

Ozimek v Staten Is. Physician Practice, P.C.
2011 NY Slip Op 33709(U)
March 28, 2011
Supreme Court, Richmond County
Docket Number: 150001/2010
Judge: Judith N. McMahon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
NANCY A. OZIMEK and DANIEL G. OZIMEK,

DCM PART 5

Plaintiff(s),
-against-

Present:
HON. JUDITH N. MCMAHON

DECISION AND ORDER

STATEN ISLAND PHYSICIAN PRACTICE, P.C.,
TAKSIN RATNARATHON, M.D., SHASHIKANT
KULKARNI, M.D., ROBERT ANDREWS, M.D., and
SHARLIA KRISHNAN, M.D.,

Index No. 150001/2010
Motion Nos. 001, 002

Defendant(s).

-----X

The following papers numbered 1 to 8 were used on this motion this 15th day of February, 2011:

[001] Notice of Motion [Plaintiff](Affirmation in Support).....	1
[002] Notice of Motion [Defendant Ratnarathon](Affirmation in Support)....	2
Physician’s Affirmation	3
Affirmation in Opposition [Plaintiff].....	4
Affirmation in Opposition [Defendant Ratnarathon]	5
Reply Affirmation [Defendant Ratnarathon]	6
Attorney Affirmation [Plaintiffs].....	7
Reply Affirmation [Defendant Ratnarathon]	8

This medical malpractice action alleging, *inter alia*, failure to timely diagnose breast cancer, was commenced on January 11, 2010, when the summons and complaint were filed in the Richmond County Clerks Office. Thereafter, the plaintiff contends they served all defendants. As is relevant for the instant motion, plaintiffs attempted service as to Dr. Ratnarathon by delivering the summons and complaint to 33 Uxbridge Street in Staten Island, New York, the last known residential address of defendant Dr. Ratnarathon. The plaintiffs have provided the process server’s affidavit which indicates he was informed that Dr. Ratnarathon no longer lived at this address.

The plaintiffs then delivered the summons and complaint to Staten Island Physicians Practice [hereinafter SIPP], which plaintiffs believed to be Dr. Ratnarathon’s actual place of

business. Again, the process server's affidavit states that service was not accepted. The plaintiff thereafter delivered the summons and complaint to Ms. Doreen DeVito, a risk management agent from SIPP, and mailed the summons and complaint to SIPP on May 10, 2010. The plaintiffs contend that SIPP was Dr. Ratnarathon's actual place of business and thus, the service upon Ms. DeVito (who accepted the papers) and mailing a copy to SIPP was proper pursuant to CPLR § 308(2).

Subsequently, all defendants except Dr. Ratnarathon answered. Plaintiff's counsel, in communications with defense counsel, learned they were not representing Dr. Ratnarathon because he was not employed by SIPP at the time plaintiff attempted service of process. Plaintiff's counsel contends they immediately searched for a current address for Dr. Ratnarathon using the internet, phone listings and background searching. Upon acquiring knowledge of an address in Nevada, the plaintiff personally served Dr. Ratnarathon on November 4, 2010, at his home in Las Vegas.

Presently, there are two motions before this court. First, while plaintiff contends service was properly effectuated within the required 120 days upon Dr. Ratnarathon, pursuant to CPLR § 308(2), by delivering the summons and complaint to his actual place and thereafter mailing, they are moving to extend the time to serve and deem service proper *nunc pro tunc*, upon Dr. Ratnarathon. Second, defendant Dr. Ratnarathon is moving to dismiss on the ground, *inter alia*, that plaintiff lacks personal jurisdiction.

In determining whether to grant an extension of time to serve a

summons and complaint pursuant to CPLR 306-b, due diligence is only one factor to consider along with expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiffs' request for the extension of time, and prejudice to the defendants. Some factors favoring an extension are timely service within the 120-day period allowed by CPLR 306-b which was later found to be defective and the fact the defendants had actual notice of the claim and/or of the action. The determination of whether to grant the extension in the interest of justice is within in the discretion of the motion court (Rosenzweig v. 600 N. St., LLC, 35 AD3d 705, 705 [2d Dept., 2006][*internal citations omitted*]; Owens v. Chhabra, 72 AD3d 664, 665, 2d Dept., 2010]; DiBuono v. Abbey, LLC, 71 AD3d 720, 720 [2d Dept., 2010]).

Here, the plaintiffs attempted service upon Dr. Ratnarathon within the required 120 days three times. The plaintiffs first attempted personal service at Dr. Ratnarathon's last known residence on Staten Island. They thereafter attempted service personally at Dr. Ratnarathon's actual place of business, namely, SIPP. And lastly, they delivered the summons and complaint to defendant's actual place of business and mailed a copy to same. Pursuant to CPLR § 308(6) "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business". As evidenced by the numerous internet searches and the process server's affidavit indicating that Ms. DeVito accepted service for Dr. Ratnarathon, the plaintiff's attempts at serving Dr. Ratnarathon within the 120 days exhibited diligent efforts to timely effectuate service.

Further, the Court also notes that plaintiff considered the aforementioned service proper until learning that Dr. Ratnarathon was not employed by SIPP on the date of service. The plaintiffs then quickly located an alternate address, effectuated service at that address and made the instant motion, all with minimal delay (Rosenzweig v. 600 N. St., LLC, 35 AD3d 705, 705 [2d Dept.,

2006][granting an extension of service where plaintiff, *inter alia*, thought service was proper until the hearing and quickly attempted to rectify and made the motion]. Plaintiffs have also provided a certificate of merit, evidencing the meritorious nature of the claim. Defendant's arguments of severe prejudice and statute of limitations are unavailing. Plaintiffs have presented evidence that treatment by Dr. Ratnarathon falls within the requisite time frame and is not beyond the statute of limitations. As such, this Court will grant the plaintiff's motion to extend the time to serve Dr. Ratnarathon and deny the defendant's motion to dismiss.

Accordingly, it is

ORDERED that the plaintiff's motion [001] seeking an extension of time to serve the Summons and Complaint on defendant Taksin Ratnarathon, M.D., is hereby granted, and it is further

ORDERED that the Summons and Complaint served on defendant Taksin Ratnarathon, M.D., is deemed served, *nunc pro tunc*, and it is further

ORDERED that defendant Taksin Ratnarathon, M.D.'s motion [002] to dismiss is hereby denied in its entirety, and it is further

ORDERED that all parties appear on April 13, 2011, at 9:30 a.m., for a preliminary conference.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 3/28/ 2011

E N T E R,

Hon. Judith N. McMahon
Justice of the Supreme Court