Vasquez v Ortiz
2015 NY Slip Op 30503(U)
March 27, 2015
Sup Ct, New York County
Docket Number: 805159/2014
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Scanned to New York EF on 6/11/15

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

MARIA ELIANET VASQUEZ and VINCENTE VASQUEZ,

Plaintiffs,

- against -

RAFAEL A. ORTIZ, JOSE A. GORIS, JOSE C. ORTIZ and CASILDA BALMACEDA,

Defendants.

----------X

Index No. 805159/2014

Decision and Order

JOAN B. LOBIS, J.S.C.:

In this medical malpractice action, co-defendant Jose C. Ortiz ("Dr. Ortiz") moves for an order dismissing the claims against him based on lack of personal jurisdiction. Plaintiffs oppose the motion. For the reasons below, the Court denies the motion and gives plaintiff an additional 30 days to complete service of the answer.

Plaintiffs commenced this action on May 16, 2014, asserting claims against Dr. Ortiz and three other physicians. As it relates to Dr. Ortiz, the complaint asserts that he was a licensed physician with offices at 435 Fort Washington Avenue, and that he offered his services to plaintiff Maria Elianet Vasquez. Starting May 10, 2012, "and for some time thereafter," it states, Dr. Ortiz provided negligent "medical care, diagnosis, treatment and services" to Ms. Vasquez, resulting in injuries. The complaint is verified by counsel and not by plaintiffs. In addition, plaintiff included a certificate of merit pursuant to Section 3012-a of the Civil Practice Law and Rules.

The affidavit of service indicates that plaintiff served Dr. Ortiz "C/O DR. OFFICE" with the summons and complaint on July 23, 2014, via his co-worker Janet James, a person of

Scanned to New York EF on 6/1/15

suitable age and discretion, at 435 Fort Washington Avenue #1C, New York, New York 10033. The affidavit further indicates that the process server, Angel Gutierrez, followed this by mailing the summons and complaint on the following day.

On September 24, 2014, Dr. Ortiz answered the complaint. In the answer, he lists his office address as 435 Fort Washington Avenue. As his ninth and tenth defenses, he alleges lack of personal jurisdiction due to improper service. On November 7, 2014, he brought the current motion to dismiss. He alleges that his office is at 425 Fort Washington Avenue Suite 1H not 435 Fort Washington Avenue Suite 1C. Dr. Ortiz submits an affidavit in which he acknowledges that Ms. James is a receptionist in his office and she received the summons and complaint. However, he adds that he did not receive the summons and complaint in the mail as plaintiff sent it to the wrong address. As the 120-day period in which to complete service under CPLR section 308(2) has expired, Dr. Ortiz argues, dismissal is appropriate. He additionally alleges that the affidavit of service states that the pleadings were mailed to "C/O DR. OFFICE" and apparently the envelope did not include Dr. Ortiz's name.

In their opposition to the motion plaintiffs state that the motion should be denied and the affirmative defenses stricken or that, in the alternative, there should be a traverse hearing on the issue of service. Plaintiffs argue that, despite the doctor's arguments, his office "is plainly located at 435 Fort Washington Avenue." They submit a photograph of the building, which has an awning advertising that the doctor's offices are inside, and they provide a copy of the doctor's business card which lists the doctor's address as "435 Washington Ave., New York, NY 10033." Mr. Gutierrez's affidavit asserts that Ms. James accepted service at the address in question and

that she indicated she was authorized to accept service. He points out that the photograph and business card substantiate that he served at the correct address. He states that he mailed the summons and complaint "to Dr. Ortiz via first class mail." Plaintiffs argue that the mailing was proper, as in light of the above facts Mr. Gutierrez had no reason to believe he mailed to the incorrect address. However, they ask that if the Court determines service is not proper it grant them an extension of time to serve under CPLR § 306-b. They contend that because the statute of limitations has expired, they have stated a meritorious cause of action, there was not a lengthy delay in service, they promptly made this request, and Dr. Ortiz suffers no prejudice. Accordingly, they conclude, the equities favor relief under the statute.

Scanned to New York EF on 6/11/15

Dr. Ortiz's reply states that his prior reference to building 425 was merely a typographical error, and that his real objection is that plaintiffs mailed the pleadings to him at suite 1C rather than suite 1H and that the envelope apparently did not include his name in the address and as a result the doctor did not receive the mailing. He objects to plaintiffs' request for an extension of time to serve, arguing that plaintiffs delayed in making this request. He points out that he made this motion in November 7, 2014, and served his answer, which asserted improper service, on September 12, 2014, but that plaintiffs did not request additional time until their February 13, 2015, opposition. He also states that plaintiffs set forth their request in opposition to his motion but not "upon the plaintiffs' own initiative," and that CPLR § 306-b requires that plaintiffs make their application by motion. It is significant, he further argues, that there is no physician's affidavit of merit. He states that the expiration of the limitations period in itself evidences that he would be prejudiced if the Court grants plaintiffs' application.

Under CPLR § 308(2), personal service on a natural person is proper if the process server delivers the pleadings to a person of suitable age and discretion at the individual's place of business and mails them by first class mail at his actual place of business and following other specified guidelines. The statute is strictly construed, even if a defendant receives prompt notice of the case. Macchia v. Russo, 67 N.Y.2d 592 (1986). Accordingly, if the process server delivers the pleadings to a suitable recipient but mails them to the wrong address, service is improper. See Foster v. Cranin, 180 A.D.2d 712, 712-13 (2nd Dep't 1992). Service must be complete within 120 days of the actions commencement. CPLR § 306-b.

Scanned to New York EF on 6/11/15

When a defendant challenges service after the 120-day period for the completion of service has run, the reviewing court has two options under CPLR § 306-b: "dismiss the action without prejudice; or extend the time for service in the existing action." Henneberry v. Borstein, 91 A.D.3d 493, 495 (1st Dep't 2012). The court can allow the extension "upon good cause shown or in the interests of justice." CPLR § 306-b (emphasis supplied). Good cause requires a showing that the plaintiff diligently attempted to effectuate service. Henneberry v. Borstein, 91 A.D.3d 493, 496 (1st Dep't 2012). If there is not good cause, a court alternatively may extend the time based on the interests of justice. Id. This requires "a careful judicial analysis of the factual setting of the case and a balancing of the competing interests . . . including the 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, Ponzini & Spencer, 97 N.Y.2d 95, 105 (2001). The Court has discretion in reaching its determination, Leader, 97 N.Y.2d at 101, and it may weigh and consider the factors accordingly. Nicodene v. Byblos Restaurant, Inc., 98 A.D.3d 445, 446 (1st Dep't 2012); see also Sutter v.

Reyes, 60 A.D.3d 448, 449 (1st Dep't 2009)(concluding that "because some factors weigh in favor of granting an interest of justice extension and some do not, we should not disturb Supreme Court's discretion-laden determination"). If the defendant has timely notice of the claim and the statute of limitations has expired, these factors militate in favor of granting the application. See Pennington v. Da Nico Restaurant, 123 A.D.3d 627, -- (1st Dep't 2014). The plaintiff has the burden to show that he or she should receive the extension. Busler v. Corbett, 259 A.D.2d 13, 14-15 (4th Dep't 1999).

On the facts at hand, plaintiffs technically did not complete service within the requisite time frame. Though they personally delivered the complaint to someone authorized to accept service, they concededly mailed the complaint to the wrong suite at the right building, 435 Fort Washington Avenue, to "DR. OFFICE" and did not mention Dr. Ortiz's name on the envelope. In addition, Dr. Ortiz has sworn that he did not receive the mailing. Given the strict application of the statute, see Macchia v. Russo, 67 N.Y.2d at 592, and the fact that according to Dr. Ortiz's unrefuted testimony showing that the mail was not forwarded, dismissal is appropriate absent an extension.

Under these circumstances, the Court grants plaintiffs' application for an extension of time for service. Though traditionally plaintiffs make their requests through a formal motion or cross-motion, and it would have been more appropriate for plaintiffs to proceed in this fashion, this defect is not fatal as Dr. Ortiz "was fully apprised of [plaintiffs'] position" through the opposition papers – and, indeed, responded to the application. Marx v. Marx, 258 A.D.2d 366, 367 (1st Dep't 1999). In addition, "[t]he interest of judicial economy does not favor the denial of the

Scanned to New York EF on 11/14/15

type of relief sought in this action where, as here, the application was sufficiently supported and clearly articulated." Fried v. Jacob Holding, Inc., 110 A.D.3d 56, 66 (2nd Dep't 2013)(affirming decision of court to accept service of untimely answer although request was made in opposition to motion for default, without formal notice of cross-motion). As the statute at issue, CPLR § 308-b, allows the Court to extend the time for good cause or in the interests of justice, it is especially relevant to consider the equities. Dr. Ortiz was not prejudiced by the omission, plaintiffs have shown good cause and the interests of justice militate in favor of granting this relief. Plaintiffs personally delivered the pleadings to the correct location, the propriety of which has not been challenged. Then, it promptly mailed the pleadings to the same address as appeared on the summons. This address contained the wrong suite number. This timely mailing to an address plaintiff had reason to believe was accurate is sufficient to show a reasonable effort. Moreover, it makes this an appropriate case for relief under CPLR § 308-b. See Holbert v. The New York State Teachers' Retirement Syst., 21 Misc. 3d 1144(A) (Sup. Ct. Sullivan Cnty. October 4, 2006)(avail at 2006 WL 6155420 (N.Y. Sup.), at *3), aff'd, 43 A.D.3d 530 (3rd Dep't 2007).

Even if the Court were to determine that there was not a reasonable effort, it would conclude that the interests of justice militate in favor of allowing the extension. The parties indicate that the statute of limitations has expired; plaintiff argues that because of that the Court should allow it time to extend, while Dr. Ortiz states that because of this it would be prejudicial to allow the extension. Plaintiff is correct and in fact when the limitations period has expired courts are inclined to grant the extension. See Pennington, 123 A.D.3d at –. Though insufficient to constitute evidence of a meritorious claim, the affidavit of merit is evidence that counsel investigated the claim and found it worthy of litigation. See Horn v. Boyle, 260 A.D.2d 76, 77 (3rd Dep't 1999).

Scanned to New York EF on

As for the timeliness of this application, it came five months after Dr. Ortiz served his answer. This not so long as to warrant denial of the request, especially where, as here, the affirmative defense relating to service is one of a long list of boilerplate defenses and is not specifically tailored to this case. Thus, it did not alert plaintiffs to the particular problem at hand. Plaintiffs served their opposition and included the request three months after the filing of the motion, also not a significant delay. Moreover, even an untimely request may be granted if the interests of justice otherwise warrant it. See, e.g., Sutter v. Reyes, 60 A.D.3d 448, 449 (1st Dep't 2009). The papers submitted in support of Dr. Ortiz's motion contained a typographical error that made it appear he argued that service at 435 Fort Washington Avenue was defective, and plaintiffs knew that this was indeed the correct building. Thus, the motion itself did not inform plaintiffs of the actual problem with service and may have led them to believe that Dr. Ortiz's argument was specious.

Scanned to New York EF on 9/11/15

Finally, there is no prejudice to Dr. Ortiz. As plaintiffs served the doctor with the pleadings at his place of business, he received timely notice of the litigation and claims. As the Court already stated, the expiration of the statute of limitations prejudices plaintiffs and not defendants where the defendants have notice. See Pennington, 123 A.D.3d at –. Dr. Ortiz has not argued persuasively that any other prejudice exists. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that plaintiffs shall have 30 days to complete their service upon Dr. Ortiz; and it is further

ORDERED that all parties shall appear in Part 6, room 690, 60 Centre Street, for a preliminary conference on Tuesday, May 5, 2015, at 2:15 p.m.

Dated: Mar. 27, 2015

ENTER:

JOAN B. LOBIS, J.S.C.

Scanned to New York EF on