Zacchea v Sall
2014 NY Slip Op 33204(U)
January 6, 2014
Sup Ct, Bronx County
Docket Number: 307095/2012
Judge: Alison Y. Tuitt
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[* 1] FILED Jan 17 2014 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

MARCY ZACCHEA and MICHAEL ZACCHEA,

Plaintiffs,

-against-

ALASSANE SALL and EDWARD COHN,

Defendants.

INDEX NUMBER: **307095/2012**

Present:
HON. **ALISON Y. TUITT,**
Justice

The following papers numbered 1 to 3,

Read on this Defendant Alassane Sall's Motion to Dismiss and Plaintiff's Cross-Motion for a Traverse Hearing or for Extension of Time To Serve Defendants

On Calendar of **9/9/13**

Notice of Motion/Cross-Motion-Exhibits and Affirmations	1, 2
Affirmation in Opposition	3

Upon the foregoing papers, defendant Alassane Sall's (hereinafter "Sall") motion to dismiss the action and plaintiffs' cross-motion to extend the time to serve defendant with the Summons & Complaint are consolidated for purposes of this decision. For the reasons set forth herein, the motion is denied and the cross-motion is granted.

The within action involves a motor vehicle accident that occurred on September 28, 2009 in which plaintiffs claim to have sustained injuries. Pursuant to the Affidavit of Service, plaintiffs allege that the Summons and Complaint was served on defendant Sall on October 5, 2012 by leaving the Summons and Complaint with JANE DOE, a person of suitable age and discretion at 1114 Virginia Avenue, Bronx, New York 10472. Thereafter, the Summons and Complaint was purportedly mailed to defendant at the aforementioned address.

Defendant Sall now seeks to dismiss the action arguing that he did not reside at that address at the time of purported service. Defendant claims that he has not resided at that address since 2011. Defendant states in an affidavit that at the time of the subject accident, September 28, 2009, he resided at 1961 Gleason Avenue, Bronx, New York and that shortly thereafter, in 2009, he moved to 1114 Virginia Avenue. Defendant further states that in 2011, he moved to his current address of 1218 Leland Avenue, Bronx New York. Defendant contends that he was never serve with or received the Summons and Complaint and that his first notice of the action was when his counsel sent him a letter in February, 2013 to discuss the case. Defendant argues that since he was not served, personal jurisdiction over him was not obtained and since the statute of limitations has expired on this action, the case must be dismissed with prejudice.

Plaintiffs cross-move for a Traverse Hearing or, in the alternative, for an extension of time to serve defendant. Plaintiffs argue that they made reasonable efforts to effectuate service on defendant Sall at two separate addresses. Pursuant to the Affidavits of Service filed with the Court, plaintiffs served defendant at his prior address, as it appeared on the police accident report, at 1961 Gleason Avenue, as well as at 1114 Virginia Avenue.

Pursuant to C.P.L.R. §308-b, service must be made within 120 days after the filing of the Summons and Complaint. C.P.L.R. §308-b further provides that if service is not made upon a defendant within the 120 days, the Court may, upon good cause shown or in the interest of justice, extend the time for service. Defendant argues that since the time to serve him has expired and the statute of limitations has expired, the case must be dismissed. Defendant further argues that plaintiffs' application for an extension of time to serve should be denied because plaintiffs have not shown good cause for the extension and fail to show that the interests of justice warrant an extension.

This State has a strong policy in favor of resolving disputes on the merits. See, Silverio v. City of New York, 698 N.Y.S.2d 669 (1st Dept. 1999). Accordingly, when this Court is in a position to use its discretionary power to permit a meritorious action to survive, it will do so. The Court considers several standards when exercising its discretion in granting an extension of time to serve a Summons and Complaint. While the good cause standard requires a showing of due diligence regarding service of the complaint, the interest of justice standard allows the Court to consider diligence as "simply one of many relevant factors". Slate v. Schiavone Construction Co., 780 N.Y.S.2d 567 (1st Dept. 2004) quoting Leader v. Maroney, Ponzini &

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Spencer, 97 N.Y.2d 95 (2001). In Leader, the Court of Appeals held that

> Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, 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...
>
> The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative—the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served.

Id. at 105-106. See also, Gilkes v. New York Wholesale Paper Corp., 933 N.Y.S.2d 226 (1st Dept. 2011) (Extension of plaintiff's time to serve Summons and Complaint was proper, in the interest of justice, given plaintiff's showing of merit and the expiration of the statute of limitations); Murphy v. Hoppenstein, 720 N.Y.S.2d 62 (1st Dept. 2001)(Extensions of 120–day period for making service of summons should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service, regardless of expiration of statute of limitations after filing and before service).

Based on the submissions of the plaintiffs, and in accordance with the strong policy of resolving disputes on the merits, defendant's motion is denied and plaintiff's cross-motion is granted. Defendant's submission of a copy of the New York State Department of Motor Vehicles record as proof of defendant's address as 1218 Leland Avenue is clearly irrelevant as the document is dated January 30, 2013, after the date of attempted service. Moreover, defendant, in his own affidavit, attests that he was involved in a motor vehicle accident on the date, time and place alleged. Therefore, defendant cannot claim surprise at a legal action being brought as a result of his involvement in the accident. Here, plaintiffs made reasonable efforts to serve defendant as they not only served him at the address provided in the police accident report, but they obviously made further inquiry and located a second valid address for defendant (since he admits that he did reside there at one time). Furthermore, defendant has failed to demonstrate any prejudice in allowing the extension of time to serve. See, Griffin v. Our Lady of Mercy Medical Center, 715 N.Y.S.2d 633 (1st Dept. 2000).

Accordingly, defendant's motion to dismiss the action is denied and plaintiffs' cross-motion to serve defendant is granted. As defendant is represented by counsel and has already served an Answer, the

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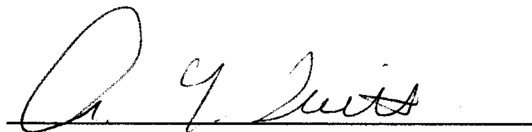
Summons and Complaint is deemed served.

This constitutes the decision and order of this Court.

Dated: 1/6/2014



Hon. Alison Y. Tuitt