

Erace v Bliss World LLC
2014 NY Slip Op 31905(U)
July 18, 2014
Supreme Court, New York County
Docket Number: 159534/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MICHAEL ERACE and FRANCINE ERACE,

Plaintiffs,

Index No. 159534/2013

-against-

DECISION/ORDER

BLISS WORLD LLC, BLISS 49 and
MICHAEL INDURSKY,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Cross-Motion and Affidavits Annexed.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action alleging negligence and loss of consortium. Defendant Michael Indursky ("Indursky") now moves pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction due to improper service. Plaintiffs cross-move for an order pursuant to CPLR § 306-b authorizing an extension of time to effectuate proper service. For the reasons set forth below, Indursky's motion is denied and plaintiffs' cross-motion is granted.

The relevant facts are as follows. On or about October 16, 2013, plaintiffs commenced the instant action by filing a summons with notice. Because the underlying claim was based on an injury alleged to have occurred on October 18, 2010, the three-year statute of limitations for the action expired two days thereafter. The defendants named in the action were Bliss World

LLC, Bliss 49, and Indursky, the licensee of record for defendant Bliss 49. Plaintiffs effected service upon the corporate defendants on December 19, 2013 by delivering a copy of the summons with notice to the Secretary of State. However, service upon Indursky was not attempted until February 7, 2014, when plaintiffs left a copy of the same with the Spa Director at Bliss 49. Thereafter, defendants served a demand for complaint on January 15, 2014, and plaintiffs served the complaint on March 24, 2014. On April 11, 2014, Indursky served a verified answer in response to the complaint, asserting an affirmative defense based on lack of personal jurisdiction.

Indursky now brings the instant motion to dismiss pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction based on improper service of process. Specifically, Indursky asserts that plaintiffs failed to effectuate proper service pursuant to CPLR § 308(2) by neglecting to mail a copy of the summons with notice within 20 days after delivering it to the Spa Director. In their cross-motion pursuant to CPLR § 306-b, plaintiffs concede that they failed to properly serve Indursky in the first instance and seek an extension of § 308(2)'s 20 day time limit to mail a copy of the summons with notice to Indursky.

As will be explained more fully below, the court grants an extension of time to effectuate proper service on Indursky pursuant to CPLR § 306-b. However, the court does not have the authority to grant the specific relief requested by plaintiffs to extend their time to mail a copy of the summons with notice to Indursky. CPLR § 306-b only grants the court with the authority to grant an extension of the 120 day time limit within plaintiff must effectuate proper service. As plaintiffs failed to mail a copy of the summons with notice within 20 days after delivery to the Spa Director in their attempt to serve Indursky, which undisputedly did not conform to CPLR § 308's requirements, that attempt at service is a nullity and plaintiffs must now fully comply with

the requirements of CPLR § 308 to effect proper service. Just mailing a copy of the summons with notice to Indursky at this point would be insufficient.

Pursuant to CPLR § 306-b, service of the summons and complaint must be made within 120 days after the commencement of the action. If service is not completed within this period, the court may dismiss the action without prejudice, or, in its discretion, grant an extension of time “upon good cause or in the interest of justice.” The “interest of justice” is a “standard designed to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant.” *De Vries v. Metro. Transit Auth.*, 11 A.D.3d 312, 313 (1st Dept 2004) (internal quotation marks omitted). In determining whether an extension is in the interest of justice, a court must balance the competing interests of the parties and consider “diligence, or lack thereof, along with any other relevant factor...including 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 defendant.” *Leader v. Maroney*, 97 N.Y.2d 95, 105-106 (2001). Potential prejudice to the defendant is mitigated by evidence that a defendant had actual notice of the action. *Id.* at 107; *Spath v. Zack*, 36 A.D.3d 410, 414 (1st Dept 2007); *Goldstein v. Columbia Presbyterian Med. Ctr.*, 1 A.D.3d 188 (1st Dept 2003). Additionally, when the statute of limitations has expired, the interests weigh in favor of granting an extension, as a denial would result in the claim being extinguished. *Woods v. M.B.D. Cmty. Hous. Corp.*, 90 A.D.3d 430, 431 (1st Dept 2011); *Griffin v. Our Lady of Justice Med. Ctr.*, 276 A.D.2d 391 (1st Dept 2000).

In the present action, the court finds that it is in the interest of justice that plaintiffs’ time to effectuate service be extended as the statute of limitations has expired and there is no evidence of prejudice to Indursky. Contrary to Indursky’s assertions, the fact that the statute of limitations

has expired does not suggest prejudice to him. On the contrary, plaintiffs will suffer a far greater prejudice if the extension is denied, as they will be barred from pursuing their claim against him. Further, because Indursky served a verified answer in response to the delivered summons, it is clear that he had actual notice of the action during the pendency of service. Thus, Indursky has failed to demonstrate how an extension would be to his prejudice. Additionally, in this instance there is no evidence that the claim is without merit, or that the plaintiffs failed to exercise due diligence. On the contrary, the "interest of justice" standard was designed to address such an office oversight as is present here.

Accordingly, plaintiffs' cross-motion is granted and Indursky's motion is denied. It is hereby ORDERED that plaintiffs are granted an extension of 45 days from the date of this order to effectuate proper service pursuant to the CPLR on Indursky. This constitutes the decision and order of the court.

Dated: _____

7/18/14

Enter: _____

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J.S.C.
CYNTHIA S. KERN
J.S.C.