Chunasamy v Khusial
2011 NY Slip Op 33706(U)
June 8, 2011
Sup Ct, Bronx County
Docket Number: 306622/2010
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
--X

DANICA CHUNASAMY,

Plaintiff,

DECISION AND ORDER

Index No. 306622/2010

- against -

THAKOORDIAL KHUSIAL, PARVIDI KHUSIAL,
RISHI CHUNASAMY and VENKATELLUM NAIDO,

Defendants.
--X

PRESENT: Hon. Lucindo Suarez

Upon notice of motion dated December 6, 2010 of defendant Venkatellum Naidoo s/h/a Venkatellum Naido and the affirmation, affidavits (3) and exhibits submitted in support thereof; plaintiff's notice of cross-motion dated January 21, 2011 and the affirmation, affidavit and exhibits submitted in support thereof; the reply affirmation dated February 10, 2011 of defendant Venkatellum Naidoo s/h/a Venkatellum Naido the exhibits submitted therewith; the decision and order of the undersigned dated February 18, 2011 setting this matter down for a traverse hearing; the traverse hearing conducted on May 19, 2011 (Angela Hofmeister, Senior Court Reporter); the written closing argument of defendant Venkatellum Naidoo s/h/a Venkatellum Naido datedMay 26, 2011; and due deliberation; the court finds:

Defendant Venkatellum Naidoo s/h/a Venkatellum Naido ("Naidoo") moves to dismiss plaintiff's complaint on the ground that plaintiff failed to exercise due diligence before resorting to service upon him under CPLR 308(4) (affixing and mailing). According to the affidavit of service, attempts were made on Thursday, August 19, 2010 at 3:55 p.m.; Saturday, August 21, 2010 at 6:19 a.m.; and Monday, August 23, 2010 at 8:33 p.m. Thereafter, service was made by affixing the summons and complaint to Naidoo's apartment door on Wednesday, August 25, 2010 at 6:03 p.m.

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and by mailing the summons and complaint to Naidoo on Thursday, August 26, 2010.

Naidoo asserts that plaintiff's process server simply did not make the three prior service attempts depicted in the affidavit of service filed with the Clerk of the Court, and annexes the affidavit of Ephious Forbes ("Forbes"), the doorman who claims to have been present and on duty during all three service attempts and who avers that no person came to the building asking for Naidoo at any of those times. The doorman further averred that all visitors to the building must present themselves to the doorman and be announced by the doorman to the tenant, and that only after the tenant has given the doorman permission will the visitor be permitted to proceed to the tenant's apartment. Furthermore, as Naidoo was also the superintendent of the building, the doorman could contact him by two-way radio (walkie-talkie), intercom to his apartment or on his cellular telephone. Naidoo avers that no doorman contacted him regarding a visitor with papers until the date that the papers were affixed to his apartment door.

In opposition, plaintiff submitted the affidavit of her process server, Jamie Blair ("Blair"), who averred that on each of the three prior service attempts he was informed by the doorman merely that Naidoo was not at home without being asked who he was, and that he was thereafter permitted to knock (unsuccessfully) on Naidoo's door. Blair further averred that when he attempted service on August 25, 2011, he was met by "Mike," a doorman he had not previously encountered, who called Naidoo on his cellular telephone and received Naidoo's permission to allow Blair to proceed to his apartment for the purpose of affixing the papers to his apartment door. Upon the questions presented by the parties' submissions, a hearing was conducted on May 19, 2011.

Blair testified that he had been serving process since April or May of 2009 and that his service had not previously been challenged. He had no independent recollection of the subject service attempts. While he brought what he stated to be his logbook, *see* 22 NYCRR § 208.29, the

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logbook was comprised of copies of work tickets, and the subject work ticket contained no information not contained in the affidavit of service aside from a physical description of the doorman present on the occasion that Blair affixed the summons and complaint to Naidoo's door and a note that he confirmed with "Mike" that Naidoo was the building superintendent. Blair testified that he had encountered more than one doorman on his visits to the building, but could not describe them. He did not recognize Naidoo or Forbes, who were both present during his testimony. He testified that the work ticket assigning this job to him would have contained the date and time of the assignment. In this case, the work ticket indicated that he received the assignment for service upon Naidoo was assigned to him approximately forty-five (45) minutes *after* the first service attempt occurred.

Blair testified that he was not apprised that Naidoo was the building's superintendent until his fourth attempt to serve Naidoo. While he had previously merely been advised that Naidoo was not at home on his previous attempts, when he arrived at the building and asked for Naidoo on the fourth attempt, the doorman, "Mike," informed him that Naidoo was not at home and telephoned Naidoo. Blair was able to hear Naidoo tell the doorman over the phone to allow Blair to place the papers on his apartment door. Blair attempted to leave the papers with Mike, but Mike refused to take them. Since Naidoo had agreed to the papers being placed on his door, Blair knocked on Naidoo's door, and, receiving no answer, affixed the papers to the door. He thereafter took photographs of Naidoo's door.

Forbes testified that Naidoo is his boss, that they have known each other for nine years and that they have a cordial relationship that does not extend outside of work. He further testified that he works from 3:00 p.m. to 11:00 p.m. on Sunday, Monday, Thursday and Saturday and from 11:00 p.m. Friday to 7:00 a.m. Saturday, and was accordingly on duty during the three service attempts,

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having returned from a one-week vacation on "Sunday, August 18, 2010." Forbes testified that if Naidoo was served on a Monday, then he returned from vacation on Sunday. August 18, 2010 fell on a Wednesday. Naidoo was not served on a Monday until the third attempt, permitting the inference that Forbes may have been on vacation during the first two service attempts.

Forbes testified that visitors are not allowed past the doorman to approach residential apartments, including Naidoo's, if the resident sought is not at home, and that the only buzzer system is controlled by him at his desk. Blair would not have been permitted by any doorman to approach Naidoo's apartment if Naidoo were not at home. While a porter may usually relieve a doorman on restroom or meal breaks, no porters worked during Forbes' shifts, so he did not take meal breaks and he closed and locked the front door when he left his post for restroom breaks. Naidoo's regular work hours were 7:30 a.m. to 4:00 p.m., during which time he could be reached by walkie-talkie. He could otherwise be reached by buzzer to his apartment or on his cellular phone. If Forbes still could not reach Naidoo, a visitor could have a message left for him on a clipboard that Naidoo regularly checked. Forbes would have remembered someone who had come to the building three times within one week for the same reason, and stated that he had never before seen Blair, who was in the courtroom during Forbes' testimony. Forbes also testified that the building houses ninety-eight apartments, that there are "a lot" of people coming and going at all hours of the day, and that there is only one door through which non-residents could gain access. There was no testimony as to the identities of the building's other doormen, if there are any, although "Mike" is a "relief" doorman. "Mike" did not testify at the hearing.

Naidoo testified that on Thursday, August 19, 2010 at 3:55 p.m. he would have been working, although he leaves to take his children to school and to pick them up at 2:30 p.m. He did not receive notification of a visitor at that time by either walkie-talkie or cell phone. On Saturday,

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August 21, 2010 at 6:19 a.m. he was at home with his wife and two children. The doorbell was in functioning order and he did not hear knocking or a doorbell at that time, nor did he receive notification of a visitor by intercom or cell phone. Naidoo was also home on Monday, August 23, 2010 at 8:33 p.m. and received no notification of a visitor by any means. On Wednesday, August 25, 2010 at 6:03 p.m., Naidoo was at the park with his children. He received a telephone call from Michael Zarcone ("Zarcone"), the relief doorman, who informed him that he had a visitor wishing to leave him some papers. He asked Zarcone if the visitor could leave the papers with him, but as he heard the visitor saying that the papers could be left at Naidoo's door, he told Zarcone to have the visitor leave the papers at his door.

Plaintiff bears the burden of proving by a fair preponderance of the credible evidence that service was properly effectuated. *See Blue Spot, Inc. v. Superior Merchandise Electronics Co.*, 150 A.D.2d 175, 540 N.Y.S.2d 787 (1st Dep't 1989). Plaintiff must therefore demonstrate that it is more likely than not that service was made in the manner asserted. *See* Prince, Richardson on Evidence § 3-206. Blair's service attempts, if made, would be sufficient to satisfy the due diligence requirement of CPLR 308(4) so as to permit service by affixing and mailing. *See Farias v. Simon,* 73 A.D.3d 569, 570, 899 N.Y.S.2d 843, 843 (1st Dep't 2010); *Albert Wagner & Son v. Schreiber,* 210 A.D.2d 143, 621 N.Y.S.2d 15 (1st Dep't 1994). Nor would Blair have been required to attempt to find out where Naidoo worked in order to satisfy the due diligence requirement. *See Farias*, 73 A.D.3d at 570, 899 N.Y.S.2d at 844. Furthermore, Blair testified without contradiction that "Mike" refused to accept the summons and complaint and would not have allowed Blair to proceed without Naidoo's consent; service thereafter under CPLR 308(4) would have been permissible. *See Colonial Nat'l Bank, U.S.A. v. Jacobs*, 188 Misc.2d 87, 727 N.Y.S.2d 237 (Civ. Ct. N.Y. County 2000). Plaintiff questions whether the three initial attempts were made at all, however; the question

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is therefore one of credibility.

Blair's credibility was not harmed by his inability to recall definitively whether he had personally deposited a copy of the summons and complaint in a mail receptacle. *See Spangenberg v. Chaloupka*, 229 A.D.2d 482, 645 N.Y.S.2d 514 (2d Dep't 1996). However, the suggestion that the first service attempt occurred before Blair was ever assigned the case, together with Blair's affidavit that he was allowed to approach a resident's apartment even after being advised of the resident's absence, in contravention of policy as averred by both Forbes and Zarcone and as verified by Blair's interaction with Zarcone, casts doubt that service occurred as Blair claims. While Forbes, too, appeared credible, it is not unlikely that a doorman, subject to Naidoo's supervision and control, allowed Blair to knock on Naidoo's door in contravention of policy, as opposed to Blair having wholly fabricated three service attempts. Forbes was not an entirely disinterested witness, as the person to be served was and is his supervisor, and to testify other than as he did he would have had to admit to lapses in the performance of his duties. Given the date discrepancy of Forbes' recollection of when he returned to work after his vacation, Forbes' testimony was not conclusive of Blair's service attempts, or lack thereof. *See Gass v. Gass*, 42 A.D.3d 393, 840 N.Y.S.2d 58 (1st Dep't 2007).

A party has failed in his burden of proof by a fair preponderance of the evidence if the evidence is equally balanced or differing inferences are equally as likely. *See e.g. Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 347 N.E.2d 618, 383 N.Y.S.2d 256 (1976). Here, despite the affidavit of service, plaintiff's failure to provide "convincing additional details of the facts and circumstances surrounding the alleged service" was insufficient to rebut defendant's affidavits and proof. *See Forrester v. Luisa*, 52 A.D.3d 324, 324, 859 N.Y.S.2d 645, 646 (1st Dep't 2008); *Holtzer v. Stepper*, 268 A.D.2d 372, 702 N.Y.S.2d 268 (1st Dep't 2000).

Pursuant to CPLR 306-b, "[i]f service is not made upon a defendant within [one hundred twenty days after the filing of the summons and complaint], 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." Reasonable diligence must be established under "good cause," but "under the interest of justice standard, a showing of reasonable diligence in attempting to effect service is not a 'gatekeeper.' It is simply one of many relevant factors to be considered by the court." *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104, 761 N.E.2d 1018, 1023-24, 736 N.Y.S.2d 291, 296-97 (2001). "Good cause" was not envisioned to accommodate conduct usually characterized as law office failure. *See id.*, *citing* Mem of NYSBA Rules Comm, Bill Jacket, L 1997, ch 476, at 14.

Under the interest of justice standard, "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." *Leader*, 97 N.Y.2d at 105-6, 761 N.E.2d at 1025, 736 N.Y.S.2d at 298. Here, Naidoo received no notice of the action until seventeen (17) years after the accrual of the cause of action and less than two months before the statute of limitations had expired, which creates an inference of "substantial" prejudice. *See id.* Further, plaintiff made her motion for an extension of time only in response to defendant's motion to vacate, and it is now seventeen (17) years since the cause of action accrued and over seven (7) months since the statute of limitations expired. *See Johnson v. Concourse Vil., Inc.*, 69 A.D.3d 410, 892 N.Y.S.2d 358 (1st Dep't 2010). Plaintiff's motion further fails to establish the lack of prejudice to defendant. *See Esposito v. Isaac*, 68 A.D.3d 483, 888 N.Y.S.2d 889 (1st Dep't 2009).

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While the interest of justice standard may forgive mistake, confusion or oversight, of particular concern is prejudice to the defendant. *See de Vries v. Metropolitan Transit Auth.*, 11 A.D.3d 312, 783 N.Y.S.2d 540 (1st Dep't 2004); *Yardeni v. Manhattan Eye, Ear & Throat Hosp.*, 9 A.D.3d 296, 780 N.Y.S.2d 140 (1st Dep't 2004), *appeal denied*, 4 N.Y.3d 704, 825 N.E.2d 1092, 792 N.Y.S.2d 897 (2005). The court is not unmindful of the preference for resolution of actions on their merits. *See Guzetti v. City of New York*, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dep't 2006). However, given the lack of due diligence and the extreme prejudice to defendant from not having received notice of the action for several years beyond the expiration of the statute of limitations, it would be an abuse of discretion to permit plaintiff an extension of time to serve Naidoo "in the interest of justice." *See Slate v. Schiavone Constr. Co.*, 4 N.Y.3d 816, 829 N.E.2d 665, 796 N.Y.S.2d 573 (2005).

Accordingly, it is

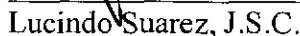
ORDERED, that the motion of defendant Venkatellum Naidoo s/h/a Venkatellum Naido for dismissal of the complaint is granted; and it is further

ORDERED, that the cross-motion of plaintiff cross-motion for an extension of time to serve said defendant is denied; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Venkatellum Naidoo s/h/a Venkatellum Naido dismissing the complaint as against him.

This constitutes the decision and order of the court.

Dated: June 8, 2011



Lucindo Suarez, J.S.C.