

**Camarda v Costco Wholesale Corp. & Richard Kancyr**

2014 NY Slip Op 32999(U)

March 31, 2014

Supreme Court, Westchester County

Docket Number: 58184/13

Judge: Robert DiBella

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of 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  
WESTCHESTER COUNTY**

-----X  
**MADLINE CAMARDA,**

**Plaintiff,**

**-against-**

**DECISION AND ORDER  
Motion Seq. No. 001, 002**

**COSTCO WHOLESALE CORPORATION &  
RICHARD KANCYR, XYZ SECURITY,**

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**Defendants.**

-----X  
**DIBELLA, J.**

The following papers were read and considered on this motion by defendant Richard Kancyr to dismiss the complaint as to him on the grounds of lack of personal jurisdiction and cross motion by plaintiff for an order extending its time to serve defendant Kancyr:

- 1) Notice of Motion (seq. no. 001); Affidavit in Support of James C. Miller, Esq.; Exhibits A–C; Affidavit of Richard Kancyr;
- 2) Notice of Cross Motion (seq. no. 002); Affidavit in Support of Cross Motion and in Opposition to Motion of Christine J. Klein, Esq.; Exhibits A–B; and
- 3) Affidavit in Reply to Motion and in Opposition of Cross Motion of James C. Miller, Esq.

In this personal injury action, defendant Richard Kancyr moves to dismiss the complaint as to him on the grounds of lack of personal jurisdiction, pursuant to CPLR 3211(a)(8). Plaintiff opposes the motion and cross-moves for an order extending its time to serve defendant Kancyr, pursuant to CPLR 306-b. For the reasons set forth below, the motion is granted and the cross motion is denied.

This personal injury action arises out of an alleged physical assault and battery on August 12, 2010 by defendant Richard Kancyr upon plaintiff Madeline Camarda while he was working as a security guard for defendant Costco Wholesale Corporation. Plaintiff

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alleges that defendant Kancyr wrongfully accused her of stealing, and his negligent and intentional acts in detaining her resulted in serious personal injuries, including a fractured finger and emotional trauma.

Plaintiff commenced this action on or about May 22, 2013. It is undisputed that defendant Richard Kancyr was not served.

Defendant Kancyr moves to dismiss the complaint for lack of personal jurisdiction as he was not timely served, pursuant to CPLR 3211(a)(8). Plaintiff cross-moves for an extension of time to serve defendant Kancyr, pursuant to CPLR 306-b, contending that it did not know defendant Kancyr's home address, defendant Kancyr stopped working at Costco Wholesale Corporation, and, thus, plaintiff could not timely serve him. Defendant opposes the cross motion. Defendant contends that plaintiff does not meet the good cause or interests of justice standards for an extension, in that: (a) plaintiff has not demonstrated due diligence; (b) plaintiff delayed in seeking the requested relief; (c) the application lacks a showing of merit; and (d) defendant would be prejudiced as the Statute of Limitations has expired.

Pursuant to CPLR 306-b, the Court has the discretion to extend a plaintiff's time to serve the summons and complaint, upon motion, when good cause is shown or in the interests of justice. *See Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 (2001). Good cause is demonstrated where a plaintiff shows due diligence in attempting to serve the defendant. *See id.* at 105. In considering when the extension of time should be granted under the interests of justice standard, a showing of due diligence is not required,

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but the court may nonetheless consider plaintiff's diligence in attempting to serve, as well as the expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay, the promptness of the request for the extension, and whether the defendant would be prejudiced. *See id.* at 105–06.

Here, the Court finds that plaintiff has not demonstrated due diligence in attempting to serve defendant Richard Kancyr and, therefore, she does not meet the good cause prong under CPLR 306-b. Plaintiff's counsel states in her affidavit that she telephoned the home phone number listed on the police report but was unable to reach anyone, she attempted to locate defendant Kancyr "through internet searches" and she called Costco where defendant Kancyr had worked, but she was told he no longer worked there and they did not know where he had gone. Klein Aff ¶ 10. Plaintiff's counsel's Affidavit fails to meet the due diligence standard, in that it is conclusory and insufficient in the attempts set forth to find defendant Kancyr. Counsel does not elaborate and provide specifics as to the searches she conducted, and she has not set forth any other attempts, other than calling the Costco in Port Chester, to find out from defendant Kancyr's old employer identifying information (such as his home address) that would have assisted in locating said defendant. *See Bumpus v. New York City Transit Auth.*, 66 AD3d 26, 36 (2d Dep't 2009). For instance, counsel could have made a motion (even in the form of pre-action discovery before the action was commenced) to discover what information defendant Costco Wholesale Corporation had in terms of Mr. Kancyr's home address, location, other phone numbers, etc. *See, e.g., Bumpus*, 66 AD3d at 33.

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The Court also finds that plaintiff has failed to meet the interests of justice standard to warrant an extension of time to serve, considering the following facts and circumstances of this case: lack of due diligence in attempting to serve the defendant as set forth above, lack of an affidavit by plaintiff herself to demonstrate the meritorious nature of her claim<sup>1</sup>, and plaintiff's delay in bringing the action close to the expiration of the Statute of Limitations and waiting until after the time to serve expired and defendant made a motion to dismiss to move for an order granting an extension of time to serve. *See Khodeeva v. Chi Chung Yip*, 84 AD3d 1030, 1030–31 (2d Dep't 2011); *Calloway v. Wells*, 79 AD3d 786, 786–87 (2d Dep't 2010).

Accordingly, it is

ORDERED that defendant Karcyr's motion to dismiss the complaint as to him is granted, the action is severed as to this defendant and continued against the remaining defendants, and the Clerk is directed to enter judgment in favor of defendant Karcyr dismissing the complaint against him; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on April 14, 2014 at 9:30 AM in Courtroom 811 of the Westchester County Courthouse in White Plains, New York; and it is further

ORDERED that plaintiff is directed to serve a copy of this Decision and Order upon defendant XYZ Security within 10 days.

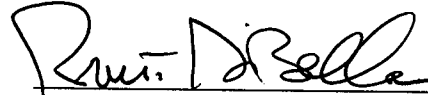
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<sup>1</sup> An uncertified police report and certain uncertified hospital records were submitted in support of the cross motion.

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This is the Decision and Order of the Court.

Dated: March 31, 2014  
White Plains, New York

  
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Hon. Robert DiBella, JSC

To: Thomas M. Bona, PC  
Via e-file

Law Offices of Christine J. Klein, PC  
Via e-file