

Torati v Vahabzadeh

2014 NY Slip Op 31794(U)

June 30, 2014

Supreme Court, New York Couty

Docket Number: 155252/2012

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK: Part 17**

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HEZI TORATI and NSS FINANCIAL SERVICES LLC,

Plaintiffs,

- against -

VEEDA VAHABZADEH,

Defendant.

Index No.: 155252/2012

Motion Sequence No. 002

DECISION/ORDER

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HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiffs Hezi Torati (“Torati”) and NSS Financial Services, LLC (“NSS”) (collectively “plaintiffs”) move for an Order to extend the time allowing plaintiffs to serve defendant, Veeda Vahabzadeh (“defendant”), pursuant to New York Civil Practice Law and Rules (“CPLR”) § 306-b. Defendant opposes plaintiffs’ motion.

FACTUAL AND PROCEDURAL BACKGROUND

Torati is an individual residing in the State of New York. His company, NSS, is a Delaware Limited Liability Company authorized to do business in the State of New York. In 2010, defendant entered into an agreement with NSS, wherein, for a fee, NSS agreed to assist defendant in obtaining a Loan Modification Agreement (“LMA”) from the financial institution holding a Note and Mortgage secured by defendant’s residence. NSS was unable to procure the requested LMA.

On or about August 8, 2012, Torati and NSS filed a complaint in New York State Supreme Court against the defendant alleging three (3) counts of defamation and seeking a judgment and order that defendant committed libel per se and requesting, inter alia, monetary damages and an injunction prohibiting defendant from publishing such comments in the future. Plaintiffs allege in the

complaint that after, failing to receive the requested LMA, defendant subsequently “posted on an internet site that Torati is a ‘Crook’ and ” referring to Torati and NSS that “ ‘they are a bunch of frauds and should not be allowed to do business in this country.’ ” (Plaintiffs’ Complaint at ¶ 7.)

Plaintiffs thought they had served the defendant with the Summons and Complaint by substitute service at 10 Greene Street, New York, New York 10012 on September 5, 2012, with the required mailing to the same address on September 6, 2012. In November 2012, when defendant did not answer the Complaint, plaintiffs filed a motion (under motion sequence number 001) for a default judgment against defendant. Defendant’s counsel notified plaintiffs’ counsel that, although defendant resided at 100 Greene Street, New York, New York 10012, as the complaint acknowledged in ¶ 3, the summons and complaint was served at 10 Greene Street, New York, New York. Plaintiff’s counsel acknowledged this service error and on December 20, 2012, both counsel executed a stipulation whereby plaintiffs withdrew their motion for a default judgment.

On or about December 8, 2012, the one hundred twenty (120) day period in which a plaintiff has to effect service under CPLR § 306-b tolled. Furthermore, the one (1) year statute of limitations on the defamation action expired in August, 2012. On or about May 9, 2013, plaintiffs filed the instant motion (motion sequence number 002) requesting an order allowing plaintiffs to serve defendant with late service pursuant to CPLR § 306-b. Plaintiffs contend that the motion for an extension was delayed due to an “oversight,” and plaintiffs will be prejudiced should relief not be granted as the statute of limitations for the underlying cause of action has expired.

DISCUSSION

Time for Service

CPLR § 306-b provides, in pertinent part:

Service of the summons and complaint, summons with notice ... shall be made within one hundred twenty days after the filing of the summons and complaint... If service is not made upon a defendant within the time period provided in this section, the court, upon motion, 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 [emphasis added].

CPLR § 306-b authorizes an extension of time for service “upon good cause shown” or “in the interest of justice” (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 [2001]). The “good cause” and “interest of justice” prongs of 306-b constitute separate grounds for extensions, to be defined by separate criteria (*id.* at 104). It is further well settled that the determination to grant “an extension of time for service is a matter within the court's discretion” (*id.* at 105). Therefore, in order for plaintiffs to prevail on their motion, they must establish either that they had good cause for their failure to serve defendant within 120 days of the commencement of the action, or that the court should grant them an extension in the interest of justice.

Good Cause

A “good cause” extension requires a showing of reasonable diligence in attempting to effect service upon a defendant (*Leader*, 97 NY2d at 104). Good cause has been found where “the plaintiff's failure to timely serve process is a result of circumstances beyond its control” (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 32 [1st Dept 2009] [noting difficulties of service with person in military or person abroad through Hague Convention]). In addition, good cause does not include conduct usually characterized as ‘law office failure’ (*Leader*, 97 NY2d at 104-105).

Here, plaintiffs failed to exercise reasonable diligence in attempting to serve defendant. Plaintiffs could have simply identified defendant's address by viewing their complaint which

identified the correct address. Moreover, the *Bumpus* court found that good cause was not shown when plaintiff failed to effect service because he possessed an inaccurate listing of defendant's address, as "plaintiff's counsel never described what serious efforts were made" to ascertain defendant's correct address (*Bumpus*, 66 AD3d at 108). Here, plaintiffs do not describe any serious effort they made to serve defendant. Furthermore, plaintiffs became aware of the error when defendant's counsel challenged the service on the return date of plaintiffs' motion for a default. Although with a diligent effort, they still had time to serve defendant before the 120 day limit expired, plaintiffs failed to do so. Plaintiffs' contention that they waited because of an oversight is unavailing. Service was in plaintiffs' control, and at best, this was a typical display of law office failure. An extension for good cause is, therefore, not warranted.

Interest of Justice

Although this case does not qualify for an extension under the "good cause" exception, this Court must also determine if it qualifies under the "interest of justice" category. This alternate standard is a separate, broader and more flexible provision than the good cause standard and may encompass a mistake or oversight as long as there was no prejudice to the defendant (*Leader*, 97 NY2d at 105). As a result, the interest of justice 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.*) While defendant calls attention to plaintiffs' lack of diligence in effecting proper service and filing of the instant motion, diligence or lack thereof is but one of several factors that may be considered by a court under an interest of justice analysis (*id.* at 105-106). The court should also 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 plaintiff's request for the extension of time, and prejudice to defendant" (*id.*). No single factor is determinative (*de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, 313 [1st Dept 2004]).

Meritorious Cause of Action

One factor in the "interest of justice" analysis is whether plaintiff presents a potentially meritorious cause of action (*Leader*, 97 NY2d at 105). To sustain a defamation action, CPLR § 3016(a) requires that "the particular words complained of . . . be set forth in the complaint." In addition, the complaint also must allege the time, place and manner of the false statement, and specify to whom it was made (*Seltzer v Fields*, 20 AD2d 60, 64 [1st Dept 1963] *affd* 14 NY2d 624 [1964]; *Simpson v Village Voice, Inc.*, 58 AD3d 421 [1st Dept 2009], *leave to appeal denied* 12 NY3d 710 [2009]; *Arsenault v Forquer*, 197 AD2d 554 [2d Dept 1993]).

Here, while plaintiffs' complaint quoted the allegedly defamatory statements, defendant argues that the pleadings are technically deficient because the Verified Complaint did not specify the time, place and manner of the statements. However, plaintiffs rectified this shortcoming both in reply to the instant motion and when plaintiffs attached as an exhibit the affidavit of Hezi Torati, sworn to on October 19, 2012, which presented printouts of the internet postings at issue with their dates of publication. As the Court of Appeals stated in *Rovello v Orofino Realty Co.* (40 NY2d 633 [1976]), a plaintiff may submit affidavits "to remedy defects in the complaint" and "to preserve inartfully pleaded, but potentially meritorious claims" (40 NY2d at 635). To the extent that the alleged defamatory statements were that plaintiff "Torati was a 'Crook' " and that Torati and NSS "are a bunch of frauds and should not be allowed to do business in this country," plaintiffs have met

their burden in showing that they have a potentially meritorious claim for defamation per se, which includes statements charging plaintiff with a serious crime or that tend to injure another in his or her trade, business or profession (*Geraci v Probst*, 15 NY3d 336, 344 [20010]; *Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Pehzman v City of New York*, 29 AD3d 164, 167-168 [1st Dept 2006]). This factor weighs in favor of granting a late service in the interest of justice.

Prejudice to Plaintiffs or Defendant

Here, plaintiffs commenced the action in a timely manner, yet because of an error regarding defendant's address, the statute of limitations expired prior to plaintiffs effecting proper service. Since plaintiffs will be unable to commence another action absent an extension, withholding an extension would result in extreme prejudice to plaintiffs. This factor weighs in favor of an extension being granted (*Woods v. M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept 2011] [holding that an extension should be afforded solely on grounds that the statute of limitations has already expired]; *Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] [holding that plaintiff was entitled to an extension after timely commencing a legal malpractice action less than one month before statute of limitations was set to expire and diligently attempting to effect service of process]).

Defendant argues that plaintiffs' late notice to defendant triggers prejudice because evidence can get lost, memories fade, and witnesses disappear. However this case is a simple defamation case and the evidence of defamation depends on the already published materials. In addition, barely a year has passed since the complaint was filed. Since defendant will not suffer any real prejudice, and plaintiffs will be barred from bringing another action, the "prejudice" factor favors granting plaintiffs an extension.

Defendant Was On Notice of Action

Defendant further contends that this Court should not grant an extension because plaintiffs did not display reasonable diligence in filing this motion. Though plaintiffs were certainly dilatory by delaying the filing of this motion and allowing the statute of limitations to run, this factor is not dispositive. The Court of Appeals in *Leader* specifically rejected the proposition that reasonable diligence in effectuating service of process was a prerequisite to a court's analysis under the interest of justice standard (97 NY2d at 104).

Unlike the cases upon which defendant relies, in the instant action defendant had notice of the action prior to the expiration of the statute of limitations for the defamation action and the 120 day limit for effecting service. Defendant will therefore not be prejudiced should an extension be granted because she was on notice of the action since November 2012. In *Slate v Schiavone Const. Co.* (4 NY3d 816 [2005]), the Court of Appeals reversed the Appellant Division's decision to allow an extension because, "in view of the extreme lack of diligence shown by plaintiff, and the long delay (more than a year and a half after running of the statute of limitations) before defendant received any notice of the action, the courts below abused their discretion in granting plaintiff an extension to serve defendant "in the interest of justice." In the instant action, however, defendant had notice only a month after the complaint was filed when plaintiff moved for a default judgment. The Appellate Division noted such a distinction in *Sutter v Reyes*, (60 AD3d 448 [1st Dept 2009]), where the court held that an extension was proper under the 'interest of justice' standard despite "little, if any, diligence" by plaintiff's counsel, because there was a hearing that notified the

defendant of the occurrence, theory of recovery and claimed injuries well before expiration of the statute of limitations (60 AD3d at 449).

CONCLUSION

Based on the foregoing, this Court exercises its discretion to grant plaintiffs an extension under the “interest of justice” standard set forth in CPLR §306-b. While the lack of due diligence in effecting service and filing this motion is not helpful to plaintiffs’ interest of justice analysis, that factor, standing alone, is outweighed by the other factors. Plaintiffs present a potential meritorious cause of action, they will suffer extreme prejudice should an extension be withheld, and defendant was on notice of the action despite plaintiffs improper service. In addition, granting plaintiffs the opportunity to pursue this action is not only consistent with the “interest of justice” exception set forth in CPLR § 306-b, but also with the strong interest in deciding cases on the merits where possible (*Henneberry*, 91 AD3d at 497).

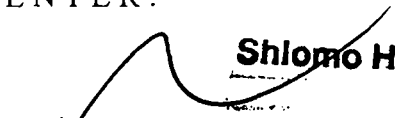
Accordingly, it is hereby

ORDERED that the motion by plaintiffs Hezi Torati and NSS Financial Services LLC is granted to the extent of permitting plaintiffs to serve defendant with proper service of the Summons and Complaint within thirty (30) days of Notice of Entry of this Order.

The foregoing constitutes the decision and order of this Court.

Dated: June 30, 2014
New York, New York

ENTER :


Shlomo Hagler
J.S.C.

Hon. Shlomo S. Hagler J.S.C.