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

PRESENT: O. PETER SHERWOOD Justice PART 61

GEORGE NICODENE,

Plaintiff,

-against-

BYBLOS RESTAURANT, INC., *et al.*,

Defendants.

INDEX NO. 103238/2010

MOTION DATE Oct. 15, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, the motion for an order, pursuant to CPLR § 3211 (a) (8), dismissing the complaint and plaintiff's cross motion, *inter alia*, pursuant to CPLR § 306-b extending his time to effect service upon defendants are decided in accordance with the accompanying decision and order.

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Dated: 1/14/11

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

GEORGE NICODENE,

Plaintiff,

-against-

BYBLOS RESTAURANT, INC., DANNY HASBANI, SABEH K. KACHOUH, TOM KOUTROS a/k/a TOM KOUGEMITROS, ELENI KOUGEMITROS, LYCIA KOUGEMITROS, and/or JOHN DOE (being fictitious names true names of individual and/or corporation responsible for the maintenance of the property unknown at this time),

Defendants.

----------X

DECISION AND ORDER

Index No. 103238/2010

O. PETER SHERWOOD, J.:

In this action to recover damages for personal injuries alleged to have been sustained by plaintiff, defendants Byblos Restaurant, Inc., Danny Hasbani and Sabeh K. Kachouh (collectively the "moving defendants") move for an order, pursuant to CPLR § 3211 (a) (8), dismissing the complaint as against them on the ground of lack of personal jurisdiction.

Plaintiff opposes the motion and cross moves for an order pursuant to CPLR § 306-b, extending his time to effect service upon the moving defendants for an additional 120-day period for good cause and in the interest of justice. The moving defendants oppose the cross motion. For the reasons that follow, the motion is granted and the cross motion is denied.

Procedural History

On March 11, 2010, plaintiff George Nicodene ("plaintiff") commenced this action by filing the summons and verified complaint to recover damages for personal injuries he allegedly sustained on March 11, 2007, while a customer at a restaurant allegedly owned and operated by defendants and located at 200 East 39th Street, New York, New York, when the legs of the chair upon which he was seated broke, causing him to fall to the floor.

Issue was joined as to the moving defendants Byblos Restaurant, Inc., Danny Hasbani and Sabeh K. Kachouh, on or about June 14, 2010, by service of their verified answer in which they

generally denied the material allegations of the verified complaint, raised several affirmative defenses, including that personal jurisdiction over them had not been obtained and that the action is barred by the applicable statute of limitations, and cross claimed against co-defendants Tom Koutros a/k/a Tom Kougemitros, Eleni Kougemitros and Lycia Kougemitros for indemnification and contribution.

By this motion filed August 16, 2010, the moving defendants seek an order pursuant to CPLR § 3211 (a) (8) dismissing the action as against them for lack of personal jurisdiction. In support thereof, the moving defendants submit an affirmation of their attorney, as well as affidavits from defendants Sabeh K. Kachouh and Danny Hasbani, all of whom contend that repeated requests made to plaintiff for the affidavits of service have gone unanswered, that the moving defendants have not been served, and that the action must be dismissed as the statute of limitations applicable to the claim has expired.

Plaintiff opposes the motion and cross moves for an order pursuant to CPLR § 306-b, granting him an additional 120 days within which to effect service upon the moving defendants and deeming service complete *nunc pro tunc* for good cause and in the interest of justice. In opposition and in support of the cross motion, the moving defendants submit an affirmation of their attorney Michael S. Paulonis, Esq., of counsel to the firm of Jeremias E. Batista, LLC, who states, erroneously, that the moving papers are defective in that defendants in their respective affidavits do not deny receipt of the Summons and Complaint or that they were, in fact, served. Thus, plaintiff argues that since the moving defendants have not provided a sufficient evidentiary basis to support their claim of lack of personal jurisdiction within 60 days after answering, their motion must be denied.

Plaintiff also seeks, by means of a cross motion, an additional 120 days to effect service upon the moving defendants. An affidavit of service annexed as Exhibit "H" to the cross moving papers states that service of the summons and verified complaint was effectuated upon all of the defendants pursuant to CPLR § 308 (4) by conspicuous place service at 200 East 39th Street, New York, New York 10128, the same address as the site of the accident and allegedly the defendants' principal place of business, with the affixing (apparently of only one copy of the summons and verified complaint for all defendants) occurring on April 1, 2010, at 9:30 a.m., after two previous attempts at personal

service made, respectively, on March 29, 2010, at 10:15 a.m., on March 31, 2010, at 11:00 a.m., failed. Also on April 1, 2010, a copy of the summons and verified complaint was mailed to defendants at the same address in an envelope marked personal and confidential.

Plaintiff's counsel asserts that despite numerous attempts, he had difficulty obtaining the affidavit of service from his process server until August 15, 2010. Notwithstanding the affidavit of service and in an apparent effort to cover all bases in the event the court finds service of process on defendants to be defective, plaintiff contends that his cross motion should be granted in the interest of justice on the ground that the statute of limitations has expired leaving him without any recourse if the complaint is dismissed and that defendants will suffer no prejudice by the extension as they were aware of plaintiff's claim within months of the accident by their receipt of a claims letter and pursuant to the lengthy discussions between plaintiff's attorney and defendants' insurance adjuster regarding plaintiff's claim.

In opposition to the cross motion and in further support of the motion, the moving defendants' attorney contends that plaintiff's service of one copy of the summons and verified complaint for all eight defendants is defective. He also argues that the process server did not exercise due diligence in her attempts to serve process personally upon the defendants pursuant to CPLR § 308 (1) or (2) before resorting to "nail and mail" service. Nor does plaintiff offer any explanation for not serving the corporate defendant through the Secretary of State. Defense counsel notes that the action was not commenced until the eve of the expiration of the statute of limitations, that plaintiff did not seek an extension of time within which to serve defendants until the instant motion was made, which was 89 days after the expiration of the 120-day service period and 211 days after the expiration of the applicable statute of limitations, even though the answer contained defenses of lack of personal jurisdiction and statute of limitations.

Discussion

1. Motion to Dismiss for Lack of Personal Jurisdiction

The court must first determine the threshold issue of whether plaintiff properly effectuated service upon the moving defendants. In this regard, it is well settled that once jurisdiction and service of process have been questioned, the ultimate burden of proving satisfaction of statutory and due process prerequisites rests on the plaintiff (*see Stewart v Volkswagen of Am.*, 81 NY2d 203, 207

[1993]). However, a plaintiff, in opposing a motion to dismiss pursuant to CPLR § 3211 (a) (8) on the ground of a lack of personal jurisdiction, need only make a *prima facie* showing that such jurisdiction exists (*see Lang v Wycoff Heights Medical Ctr.*, 55 AD3d 793 [2d Dept 2008]; *Alden Personnel, Inc. v David,* 38 AD3d 697, 698 [2d Dept 2007]).

The court finds that plaintiff failed to meet his burden. Ordinarily, a process server's affidavit of service in appropriate form establishes a *prima facie* case as to the method of service and, therefore, gives rise to a presumption of proper service (*see Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411 [1st Dept 2010]; *see also Wells Fargo Bank, N.A. v Chaplin,* 65 AD3d 588, 589 [2d Dept 2009]; *Household Fin. Realty Corp. of N.Y. v Brown,* 13 AD3d 340 [2d Dept 2004]). However, where, as here, the documentary evidence raises issues of fact as to proper service, the failure of the defendants to specifically deny service of process is not fatal (*see Johnson v Deas,* 32 AD3d 253, 254 [1st Dept 2006]).

As noted above, in support of their cross motion, the moving defendants submit an affidavit of service of the process server, Vanessa Vega, indicating that on Thursday, April 1, 2010, she served the summons and complaint on the corporate and individual defendants by "nail and mail" substitute service, pursuant to CPLR § 308 (4), by affixing one copy of the summons and complaint "to a conspicuous part of the door of 200 East 39th Street, New York, New York 10016". She further stated that "[p]revious attempts were made on **03/29/2010** at or about 10:15 a.m. the individuals were not available to be personally serve [sic] and **03/31/2010** at or about 11:00 a.m. the individual [sic] again were not available to be serve [sic] I was advised to come back earlier in the morning the next day". A subsequent mailing of the summons and complaint was made to all of the defendants at the business address.

The affidavit of service falls significantly short of evidencing compliance with the guiding principle regarding service, namely, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Raschel v Rish,* 69 NY2d 694, 696-697 [1986], quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306 [1950]). In the first instance, service upon a corporation may only be made pursuant to: (1) CPLR § 311 (a) (1), which requires personal service upon "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent

authorized by appointment or by law to receive service"; (2) Business Corporations Law § 306 (a), which permits service upon a registered agent; or (3) Business Corporations Law § 306 (b), which permits service upon the Secretary of State. Plaintiff has made no showing that service was made or attempted upon the corporate defendant Byblos Restaurant, Inc. by serving a registered agent or the Secretary of State. In addition, substitute service under CPLR § 308 (4) is available only against individual defendants, and not corporations (*see Lakeside Conceret Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984], *affd.* 65 NY2d 865 [1985]; *Napic, N.V. v Fverfa Investments, Inc.*, 193 AD2d 549 [1st Dept 1993]). Thus, the "nail and mail" method of service cannot be used to effect valid service of process on a corporation and, thus, the attempted service upon Byblos Restaurant, Inc. is invalid.

The question then is first, whether the plaintiff's process server exercised due diligence in attempting to serve the individual defendants pursuant to CPLR § 308 (1) and/ or (2) as is required under CPLR § 308 (4), and, if so, whether service of a single copy of the summons and complaint was sufficient to effectuate service upon the multiple individual defendants. "[T]he due diligence requirement of CPLR (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*Krisalas v Mount Sinai Hosp.*, 63 AD3d 887, 888 [2d Dept 2009]; *see Gurevitch v Goodman,* 269 AD2d 355 [2d Dept 2000]). "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts, but on their quality" (*McSorley v Spear,* 50 AD3d 652, 653 [2d Dept 2008]). Here, the affidavit of service which stated that the process server attempted to serve the individual defendants at the defendant business in the morning hours on two weekdays in the same week is not sufficient to meet the "due diligence" standard. The affidavit of service does not describe any efforts to ascertain the respective defendants whereabouts, dwelling place, or usual place of abode or to determine whether the defendant business was their actual place of employment (*see McSorley,* 50 AD3d at 653; *Estate of Waterman v Jones,* 46 AD3d 63, 67 [2d Dept 2007]). Moreover, given that this was a business, the affixing of the papers to the door of the business premises at a time when the business was likely to have been open was unlikely to have apprised the respective defendants of the pendency of the action.

Even if the court were to hold that the due diligence requirements were met, the court would conclude that service of one copy of the summons and complaint was inadequate to effectuate service upon the multiple individual defendants. The Court of Appeals in the case of *Raschel v Rish* (69 NY2d 694, *supra*) held, that since the CPLR is "silent as to the number of copies of a summons and complaint that must be served on a person conceivably acting in more than one representative capacity, the guiding principle must be one of notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Raschel*, 69 NY2d at 696-697). There is no evidence here that the affixing and mailing of one copy of the summons and complaint would be reasonably calculated to provide notice to each of the individual defendants. In this regard, the fact that defendants may have actually received the pleadings or received notice by some means other than those authorized by statute is irrelevant (*see Raschel,* 69 NY2d at 697; *Matter of 72A Realty Assoc. v New York City Envtl. Control Bd.*, 275 AD2d 284, 286 [1st Dept 2001]). Thus, even viewing the evidence in a light most favorable to plaintiff, he has failed to establish, *prima facie*, that personal jurisdiction was obtained over the moving defendants.

2. Cross Motion for an Extension of Time to Serve Process

CPLR § 306-b provides that service of the summons and complaint must be made within 120 days of their filing with the clerk of the court, which in this case would have expired on July 9, 2009. While it appears that plaintiff's negligence action was timely when he commenced it by filing on March 11, 2010 (*see* CPLR § 214 [5] [limitations period for personal injury based on negligence is three years measured from the date of the injury]), it is undisputed that any attempt by plaintiff to commence a new action against defendants at this juncture based upon the allegations in the complaint would be futile as the claims would be time-barred. Thus, plaintiff is at risk of losing the opportunity to bring his negligence claim before the court and obtain relief and his action may be preserved only if the court grants plaintiff an extension of time within which to re-serve defendants.

CPLR § 306-b provides that the court, upon motion, shall dismiss an action against a defendant, without prejudice, if the defendant is not served with the complaint within 120 days after filing. However, the court may, upon motion, extend the time for service upon good cause shown or in the interests of justice (CPLR § 306-b). These are two distinct standards and an extension of

the service time made pursuant thereto is a matter within the court's discretion (*see Leader v Maroney, Ponzini & Spencer,* 97 NY2d 95, 101 [2001]).

In order to establish good cause, a plaintiff must show "reasonably diligent efforts" in attempting service upon the defendant within the allotted time (*Leader v Maroney, Porzini & Spencer,* 97 NY2d at 105-106). Good cause may be found to exist where a plaintiff's failure to effectuate service in a timely manner is a result of circumstances beyond the plaintiff's control (*see Greco v Renegades, Inc.,* 307 AD2d 711 [4th Dept 2003] [difficulties of service associated with locating a defendant on active military duty]; *Kulpa v Jackson,* 3 Misc3d 227, 235 [Sup. Ct. Oneida Co. 2004 [difficulties of effectuating service abroad pursuant to the Hague Convention]; *see also Bumps v New York City Tr. Auth.,* 66 AD3d 26, 32 [2d Dept 2009]; *U.S. 1 Brookville Real Estate Corp. v Spallone,* 13 Misc3d 1236 [A]).

If a plaintiff is unable to establish good cause for an extension, the court may still extend the time for service under the broader interests of justice standard, which permits the court to consider not only diligence or lack thereof, but also other relevant criteria including expiration of the statute of limitations, the length of the delay in service, the promptness of plaintiff's request for an extension of service time and prejudice to defendant (*see Leader v Maroney, Porzini & Spencer,* 97 NY2d at 105-106; *Bumpus v New York City Tr. Auth.,* 66 AD3d at 32; *Spath v Zack,* 36 AD3d 410 [1st Dept 2007]; *Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]). Extensions based upon the interests of justice have been denied where there is a showing of an extreme lack of diligence on the part of the plaintiff and a long delay before the defendant received any notice of the action (*Slate v Schiavone Construction Co.,* 4 NY3d 816 [2005]; *see Ekbatini v Rockefeller Center Props.,* 30 Ad3d 347 [1st Dept 2006]; *Yardeni v Manhattan Eye, Ear & Throat Hosp.,* 9 AD3d 296, 297 [1st Dept 2004], *lv denied* 4 NY3d 704 [2005]). Authority also exists for the proposition that once a plaintiff has failed to make timely service pursuant to CPLR § 306-b, an affidavit demonstrating that plaintiff's cause of action is meritorious or its equivalent must be submitted before a court may grant an extension under the interests of justice standard (*see Esposito v Isaac,* 68 AD3d 483 [1st Dept 2009]; *cf. Campbell v Starre Realty Co.,* 283 AD2d 161, 162 [1st Dept 2001]).

Here, plaintiff's arguments are based primarily on the "interest of justice" standard. Regarding the relevant factors, plaintiff failed, as noted above, to demonstrate diligence in effecting

service. However, the length of delay in service factor weighs in favor of plaintiff as his service, though defective, was made only twenty-one days after filing of the summons and complaint. In addition, plaintiff has produced documentary proof that defendants had notice of the claim as early as August 2007 when their attorney mailed a certified claim letter to the defendant restaurant and further documentary proof that, thereafter, plaintiff's attorney and defendants' insurance adjuster engaged in a series of exchanges via letter concerning the accident and plaintiff's alleged injuries. Moreover, the service of the moving defendants' answer on or about June 14, 2010, is evidence that they had notice of this action prior to the expiration of the 120-day period for making service. Nevertheless, even after receiving the moving defendants' answer in which the lack of personal jurisdiction was raised as a defense and after receiving in August 2010 the affidavit of service which even a cursory review would have revealed such service to be defective, plaintiff failed to move promptly for an extension of time. Indeed, plaintiff only sought such extension in response to the moving defendants' motion to dismiss. In addition, plaintiff's affidavit of merit submitted in support of the cross motion is not sufficiently detailed to demonstrate that his cause of action, particularly as against the individual defendants, is meritorious. Lastly, the moving defendants contend that they will be prejudiced by any extension as the defendant restaurant has since burned down and, in any event, plaintiff did not commence this action until the eve of the expiration of the statute of limitations. The court concludes that under these circumstances, the fact that the statute of limitations has expired does not warrant an extension of time in which to effect service on the defendants and, on balance, overall the factors enunciated in *Leader* (97NY2d at 105-106) weigh in favor of defendants and against an extension of time to serve the complaint (*see e.g. Johnson v Concourse Village, Inc.*, 69 AD3d 410 [1st Dept 2010]; *Esposito v Isaac,* 68 AD3d 483 [1st Dept 2009]; *Posada v Pelaez,* 37 AD3d 168 [1st Dept 2007]).

Accordingly, it is

ORDERED that the motion to dismiss pursuant to CPLR § 3211 (a) (8) is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that plaintiff's cross motion, *inter alia,* pursuant to CPLR § 306-b extending the time to serve the complaint is denied in its entirety; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B).

This constitutes the decision and order of the court.

DATED: 1/14/11

ENTER:

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.