

**Great N. Ins. Co. v Blodgett**

2011 NY Slip Op 34335(U)

January 4, 2011

Supreme Court, New York County

Docket Number: 111848/2009

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

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**GREAT NORTHERN INSURANCE COMPANY,**  
as subrogee of Karoline Durr,  
**Plaintiff,**

**DECISION AND  
ORDER**

**Index No. 111848/2009**

**-against-**

**LUCY BLODGETT, ISLA GORDON CROZIER,  
CHARLOTTE B.E. PHILLIPS, GILLIAN GORDON,  
and ROBERT CROZIER,**

**Defendants.**

-----X  
**O. PETER SHERWOOD, J.:**

This is a subrogation action to recover insurance funds paid by plaintiff Great Northern Insurance Company ("Great Northern") to its insured, the owner and/or tenant of premises, known as 167 Spring Street, Apartment 8, New York, New York (the "Premises"), for property damage arising out of a 2006 fire. Defendant Charlotte B.E. Phillips ("Phillips") moves for an order, pursuant to CPLR § 306-b, dismissing the complaint as against her on the ground that the summons and complaint were not timely served.

Great Northern opposes the motion and cross moves for an order, (1) pursuant to CPLR § 306-b, extending its time to effect service upon Phillips; (2) pursuant to CPLR § 308 (5), permitting it to effect service upon Phillips by serving the summons and complaint upon either her attorneys or her insurance company; and (3) pursuant to CPLR § 3215 for a default judgment against defendants Lucy Blodgett ("Blodgett"), Isla Gordon Crozier ("Gordon Crozier"), and Robert Crozier ("Crozier") for the amount sought in the complaint. The motion is opposed by Phillips. That branch of the cross motion as seeks a default judgment as against Blodgett, Gordon Crozier and Crozier is opposed by Gordon Crozier and Crozier on the ground that such relief is improperly sought against non-moving parties and, in any event, plaintiff has failed to properly serve them and the time within which do so has long since expired.

***Procedural History***

On August 19, 2009, Great Northern commenced this action, as subrogee for its insured, by filing the summons and complaint to recover insurance proceeds paid to its insured Karoline Durr for property damages sustained as the result of a fire in 2006, which was allegedly caused by a

discarded cigarette on the roof of the Premises. The named defendants are Crozier, Gillian Gordon ("Gordon"), Crozier's and Gordon's college-age daughter, Isla Gordon Crozier, Blodgett, and Phillips. Under CPLR § 306-b, the complaint was required to be served by December 17, 2009, *i.e.*, within 120 days after filing.

It is not disputed that Phillips is a citizen of Germany and a resident of Moscow, Russia, where she rents an apartment, and of London, England, where she owns a home (Phillips Aff. ¶ 3). On October 13, 2009, Great Northern mailed a copy of the summons and complaint to the Central Authority of the United Kingdom ("U.K."), located in London, in compliance with Article 5 of the Hague Convention, a treaty to which the U.K. and the United States are signatories and which undisputedly governs the service of process on Phillips. Plaintiff's counsel received a return receipt indicating that such papers were received by the Royal Courts of Justice in London on October 22, 2009. That same date, plaintiff also mailed a copy of the summons and complaint by international registered mail, return receipt requested, directly to Phillips at her London address, allegedly in conformity with Article 10 of the Hague Convention (Affirmation of Joseph Obermeister in Support of Cross Motion [Obermeister Affirm.], ¶ 3, Ex. "A"). Plaintiff's counsel acknowledges that he never received the return receipt of the service by international registered mail, but states that upon inquiry, he was advised that the mailing had arrived in London on October 18, 2009, and that no further information was available (*id.* Ex. "C"). However, by letter dated March 19, 2010, plaintiff's counsel was advised that his inquiry concerning the mailing to Phillips had been received and was being investigated (*id.*).

By an *ex parte* order, dated November 4, 2009 (Sherry Klein Heitler, J.), Great Northern was granted an extension of its time, within which to effectuate service on Gordon and Phillips, for a period of 120 days from the date of the order, with said time expiring on March 4, 2010 (Obermeister Affirm., Ex. "B").<sup>1</sup>

On January 18, 2010, over two months after the order extending plaintiff's time to serve Phillips was entered, plaintiff's counsel contacted the Royal Courts of Justice regarding service upon Phillips and was advised by a woman named "Michelle" that when service of process was effectuated, he would receive written notification (*id.* ¶ 5).

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<sup>1</sup>Gordon has since served an answer to the complaint and is the only defendant to have done so.

### *Discussion*

#### **1. Extension of Service Time**

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 December 17, 2009, but was extended by court order to March 4, 2010. In her motion to dismiss filed July 8, 2010, defendant Phillips argues that the complaint should be dismissed as against her on the ground that plaintiff failed to serve the complaint upon her within the 120-day period or any extension thereof. Phillips submits her own sworn affidavit in support of the motion claiming that she was never served with the summons and complaint through the central authorities of either Russia or England or in any other manner.

CPLR § 306-b further 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, Ponzini & 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 [4<sup>th</sup> 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, Ponzini & Spencer*, 97 NY2d at 105-106; *Bumpus v New York City Tr. Auth.*, 66 AD3d at 32; *Spath v Zack*, 36 AD3d 410

[1<sup>st</sup> 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 [1<sup>st</sup> Dept 2006]; *Yardeni v Manhattan Eye, Ear & Throat Hosp.*, 9 AD3d 296, 297 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2009]; cf. *Campbell v Starre Realty Co.*, 283 AD2d 161, 162 [1<sup>st</sup> Dept 2001]).

Here, plaintiff's arguments are based primarily on the "good cause" standard. The court finds that plaintiff has demonstrated diligent efforts in attempting service upon Phillips within the 120-day period and the extension of such time granted by the court. Plaintiff has demonstrated that it followed the proper procedures to effectuate service upon Phillips at her residence in England and also made efforts to serve her at her Moscow residence (see *Reply Affirmation of Joseph Obermeister, Esq.*, ¶ 6). However, according to plaintiff, Russia does not adhere to the service protocols of the Hague Convention and, therefore, service cannot be properly effectuated in accordance therewith via the Central Authority in Russia. Although the better practice might have been for plaintiff to seek another extension of the service time while it continued to monitor compliance with the Convention by the English authorities, the court does not conclude that its failure to do so until the instant motion was made precludes a finding of good cause (see *Bumpus v New York City Tr. Auth.*, 66 AD3d at 35).

Defendant Phillips urges this court to adopt the reasoning of Justice Richard Lowe of this court in the case of *Adamowicz v Fauchon, Inc.* (2008 WL 206951). Therein, Justice Lowe granted defendants' motion to dismiss the complaint for plaintiff's failure to timely serve the summons and complaint within 120 days after filing and denied plaintiff's cross motion for an extension of time. Justice Lowe's decision does not address the "good cause" standard, but concludes "in the interests of justice" that plaintiff's delay in effectuating service and failure to promptly request an extension warranted dismissal under CPLR § 306-b. The decision was predicated upon plaintiff's failure, even after being advised by the Ministry of Justice in Brussels, to follow the proper procedures for serving defendants in Brussels pursuant to the Hague Convention by having the relevant papers translated

into French as required by the Convention and, further, upon plaintiff's failure to monitor compliance with the Convention, and to seek, when necessary, extensions of time to effectuate service.

The facts of *Adamowicz* are inapposite and do not compel denial of the instant plaintiff's cross motion for an extension of time. Here, unlike in *Adamowicz*, plaintiff followed the proper procedures regarding service pursuant to the Hague Convention, which was all that it could do, and then it could only wait for the English authorities to take the requisite actions to complete service upon Phillips while periodically monitoring the progress of such procedures. Accordingly, defendant Phillips motion to dismiss the complaint as against it is denied and that branch of plaintiff's cross motion as seeks an extension of time to serve Phillips is granted.

## **2. Alternative Service Method**

Turning then to that branch of plaintiff's cross motion as seeks to serve defendant Phillips by serving her New York attorneys or her insurance carrier, CPLR § 308 (5) permits the court discretion to direct an alternate method of service if service via the methods described in CPLR § 308 (1) through (4) is impracticable. Here, plaintiff has failed to demonstrate that service upon Phillips where she resides in England is not practicable under the Hague Convention. The fact that such service has not yet been completed does not necessarily evidence impracticability of that method of service. Accordingly, plaintiff's request for an order directing that service upon Phillips be effectuated by personal delivery of process upon her attorneys or her insurance company must be denied (*see Yamamoto v Yamamoto*, 43 AD3d 372 [1<sup>st</sup> Dept 2007]; *Corbo v Stephens*, 272 AD2d 502 [2d Dept 2000]; *So v So*, 2008 WL 4537797 [Sup Ct , N.Y. Co. 2008]).

## **3. Default Judgment**

Plaintiff also cross moves for entry of a default judgment against Blodgett, Gordon Crozier and Crozier. Defendants Gordon Crozier and Crozier oppose this branch of the cross motion as procedurally improper as it seeks relief against non-moving parties. Counsel for said defendants contends that his clients reside overseas and are of limited means such that the reduced response time available on a cross motion prejudices his clients. Counsel further avers that he requires the full period available in opposing a motion as he needs to consult with his overseas clients as to how to proceed and was unable to obtain an adjournment of the motion and cross motion due to a dispute between plaintiff and Phillips.

The court agrees with defendants Gordon Crozier and Crozier that the branch of the cross motion as seeks relief against them is defective. "A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Terio v Spodek*, 25 AD3d 781, 785 [2d Dept 2006], quoting *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]). While this defect may be disregarded pursuant to CPLR 2001 where there is no prejudice (*Volpe v Canfield*, 237 AD2d 282,283 [2d Dept 1997]), this court cannot conclude that said defendants are not prejudiced by the lack of proper notice. Accordingly, that branch of the cross motion as seeks a default judgment is denied without prejudice to renewal upon proper papers, if the plaintiff be so advised.

**Conclusion**

Based upon the foregoing discussion, it is


**ORDERED** that the motion of defendant Charlotte B.E. Phillips for an order dismissing the complaint pursuant to CPLR § 306-b is denied; and it is further

**ORDERED** that plaintiff's cross motion is granted to the extent that plaintiff's time within which to serve defendant Charlotte B.E. Phillips with the summons and complaint in this action and file an affidavit of service is hereby extended one hundred and twenty (120) days from the date of this order, said time to expire on May 4, 2011, and in all other respects the cross motion is denied.

This constitutes the decision and order of the court.

**DATED:** January 4, 2011

**ENTER:**



**O. PETER SHERWOOD**  
J.S.C.