

Hodson v Cipes

2013 NY Slip Op 32744(U)

April 8, 2013

Sup Ct, Westchester County

Docket Number: 58812/2012

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
RYAN HODSON,

Plaintiff,

-against-

STEPHEN R. CIPES and THOMAS BRENNAN,

Defendants.

DECISION and ORDER
Sequence No. 1 & 2
Index No. 58812/12

-----X
CONNOLLY, J.

The following documents were read in connection with the defendants' motion and the plaintiff's cross-motion:

Defendants' Notice of Motion, Affirmation, Exhibits	1-7
Defendants' Memorandum of Law	8
Plaintiff's Notice of Cross-Motion, Affirmation, Exhibits	9-15
Defendants' Affirmation in Opposition and Further Support	16
Plaintiff's Reply Affirmation	17

The defendants move for an order pursuant to CPLR § 3211 (8) dismissing the plaintiff's complaint against the defendant, Stephen R. Cipes ("Cipes"), with prejudice. The plaintiff cross-moves for an order extending his time to serve the summons and complaint upon defendant Cipes *nunc pro tunc*, and allowing the plaintiff to serve an amended verified complaint pursuant to CPLR § 3025.

PROCEDURAL/FACTUAL BACKGROUND

The plaintiff commenced this action by filing a summons and verified complaint on May 31, 2012 alleging a cause of action for negligence. According to the complaint, the plaintiff sustained personal injuries after he tripped and fell on the defendants' premises located at 94 Grand Street, Croton-on-Hudson, New York, due to the defendants' negligence in the ownership, operation, maintenance, repair and control of the premises.

After filing the summons and complaint, the plaintiff had 120 days, or until September 28, 2012, to serve the defendants pursuant to CPLR § 306-b. The defendant, Thomas Brennan

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(“Brennan”), was served on September 21, 2012 when a copy of the summons and verified complaint was affixed to the door of his residence at 45 Truesdale Drive, Croton-on-Hudson, New York, and then sent by mail to the same address on September 27, 2012.

According to the affidavit of service, service was attempted upon defendant Cipes at 71 Spencer Street, Mount Kisco, New York, on September 13 and September 17, 2012. Thereafter, on September 21, 2012, the process server left a copy of the papers at that address and mailed a copy to the defendant there. The defendants assert that defendant Cipes has never resided at that address, and that he lives at 4870 Chute Lake Road, Kelowna, BC, Canada V1W4M3.

The defendants claim that defendant Cipes was never personally served with the summons and complaint, nor did he receive a copy by mail. The defendants explain that the owner of the home at 71 Spencer Street, Mary Lynn Windsor, handles business matters for defendant Cipes through a power of attorney, but she has no authority to accept service of process as Cipes’ agent. In her affidavit, Ms. Windsor states that when she spoke to the process server, she advised him that defendant Cipes did not reside there, and that, to her knowledge, he resided in Canada.

The plaintiff conducted a postal search and private investigation, which revealed the last known address of defendant Cipes was 71 Spencer Street, Mount Kisco, New York. According to the plaintiff, Ms. Windsor told the process server that defendant Cipes was not present at that location and that she believed he was in Canada, but she never said Cipes did not reside there or that he resided in Canada. In addition, following receipt of the motion, by letter dated November 28, 2012, the plaintiff forwarded a copy of the summons and complaint to the designated “central authority” in Canada for service of process pursuant to the Hague Convention. Personal service was subsequently performed on defendant Cipes in compliance with the Hague Convention on December 10, 2012, when he retrieved the papers at a courthouse.

The instant motion was filed on November 9, 2012, and was returnable for December 7, 2012. At the plaintiff’s request, the motion was adjourned on consent to January 18, 2013. The defendants claim the plaintiff used this time extension to attempt untimely service upon defendant Cipes at his Canadian residence.

The plaintiff also seeks to amend the complaint to reflect the correct date of the incident on June 17, 2009.

DISCUSSION/ ANALYSIS

Under CPLR § 306-b, a plaintiff must serve a defendant within 120 days after the action is filed. If service is not made within the time provided, the court “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” (CPLR § 306-b). The decision to extend the time for service is within the discretion of the court (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

The good cause and interest of justice provisions are separate and independent grounds for an extension, with the interest of justice standard being a “broader and more flexible provision which could encompass a mistake or oversight as long as there was no prejudice to the defendant” (*id.* at 102). “To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service” (*Bumpus v New York City Transit Authority*, 66 AD3d 26, 31 [2d Dept 2009]). “Good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control” (*id.* at 32).

Unlike the good cause standard, the interest of justice standard does not require the plaintiff to demonstrate that diligent efforts were made at service, although it is a factor to be considered (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). Moreover, with the interest of justice standard, “no one factor is determinative—the calculus of the court’s decision is dependent on the competing interests of the litigants” (*id.* at 106). Factors for the court to consider include the plaintiff’s explanation for its failure to serve within the time provided, the promptness with which the extension is sought, whether the plaintiff exercised due diligence in attempting to perform service, whether the statute of limitations for the plaintiff’s claims has otherwise run, the length of delay in service, and whether the defendant would be prejudiced by the extension (*see Hafkin v North Shore University Hospital*, 279AD2d 86, 90-91 [2d Dept 2000]).

Here, the plaintiff made efforts to serve defendant Cipes within the statutory period, as the process server attempted service on three occasions at the 71 Spencer Street address. Before attempting service, the process server had performed an internet search, which showed defendant Cipes’ address as 71 Spencer Street. The plaintiff also submits the plaintiff’s lease agreement, which lists defendant Cipes as landlord and gives the 71 Spencer Street address as the “address for notices,” as well as a document from the postmaster, which lists that location as defendant Cipes’ address. However, it does not appear that the plaintiff made attempts to ascertain defendant Cipes whereabouts in Canada, let alone serve him there, until after the defendants moved to dismiss. Even assuming that Ms. Windsor had only stated that Cipes was “in” Canada, rather than that he “resided in” Canada, which is in dispute, the plaintiff should have made some effort to ascertain Cipes’ whereabouts. The plaintiff failed to do so, and therefore has not established that an extension of time to serve is warranted under the good cause standard.

Nevertheless, the plaintiff is entitled to an extension under the interest of justice standard. The plaintiff made reasonable attempts within the statutory period to serve defendant Cipes at the defendant’s last known address. These attempts at service, along with the alleged ambiguous response from Ms. Windsor about defendant Cipes’ whereabouts, provide a reasonable excuse for the lack of timely service. Moreover, defendant Cipes was subsequently served in Canada shortly after the statute ran and soon after the plaintiff was advised that he resided there. Also, weighing in favor of the plaintiff’s argument is the prejudice to the plaintiff if an extension is not granted due to the expiration of the statute of limitations. On the other hand, the defendants have not specified how they would be prejudiced by an extension. Although the plaintiff waited until after the defendant had moved to dismiss to seek an extension, and waited to file the action close to the expiration of the statute of limitations, these facts, without more egregious circumstances, are insufficient to deny

an extension in the interest of justice (*see Braxton v McMillan*, 76 AD3d 607 [2d Dept 2010]; *Garcia v Simonovsky*, 62 AD3d 655 [2d Dept 2009]; *Velentin v Zaltsman*, 39 AD3d 852 [2d Dept 2007]).

The plaintiff's request for an order allowing him to amend his complaint is also granted. Pursuant to CPLR § 3025(b), "a party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]). "Leave to amend the pleadings 'shall be given freely' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies and Associates, Inc., v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 [1983]). In addition, while the statute requires that a motion to amend pleadings be accompanied by a proposed amended pleading showing the changes or additions to be made, "in the absence of prejudice the Court will disregard movants' failure to provide one as they have presented the proposed amendments in the supporting affirmation" (*Jimenez v Shippy Realty Corp.*, 163 Misc 2d 121, 123 [Sup. Ct. West. 1994]). Here, the defendants do not allege that this amendment would prejudice them in any way. Therefore, the plaintiff's cross-motion to amend his complaint to reflect the date of the incident as June 17, 2009, rather than May 31, 2009, is granted.

Based on the foregoing, it is hereby

ORDERED, that the defendants' motion to dismiss is denied; and it is further

ORDERED, that the plaintiff's cross-motion for an order extending the plaintiff's time to serve the summons and verified complaint upon the defendant Stephen R. Cipes *nunc pro tunc* to December 10, 2012 is granted; and it is further

ORDERED, that the plaintiff's cross-motion for leave to file an amended verified complaint is granted; and it is further

ORDERED, that the plaintiff is directed to serve a copy of the amended verified complaint with notice of entry upon the defendants' counsel within ten (10) days of the date of this decision and order.

The parties are directed to appear in the Preliminary Conference Part on Monday, May 20, 2012 at 9:30 AM in Room 811 at the Westchester County Courthouse.

All other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
April 8, 2013


HON. FRANCESCA E. CONNOLLY, J.S.C.

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