff admits service has not been made upon Vaughn-Flam and gives no explanation as to why service was never made or whether such service was ever even attempted. As of March 13, 2010, 120 days had passed since Plaintiff filed the present action. According to its Affidavit of Service, Defendant Eric Vaughn-Flam P.C. served a Verified Answer to the complaint on April 8, 2010. In a Notice of Motion dated April 26, 2010, Vaughn-Flam moved to dismiss the complaint against him for lack of personal jurisdiction. In a Notice of Cross-Motion dated May 4, 2010, Plaintiff requested an extension of time to complete service of process on Vaughn-Flam or to deem service timely *nunc pro tunc* pursuant to CPLR § 306-b.

### **Discussion**

It is not claimed by either party that service was made upon Vaughn-Flam. While generally a court will, upon motion, dismiss an action against a defendant who has not be served within the proscribed 120 day period, the CPLR provides that the Court has discretion "upon good cause shown or in the interest of justice" to extend the time allowed for service (CPLR § 306-b). "Good cause" and the "interest of justice" are two separate standards which the Court may look to in making such a determination (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]).

Absent any evidence that Plaintiff ever even attempted service upon Vaughn-Flam during the 120 day period, Plaintiff is not entitled to relief based on the "good cause" standard (*see e.g. Valentin v. Zaltsman*, 39 AD3d 852 [2d Dept 2007]). However lack of diligence alone will not prevent relief under the "interest of justice" standard (*Leader*, 97 NY2d at 105). "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (*id.*). In its analysis, the court may consider Plaintiffs diligence as well as "any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Id.* at 105-106).

A number of factors weigh heavily against Plaintiff from the outset. The record contains no evidence that Plaintiff even attempted to serve Vaughn-Flam during the 120 day period following commencement of the action. Moreover, Plaintiff moved for an extension of time to serve process only after Vaughn-Flam moved to dismiss for lack of personal jurisdiction, which was almost two months after the period had expired. No explanation or excuse for this extreme lack of diligence has been offered.

Another factor that the court must consider is the expiration of the Statute of Limitations. As the Statute of Limitations is now past, a dismissal would foreclose Plaintiff's ability to have his case heard against this defendant. In such cases it has been noted that "courts should take into account the drafters' intent that motions to extend be liberally granted after the expiration of the limitations period" (*Leader v. Maroney, Ponzini & Spencer*, 276 AD2d 194, 200 [2d Dept 2000], *aff'd* 97 NY2d 95 [2001]). This concern must be weighed against the inference of prejudice against a defendant who was not given notice of a claim for over three years and three

months following its accrual (*see Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 107 [2001]; *Johnson v. Concourse Vil., Inc.*, 69 AD3d 410, 411 [1st Dept 2010]). Here, Plaintiff points out that service was made upon Eric Vaughn-Flam P.C. on March 9, 2010. Furthermore, on April 8, 2010, Vaughn-Flam, acting as its attorney, served a Verified Answer on behalf of Eric Vaughn-Flam P.C. However neither of these facts allow the Court to infer that Vaughn-Flam received any notice of the claim prior to the expiration of the 120 days on March 13, 2010. Absent any evidence to the contrary, the court must assume that at least three years and four months passed between the claim's accrual and when Vaughn-Flam received notice of the action.

The Court must also consider any evidence presented showing that Plaintiff's claim has merit. In this situation, Plaintiff's Verified Complaint may be utilized as an affidavit (*Fortino v. Hersh*, 307 AD2d 899, 899 [1st Dept 2003]). Here, as Plaintiff has submitted no additional probative evidence regarding the merits of the claim, even if considering the Verified Complaint,<sup>1</sup> the Court cannot conclude that sufficient evidence of a meritorious claim has been presented to tip the scales in Plaintiff's favor.

Based on Plaintiff's lack of diligence, the extreme delay before Vaughn-Flam received any notice of the claim, and Plaintiff's failure to demonstrate the meritorious nature of the claim, the Court cannot find that an extension of time to complete service is in the interest of justice.

Therefore, for the reasons discussed, Vaughn-Flam's Motion to Dismiss is granted and Plaintiff's Cross-Motion for an extension of time to complete service is denied.

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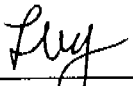
<sup>1</sup> The Court must note that Plaintiff failed to include a copy of his Verified Complaint with the cross-motion that was submitted to the Court. In the Affirmation submitted to the Court along with Plaintiff's Notice of Motion, Plaintiff states that a copy of the Verified complaint was attached as Exhibit B. Exhibit B did not contain a copy of the Verified Complaint but rather it only contained a copy of the summons with notice and a copy of the exact same Affirmation to which the exhibit was attached.

Based on the foregoing, it is

**ORDERED** that the Cross-Motion requesting an extension of the time to complete service is denied; and it is further

**ORDERED** that the Motion to Dismiss is granted.

Dated: 3 | 7 | 11

  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
**MAR 10 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE