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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

JPMORGAN CHASE BANK, N.A., as successor-by-assignment from The Bank of New York,

Plaintiff,

- against -

HIGHFIRED INC. and THOMAS W. HOFF JR.,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 9451/10

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits ..... _____
Replying Affidavits ..... _____
Briefs: Plaintiff's / Petitioner's ..... _____
Defendant's / Respondent's ..... _____

The plaintiff bank moves, under motion sequence one, for the entry of an order authorizing the *nunc pro tunc* filing of an affidavit of service based on a clerical error resulting in delayed service and filing. The plaintiff's attorney states, in an October 27, 2010 supporting affirmation, the underlying action seeks to collect money due and owing from the defendants under a March 29, 1999 business credit link agreement and guarantee. The plaintiff's attorney asserts the corporate defendant was served pursuant to Business Corporation Law § 306 with an additional mailing in compliance with CPLR 3215 while the natural defendant was served by substituted service to this defendant's wife at this defendant's residence and mailings of the

summons and complaint pursuant to CPLR 308 (2) and CPLR 3215. The plaintiff's attorney concedes the service agency, retained by the plaintiff's counsel, untimely filed the affidavit of service improperly with the Court. The plaintiff's attorney avers defendants are not prejudiced by the relief sought in the instant motion.

The natural defendant moves, under motion sequence two, pursuant to CPLR 306-b, 308 (2) and 3211 (a) (8) to dismiss the complaint, and to award this defendant costs, disbursements, expenses and attorneys fees. The defense attorney states, in a November 18, 2010 affirmation, the plaintiff failed to timely serve the natural defendant within the 120 day period mandated by CPLR 306-b, and the plaintiff failed to timely perform substituted service alleged pursuant to CPLR 308 (2), to wit it was made 133 days after the filing of the summons and complaint. The defense attorney adds the affidavit of service filed with the Nassau County Clerk was on October 22, 2010, so the plaintiff was seven days late measured from the date of delivery of the summons, and five days late measured from the date of the mailing under CPLR 308 (2). The defense attorney contends this plaintiff's motion should be denied because the plaintiff fails to meet its burden of showing good cause for its long delay in service upon this defendant. The defense attorney avers the plaintiff fails to meet its burden to establish the interests of justice require the issuance of an extension, and the plaintiff fails to timely serve this defendant and file its affidavit of service.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to these two motions, and whether the plaintiff has shown good cause or complied with the interest of justice standard enunciated in CPLR 306-b. The State Court of Appeals holds:

> legislative history is unequivocal that the inspiration for the new CPLR 306-b provision was its Federal counterpart. The revision was intended to offer New York courts the "same type of flexibility" enjoyed by Federal courts under rule 4 (m) of the Federal Rules of Civil Procedure (OCA Mem, supra, at 319). Rule 4 (m) similarly provides two alternative grounds for a plaintiff seeking an extension of time to serve process. The rule explicitly mandates that "if the plaintiff shows good cause for the failure, the court shall extend the time for service" (Fed Rules Civ Pro, rule 4 [m]). The rule also authorizes a second, unspecified discretionary basis for extension "even if there is no good cause shown" (1993 Advisory Comm Note, Fed Rules Civ Pro, rule 4 [m]; ***see, Boley v Kaymark***, 123 F3d 756, 758 [3d Cir], ***cert denied*** 522 US 1109).
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> 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. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with 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. We also agree with the Appellate Division majorities that Federal case law analysis of rule 4 (m) of the Federal Rules of Civil Procedure provides a useful template in discussing some of the relevant factors for an interest of justice determination (***see, e.g., AIG Managed Mkt. Neutral Fund v Askin Capital Mgt.***, 197 FRD 104, 109 [SD NY]; ***see also, State of New York v Sella***, 185 Misc 2d 549, 554 [Albany County Sup Ct] [compiling Federal factors])...
> The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative--the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served

Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106, 736 N.Y.S.2d 291 [2001].

The Second Department holds:

> The 120-day service provision of CPLR 306-b can be extended by a court, upon motion, "upon good cause shown or in the interest of justice" (CPLR 306-b). "Good cause" and "interest of justice" are two separate and independent statutory standards (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 104, 736 N.Y.S.2d 291, 761 N.E.2d 1018). To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 105-06, 736 N.Y.S.2d 291, 761 N.E.2d 1018). Good cause will not exist where a plaintiff fails to make any effort at service (***see Valentin v. Zaltsman***, 39 A.D.3d 852, 835 N.Y.S.2d 298; ***Lipschitz v. McCann***, 13 A.D.3d 417, 786 N.Y.S.2d 567), or fails to make at least a reasonably diligent

effort at service (***see e.g. Kazimierski v. New York Univ.***, 18 A.D.3d 820, 796 N.Y.S.2d 638; ***Baione v. Central Suffolk Hosp.***, 14 A.D.3d 635, 636-637, 789 N.Y.S.2d 315; ***Busler v. Corbett***, 259 A.D.2d 13, 15, 696 N.Y.S.2d 615). By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control (***see U.S. 1 Brookville Real Estate Corp. v. Spallone***, 13 Misc.3d 1236(A), 2006 WL 3302836, ***quoting Eastern Refractories Co., Inc. v. Forty Eight Insulations, Inc.***, 187 F.R.D. 503, 505; ***see also Greco v. Renegades, Inc.***, 307 A.D.2d 711, 712, 761 N.Y.S.2d 426 [difficulties of service associated with locating defendant enlisted in military]; ***Kulpa v. Jackson***, 3 Misc.3d 227, 235, 773 N.Y.S.2d 235 [difficulties associated with service abroad through the Hague Convention]). If good cause for an extension is not established, courts must consider the "interest of justice" standard of CPLR 306-b (***see e.g. Busler v. Corbett***, 259 A.D.2d at 17, 696 N.Y.S.2d 615). The interest of justice standard does not require reasonably diligent efforts at service, but courts, in making their determinations, may consider the presence or absence of diligence, along with other factors (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 105, 736 N.Y.S.2d 291, 761 N.E.2d 1018). The interest of justice standard is broader than the good cause standard (***see Mead v. Singleman***, 24 A.D.3d 1142, 1144, 806 N.Y.S.2d 783), as its factors also include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 105-106, 736 N.Y.S.2d 291, 761 N.E.2d 1018; ***Matter of Jordan v. City of New York***, 38 A.D.3d 336, 339, 833 N.Y.S.2d 8; ***Estey-Dorsa v. Chavez***, 27 A.D.3d 277, 813 N.Y.S.2d 54; ***Mead v. Singleman***, 24 A.D.3d at 1144, 806 N.Y.S.2d 783; ***de Vries v. Metropolitan Tr. Auth.***, 11 A.D.3d 312, 313, 783 N.Y.S.2d 540; ***Hafkin v. North Shore Univ. Hosp.***, 279 A.D.2d 86, 90-91, 718 N.Y.S.2d 379, ***affd***. 97 N.Y.2d 95, 736 N.Y.S.2d 291, 761 N.E.2d 1018; ***see also Slate v. Schiavone Const. Co.***, 4 N.Y.3d 816, 796 N.Y.S.2d 573, 829 N.E.2d 665)

Bumpus v. New York City Transit Authority, 66 A.D.3d 26, 31-32, 883 N.Y.S.2d 99 [2nd Dept, 2009].

The Second Department also holds:

> A process server's affidavit of service constitutes prima facie evidence of proper service (***see Associates First Capital Corp. v. Wiggins***, 75 A.D.3d 614, 904 N.Y.S.2d 668; ***Scarano v. Scarano***, 63 A.D.3d 716, 880 N.Y.S.2d 682). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing ... no hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's affidavits' " (***Scarano v. Scarano***, 63 A.D.3d at 716, 880 N.Y.S.2d 682, ***quoting Simonds v. Grobman***, 277 A.D.2d 369, 370, 716 N.Y.S.2d 692; ***see Associates***

First Capital Corp. v. Wiggins, 75 A.D.3d at 614-615, 904 N.Y.S.2d 668; ***City of New York v. Miller***, 72 A.D.3d 726, 727, 898 N.Y.S.2d 643). Here, the defendant never denied the specific facts contained in the process server's affidavits. Accordingly, no hearing was required (***see Scarano v. Scarano***, 63 A.D.3d at 716-717, 880 N.Y.S.2d 682; ***Roberts v. Anka***, 45 A.D.3d 752, 754, 846 N.Y.S.2d 280)

Tikvah Enterprises, LLC v. Neuman, 80 A.D.3d 748, 915 N.Y.S.2d 508 [2nd Dept, 2011].

Here, Carmelo Papa, a process server, who is not a party to the underlying action, over the age of 18 years, and resides in New York State indicated, in a September 27, 2010 affidavit, he went to 160 Stewart Drive, Maplecrest, New York on September 25, 2010, at 1:10 P.M., and delivered there a copy of the summons and verified complaint to the natural defendant's wife. The process server described the defendant's spouse as a white female, strawberry color hair, 40 to 49 years of age, standing five feet to five feet three inches tall, weighing 100 to 130 pounds. The process server stated he asked the wife whether the defendant was presently in the military service of the United States Government or of the State of New York, and she informed him the defendant was not in the military service. The process server asserted on September 27, 2010 he completed service by depositing a copy of the summons and verified complaint addressed to the defendant at 160 Stewart Drive, Maplecrest, New York 12454 in a first class postpaid properly addressed envelope marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Postal Service in the State of New York. That affidavit of service time stamped by the Nassau County Clerk's Office as received on October 22, 2010.

Here, the plaintiff shows good cause why the 120-day service provision of CPLR 306-b should be extended by this Court. The plaintiff demonstrates reasonable diligence in attempting service upon this defendant. The Court notes the defendant does not challenge the details of the process server' September 27, 2010 affidavit. The defendant fails to show evidence as to

particular facts which rebut the statements in the process server's affidavit. The process server retained by the plaintiff fails made an effort at service, and which demonstrates a reasonably diligent effort at service. This Court also considered the diligence, or lack of it together with other relevant factor, including the Statute of Limitations, the meritorious nature of the plaintiff's collect money due and owing from this defendant, the short length of delay in service in September 2010 and filing in October 2010, plaintiff's prompt actions with respect to the extension of time, and the lack of prejudice to defendant. This Court also determines, in the interests of justice, the plaintiff meets its statutory burden. In opposition, the defendant proffers speculation and does not submit substance to overcome the plaintiff's request in this motion. The defense fails to meet his burden under CPLR 306-b, 308 (2) and 3211 (a) (8) to dismiss the complaint, and to award this defendant costs, disbursements, expenses and attorneys fees. Moreover, there is no traverse required under these circumstances.

Accordingly, the plaintiff's motion for an order deeming the service upon the defendant THOMAS W. HOFF, JR. valid service under the CPLR is granted. The motion by the defense to dismiss the complaint is denied.

So ordered.

Dated: **March 2, 2011**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX