SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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DIANNE GARVILLE,

Plaintiff,

Index No. 152067/2013

-against-

DECISION/ORDER

DYCKMAN LIQUORS INC. and DYCKMAN STREET 115 ASSOCIATES,

Defendants.

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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.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking to recover damages for personal injuries she allegedly sustained at a liquor store owned and operated by defendants. Defendant Dyckman Street 115 Associates ("Dyckman Associates") now moves to vacate the default judgment entered against it on January 31, 2014 and to dismiss plaintiff's complaint against it on the ground that this court lacks jurisdiction over it as plaintiff failed to effect proper service on it. Plaintiff cross-moves for an Order pursuant to CPLR § 306-b extending her time to effect service on Dyckman Associates. The motions are resolved as set forth below.

The relevant facts and procedural history are as follows. On or about March 6, 2013,

plaintiff commenced the instant action by filing a summons and complaint. In her complaint, plaintiff asserts a claim for negligence against defendants based on personal injuries she allegedly sustained on September 28, 2011 at the liquor store located at 121 Dyckman Street, New York, New York (the "Liquor Store") when she fell down an opened trapped door. The Liquor Store is run by defendant Dyckman Liquors Inc. ("Dyckman Liquors") who leases the store location from the building's owner Dyckman Associates.

According to plaintiff's affidavit of service, on or about April 2, 2013, plaintiff effected service of process on Dyckman Associates by delivering a copy of the summons and complaint to an authorized agent at 121 Dyckman Street, New York, NY 10040–i.e., the Liquor Store. Thereafter, plaintiff moved for default judgment against Dyckman Associates as it had failed to answer or otherwise appear in the action and the time to do so had expired. By decision/order dated January 31, 2014, this court granted plaintiff's motion for default judgment. Dyckman Associates now moves to vacate the default judgment entered against it on the ground that plaintiff's attempt to effect service on Dyckman Associates was legally insufficient as it is not located, nor does it do business at the Liquor Store and the Liquor Store is not in any way affiliated with Dyckman Associates. Thus, Dyckman Associates contends that this court lacks jurisdiction over it and the default judgment entered against it must be vacated and the action dismissed. In opposition, plaintiff presents no evidence to dispute that Dyckman Associates was improperly served. Rather, plaintiff cross-moves for an order extending her time to properly effect service.

As a threshold matter, to the extent that Dyckman Associates contend that this court should not consider plaintiff's cross-motion as it is untimely, such contention is without merit.

While plaintiff concedes that her cross-motion is untimely, courts have broad discretion, and indeed often exercise such discretion in instances such as this, to consider any untimely cross-motion for "good cause." *See* CPLR § 2214(c); CPLR § 2004. Here, there is good cause to consider the untimely cross-motion as it is meritorious and there is no prejudice to Dyckman Associates as it had ample time to review the cross-motion and submit opposition thereto. Thus, the court shall consider plaintiff's cross-motion and now turns to the merits of Dyckman Associates and plaintiff's motions.

As an initial matter, Dyckman Associates' motion to vacate the default judgment entered against it is granted. As a general matter, a defendant seeking to vacate a default judgment "must demonstrate a justifiable excuse for his default and a meritorious defense." *Johnson v. Deas*, 32 A.D.3d 253, 254 (1st Dept 2006) (internal citation omitted). However, when a defendant challenges the default on the ground that plaintiff failed to effecte proper service, "a defendant need not show a reasonable excuse and meritorious defense" as failure to properly effect service divests the courts of jurisdiction over the defendant. *Id.*

In the present case, the default judgment entered against Dyckman Associates must be vacated as Dyckman Associates has established that plaintiff failed to effect proper service on it as a matter of law. Plaintiff's only attempt at serving Dyckman Associates was to deliver the summons and complaint to an individual at the Liquor Store. However, the affidavit submitted in support of Dyckman Associates' motion clearly establishes that Dyckman Associates is in no way affiliated with the Liquor Store and does not maintain an actual place of business at said location. Plaintiff presents absolutely no evidence to refute this fact. In fact, plaintiff seems to concede that service of process was ineffective by cross-moving to extend her time to effect

proper service. Thus, the motion to vacate the default judgment is granted and the only remaining issue is whether the entire action should be dismissed as to Dyckman Associates or whether plaintiff shall be granted an extension to properly serve Dyckman Associates.

Pursuant to CPLR § 306-b, service of the summons and complaint must be made within 120 days after the filing of such. However, a court may extend the time in which to effect service of process "upon good cause shown or in the interest of justice." CPLR § 306-b. Good cause requires a threshold showing that the plaintiff made reasonably diligent efforts to make timely service. *Leader v. Maroney*, 97 N.Y.2d 95 (2001). The interest of justice standard, on the other hand, "is intended to be an additional and broader standard to accommodate late service that might be due to mistake, confusion or oversight." *Wideman v. Barbel Trucking*, 300 A.D.2d 184, 185 (1st Dept 2002) (internal quotation marks and emphasis omitted). Thus, "[u]nlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter." *Leader*, 97 N.Y.2d at 105. Instead, "[t]he 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.* Specifically, the court should 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." *Id.* at 106.

In the present case, the court finds that an extension of time to effect process of service on Dyckman Associates is justified in the interest of justice. As an initial matter, plaintiff made a good faith, though flawed, attempt to serve Dyckman Associates well within the statutorily

prescribed 120-day period. Although service at the Liquor Store was ineffective, the manner and place of service was not manifestly a display of bad faith as the accident happened at the Liquor Store. Further, plaintiff has presented her own affidavit wherein she alleges that on the day of her accident Dyckman Associates left a basement trap door open without barricades and/or warnings creating a dangerous and hazardous condition that caused plaintiff to sustain serious personal injuries. At this point, reading this allegation in the light most favorable to plaintiff, such allegation is sufficient to demonstrate a meritorious cause of action for negligence against Dyckman Associates. Moreover, granting an extension in this instance is further supported by the fact that the statute of limitations has now run for plaintiff's claim and she would be severely prejudiced if an extension was not granted. Finally, as discovery is still in the initial phases and no depositions have yet taken place, there is little prejudice to Dyckman Associates in allowing an extension.

Accordingly, Dyckman Associates' motion to vacate the default judgment entered against it is granted but is otherwise denied and plaintiff's cross-motion for an extension of time to effect service on Dyckman Associates is granted. It is hereby

ORDERED that the decision/order of this court dated January 31, 2014, granting default judgment against Dyckman Associates is vacated; and it is further

ORDERED that plaintiff is granted an extension of thirty days from the date of this order to effect proper service on Dyckman Associates. This constitutes the decision and order of the court.

Dated: 2/18/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.