

Walker v ABB, Inc.

2013 NY Slip Op 31854(U)

August 6, 2013

Sup Ct, New York County

Docket Number: 190433/11

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190433/2011
WALKER, MURRAY N. SR.
vs.
ABB
SEQUENCE NUMBER : 016
DISMISS

INDEX NO. 190433/11
MOTION DATE _____
MOTION SEQ. NO. 016

(MERIDEN)

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the
memorandum decision dated *Aug 6, 2013*

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

FILED

AUG 12 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: *Aug 6, 2013*



_____, J.S.C.
HON. SHERRY KLEIN HEITLER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----X
MURRAY N. WALKER, SR. and BARBARA WALKER,

Index No. 190433/11
Motion Seq. 016

Plaintiffs,

-against-

ABB, INC., et al.,

Defendants.

-----X
SHERRY KLEIN HEITLER, J.:

DECISION AND ORDER

FILED

AUG 12 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

In this asbestos personal injury action, defendant Meriden Molded Plastics, Inc. ("Meriden") moves pursuant to CPLR 3211(a)(8) for an order dismissing this action against it for lack of personal jurisdiction on the ground that plaintiffs failed to duly serve the defendant with the summons and complaint herein. Meriden further moves to dismiss pursuant to CPLR 3215(c) on the ground that plaintiff failed to commence proceedings for the entry of judgment within one year after Meriden failed to answer plaintiffs' complaint. Plaintiffs argue that pursuant to Section VI(E) of the NYC Asbestos Litigation ("NYCAL") Case Management Order ("CMO") they properly effectuated service upon Meriden on April 9, 2013 via an amended complaint. Plaintiffs also cross-move to extend the time within which to serve the summons and complaint upon Meriden pursuant to CPLR 306-b.

Plaintiffs' decedent Murray Walker was diagnosed with mesothelioma on October 5, 2011. Plaintiffs filed this action to recover for injuries sustained by Mr. Walker's exposure to asbestos during his career as an electrician on October 21, 2011 . On November 4, 2011, plaintiffs filed a

Summons and Second Amended Complaint which for the first time named Meriden as a defendant.¹ On November 14, 2011 plaintiffs attempted to serve these papers upon the defendant at 112 Empire Avenue, Meriden, Connecticut 06450, but were informed that the defendant was not present at that address (plaintiffs' exhibit 4). Thereafter, on November 15, 2011, plaintiffs commissioned the Sheriff of New Haven County to serve the defendant with such process at 127 Washington Ave in North Haven, Connecticut, which according to the Connecticut Secretary of State's Commercial Recording Division is the business address of Meriden's corporate principals (plaintiffs' exhibit 6).² However, instead of actually serving one of such officers, the Sheriff served plaintiffs' process on an employee of Konowitz, Kahn & Co., a full service accounting and financial management firm that provides accounting services to the defendant which is located at the same address as the defendant's principals. According to the affidavit of service, this employee represented that she was a managing agent of Meriden authorized to accept process (see plaintiffs' exhibit 5).

Mr. Walker's deposition commenced on November 30, 2011 and continued from December 1, 2011 to December 9, 2011. Mr. Walker died on December 27, 2011 before his deposition could be completed. The defendant was not represented at these depositions. Among other things, Mr. Walker testified that he worked on asbestos-containing switchgears manufactured by General Electric. It is alleged that some of these switchgears incorporated asbestos-containing arc chutes that were purchased from the defendant.

The defendant filed this motion to dismiss on February 5, 2013, arguing that service

¹ Prior to the filing of this motion, plaintiffs filed six subsequent amended summonses and complaints naming additional defendants in this action (not Meriden).

² The recorded business address of the company is listed on that document as 555 Long Wharf Drive, New Haven, Connecticut, which was later discovered by plaintiffs to also be incorrect.

upon it was improper under both New York³ and Connecticut⁴ law and that plaintiffs erred by failing to move for a default judgment against it within the time limits permitted by CPLR 3215(c).⁵

On April 9, 2013, plaintiffs filed a Summons and Ninth Amended Complaint which again named Meriden as a defendant, and caused these papers to be served on George Brencher, IV, Esq., the defendant's agent for service of process at the address provided for him by the Connecticut Secretary of State's Commercial Recording Division. Plaintiffs argue that in so doing they had properly effectuated service of process on the defendant. Plaintiffs also cross-move the court to extend their time to serve the defendant pursuant to CPLR 306(b).

There is no dispute that Meriden was not properly served with the Second through Eighth Amended Complaints and that plaintiffs did not move for a default judgment against Meriden pursuant to CPLR 3215(c). I also find that plaintiffs' attempt to bring Meriden into this action by service of yet a Ninth Amended Complaint was improper. While in general NYCAL plaintiffs are permitted to serve an amended complaint to bring new parties into an action without leave of the

³ CPLR § 311 provides in relevant part: "(a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:
1. upon any domestic or foreign corporation, to 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. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law;"

⁴ See Conn. Gen. Stat. § 52-57 which provides in relevant part that "process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state."

⁵ CPLR 3215(c) provides that "If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action."

court pursuant to CMO §VI(E),⁶ in this case Meriden was already a named party as of the Second Amended Complaint. Section VI(E) of the CMO was not intended to remedy service defects like the kind presented in the case at bar.

The real issue is whether plaintiffs' time to serve the Summons and Second Amended Complaint should be extended pursuant to CPLR 306-b, which authorizes an extension of time for service in two discrete situations: "upon good cause shown" or "in the interests of justice." *Leader v Maroney*, 97 NY2d 95, 104-106 (2001). Good cause requires that the plaintiff show "reasonable diligence in attempting to effect service upon a defendant." *Henneberry v Borstein, et al.*, 91 AD3d 493, 496 (1st Dept 2012); *see also Spath v Zack*, 36 AD3d 410, 413 (1st Dept. 2007). As an example, in *Pandolfi v Langer*, 32 Misc. 3d 1213, 934 NYS2d 35 (Sup. Ct. Nassau Co. 2011), the court held that good cause was shown to merit late service of the process where the plaintiff had attempted to serve the defendant at its place of business on two separate occasions but an individual claiming to be the defendant was ultimately served instead. The court noted that although in retrospect service upon the defendant was improper, "it was reasonable under the circumstances for the process server to conclude that the person appearing in response to her specific request to see the Defendant . . . was the correct individual." *Id.* at *7.

In respect of the interest of justice standard, the Court of Appeals stated that (*Leader, supra*, at 104):

Our analysis is buttressed by an examination of the legislative history behind the amendment.

⁶ CMO §VI(E) provides that: "Any plaintiff may, without further leave of the Court, amend his or her complaint: to add claims based on survivorship, death of the original plaintiff, change of the disease alleged, loss of consortium or society; to sever any joined claims; or to add additional defendants. . . . the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted."

The New York State Bar Association's Commercial and Federal Litigation Section Committee on Civil Practice Law and Rules characterized the interest of justice standard as "more flexible" than the good cause standard, specifically noting that "since the term 'good cause' does not include conduct usually characterized as 'law office failure,' proposed CPLR 306-b provides for an additional and broader standard, i.e., the 'interest of justice,' to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant" (Bill Jacket, L 1997, ch 476, at 14).

This standard "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." *Id.* at 105. These factors include the diligence of past attempts to serve, the expiration of the statute of limitations, the length of delay in service, the promptness of the request for an extension, and prejudice to the defendant.⁷ *Id.* "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." *Id.* at 106.

While cognizant of Meriden's position that it has been prejudiced by plaintiffs' errors in this case, I find that the circumstances weigh in favor of an extension of time to serve Meriden under both the "good cause" and "interest of justice" standards. Plaintiffs' attempts to serve the defendant, although ultimately defective, were diligent. There is nothing to suggest that plaintiffs reliance on the Sherriff's affidavit of service was inappropriate. It was not until this motion was filed that plaintiffs were made aware that the defendant was not properly served.

Further, due to Mr. Walker's death, this matter was removed from the April 2012 In-Extremis trial cluster for which discovery is closed. At that time there had been little activity in this case while plaintiffs searched for Mr. Walker's former co-workers to provide testimony on his

⁷ A showing of prejudice requires the demonstration of an impairment of a party's ability to defend on the merits. See *Busler v Corbett*, 259 AD2d 13 (4th Dept 1999).

behalf. Now that this matter has been included in the October 2013 In-Extremis cluster, discovery for this matter can continue.⁸ Such discovery should enable plaintiffs and the defendant to show whether or not the defendant contributed to Mr. Walker’s injuries. Notably, the statute of limitations on plaintiffs’ asbestos-related claims does not expire until October of 2014. *See* CPLR 214-c. As held in *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 37 n.3 (2nd Dept 2009), “[t]he statute of limitations need not actually expire for a court to extend [a plaintiff’s] time for service under CPLR 306-b in the interest of justice.”

Under the circumstances, therefore, I concur that “[g]ranting plaintiff the opportunity to pursue this action is consistent with . . . CPLR 306-b, but also with [the court’s] strong interest in deciding cases on the merits where possible . . .” *Henneberry, supra*, at 497.

Accordingly, it is hereby

ORDERED that Meriden Molded Plastics, Inc.’s motion to dismiss is denied; and it is further

ORDERED that plaintiffs time to serve the Summons and Second Amended Complaint on Meriden is hereby extended to September 9, 2013; and it is further

ORDERED that Meriden shall answer the complaint within 20 days of such service.

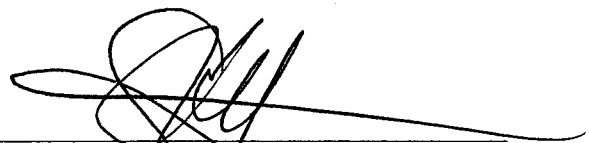
This constitutes the decision and order of the court.

FILED

AUG 12 2013

DATED:

COUNTY CLERK'S OFFICE SHERRY KLEIN HEITLER
NEW YORK J.S.C.



Aug 6, 2013

⁸ The discovery schedules for the various NYCAL trial clusters can be found at the NYCAL website, <http://nycal.net>.