

Williams v City of New York

2014 NY Slip Op 31264(U)

May 14, 2014

Supreme Court, New York County

Docket Number: 157334/13

Judge: Kathryn E. Freed

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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 5

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BARBARA WILLIAMS,

Plaintiff,

-against-

DECISION/ORDER
Index No. 157334/13
Seq. No. 001

THE CITY OF NEW YORK, THE BOARD OF
ELECTIONS and ROBERT REED,

Defendants.

-----X

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	..1,2..(Ex. A)..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.....
REPLY AFFIRMATION4.(Exs. A-B)..
OTHER...(Memo of Law)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff Barbara Williams moves for an order, pursuant to CPLR 306-b, granting a 30-day extension of her time to served defendants The City of New York (“the City”), The Board of Elections (“the BOE”), and Robert Reed, with process. Plaintiff also seeks permission to effectuate substitute service upon defendant Reed by serving his alleged employer, the BOE. The City and the BOE oppose the motion. After oral argument, and based on a review of the papers presented, all relevant statutes and case law, this Court **grants** that branch of the motion seeking an extension of time to serve the complaint.

Factual and Procedural Background:

Plaintiff commenced this action, sounding, inter alia, in sexual harassment, sexual discrimination, and hostile work environment pursuant to the New York City and New York State Human Rights Laws, by filing a summons and verified complaint on August 9, 2013.¹ In her complaint, plaintiff claims that the alleged wrongdoing occurred in August of 2012, while she and defendant Reed were employees of the BOE.

The Parties' Positions:

In support of the motion, plaintiff's counsel argues that a review of her file and contact with her process server reflect that service "was inadvertently not made" within 120 days of the filing of the summons and complaint. Counsel represents that the complaint "was not served upon all parties as [her office was] making diligently [sic] attempts to locate [defendant Reed] at his personal address" by using search engines, private investigators, and process servers. Counsel claims that additional time is needed to serve all defendants and requests permission for service upon the BOE to be considered substitute service upon Reed.

Counsel for the City and BOE oppose the motion, asserting that plaintiff has failed to set forth any explanation why the City and BOE were not served within 120 days after the filing of the summons and complaint. They maintain that the only explanation for late service offered by plaintiff pertains her inability to serve Reed. The City and BOE further assert that substitute service on Reed cannot be made upon the BOE since Reed is no longer a BOE employee.

¹Plaintiff's counsel represents in her affirmation in support of the motion that the summons and complaint were filed on September 10, 2013.

In a reply affirmation in further support of the motion, plaintiff's counsel argues that her office sent the complaint to its process server well within the 120-day period for service and "was under the impression that the City was timely served and that the process servers were making diligent attempts to find and serve [Reed]." When counsel learned that service upon the City and Reed had not been made, she filed the instant motion. Since filing this motion, plaintiff has served the City and Reed. She argues that, since the BOE refuses to accept service, this Court should deem service on the City to be sufficient service upon the BOE.

Conclusions of Law:

CPLR 306-b requires that service of process be made upon a defendant within 120 days after the filing of the commencement of the action, i.e., the filing of the summons and complaint. That statute provides that the 120-day period may be extended by a court upon motion "upon good cause shown or in the interest of justice." "Good cause" and "interest of justice" are two separate and independent statutory standards. See *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. See *Leader*, 97 NY2d *supra* at 105-106. A finding of good cause will not be made where plaintiff has not made a reasonably diligent effort to serve the defendant. *Bumpus v New York City Trans. Auth.*, 66 AD3d 26 (2d Dept 2009).

If good cause for an extension of time to serve is not established, courts must then consider whether such an extension is warranted in the "interest of justice". See *Bumpus*, 66 AD3d *supra* at 32. Although the interest of justice standard does not require plaintiff to show that he or she made reasonably diligent efforts to serve process, such efforts can be a factor in establishing whether an

extension should be granted in the interest of justice. *See Leader*, 97 NY2d *supra* at 105. In determining whether to grant an extension of time in the interest of justice, courts may consider “[the] expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to the defendant.” *Leader*, 97 NY2d *supra* at 105-106. A showing of prejudice requires the demonstration of an impairment of a party’s ability to defend on the merits as a result of late service. *See Busler v Corbett*, 259 AD2d 13 (4th Dept 1999).

Applying the foregoing factors to this matter, this Court finds that plaintiff has failed to establish good cause for her failure to serve the defendants with 120 days after the filing of the summons and complaint. Although plaintiff claims that her office made diligent attempts to locate defendant Reed at his personal address by means of “search engines”, “private investigators”, and by using process servers, plaintiff’s counsel gives absolutely no detail regarding these attempts. *See Bumpus*, 66 AD3d *supra* at 36. Additionally, plaintiff provides no explanation at all regarding attempts, if any, to serve the City and DOE. *Id.*

This Court does find, however, that plaintiff is entitled, in the interest of justice, to an extension of time to serve defendants with process. Plaintiff brought the instant motion for permission to make late service on January 31, 2014, just weeks after the 120-day period expired on December 7, 2013. The meritorious nature of the serious allegations set forth in the complaint are supported by plaintiff’s own verification of that pleading. There is nothing in the moving papers establishing, or even suggesting, that the complaint lacks merit, and defendants do not even raise the merits of the claim as an issue in their opposing papers. *See Bumpus*, 66 AD3d *supra* at 37. Most importantly, although granting of this motion would result in service of process over five

months after the 120-day deadline for service expired, none of the defendants has established that they would be prejudiced by the late service of the summons and complaint. Reed did not oppose the instant motion and neither the City nor the BOE, which both opposed the motion, even addressed prejudice in their opposition to the motion.²

That branch of plaintiff's motion seeking to effectuate substitute service on Reed by serving the BOE is denied. Plaintiff asserts that she seeks to serve Reed in this fashion because she has been unable to serve him personally. However, the reply affirmation submitted by plaintiff's counsel reflects that Reed was personally served with process after the filing of this motion.³ Since it is now evident that plaintiff is able to serve Reed personally, there is no need to serve his employer on his behalf. In any event, the counsel for BOE avers in his affirmation in opposition to the motion that Reed is no longer employed by the BOE.

Finally, to the extent plaintiff asserts that service upon the City is sufficient to constitute service on the BOE, this argument is without merit. First, it is improperly raised for the first time in plaintiff's reply papers. See *Fisher v Crossroad Realty Co.*, 63 AD3d 540 (1st Dept 2009). In any event, plaintiff submits no legal support for this argument.

²Since claims for discrimination and hostile work environment brought under New York State and New York City Human Rights Laws are governed by a three-year statute of limitations (see NY Executive Law § 297[9]; CPLR 214[2]; NYC Admin Code §§ 8-107, 8-502[d]), the expiration of the statute of limitations is not a factor warranting an extension of time to serve process in this matter. As noted previously, the alleged wrongdoing occurred in August of 2012 and thus the statute of limitations will not expire until 2015. However, "[t]he statute of limitations need not actually expire for a court to extend the time for service under 306-b in the interest of justice." *Bumpus*, 66 AD3d *supra* at 37, n. 3.

³This Court notes that, although plaintiff's reply affirmation indicates that the City and Reed were served after the filing of this motion, such service was invalid since the plain language of CPLR 306-b requires any service past the 120-day period by court leave.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion seeking an extension of time to serve process on the defendants is hereby granted in the interest of justice pursuant to CPLR 306-b; and it is further,

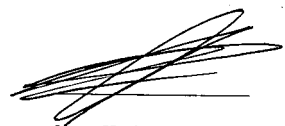
ORDERED that within 30 days of service of a copy of this order, with notice of entry, plaintiff shall serve the defendants with the summons and verified complaint; and it is further,

ORDERED that the plaintiff's motion is otherwise denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: May 14, 2014

ENTER:



Hon. Kathryn E. Freed,
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT