

593 Rest. Corp. v Kidde-Fenwal, Inc.
2015 NY Slip Op 31529(U)
August 13, 2015
Supreme Court, New York County
Docket Number: 653122/2013
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**593 REST. CORP, THIRD AVENUE FRONTIER
RESTAURANT, INC. and FRONTIER
RESTAURANT, INC.,**

Plaintiffs,

INDEX NO. 653122/13

-against-

MOTION SEQ. NO. 001

**KIDDE-FENWAL, INC. SAMIRO SERVICES,
INC. d/b/a SCIENTIFIC FIRE PREVENTION
AND ENVIRONMENTAL SERVICES CO., ALLIED
FIRE CONTROL SERVICES, INC., SSI, INC.,
ALL-BORO FIRE & SAFETY EQUIPMENT CO.,
INC., FIRE COMMAND CO., INC. and TOTAL
DOLLAR MANAGEMENT EFFORT, LTD. d/b/a
TOTAL DOLLAR INSURANCE,
Defendants.**

The following papers were read on this motion by the defendants to dismiss the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Reply Affidavits — Exhibits (Memo) _____

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ No

This action stems from a loss that plaintiff restaurant-owners, Frontier Restaurant and 593 Rest. Corp. and/or Third Ave. Frontier Restaurant, Inc. (collectively, plaintiffs) sustained as a result of a fire at 593 Third Avenue, New York, NY, on September 10, 2010. Plaintiffs allege that the fire was caused by grease and/or other flammable and/or dangerous materials in a hood for which defendant Samiro Services, Inc. d/b/a Scientific Fire Prevention and Environmental Services Co., (Samiro) was responsible, pursuant to a contract between plaintiffs and Samiro. Specifically, in the contract Samiro was "to perform cleaning, servicing, testing, maintenance, installation, and/or repair services to the hoods, ducts, exhaust fans, grease traps and/or fire suppression systems, as well as their associated parts and/or

components, located in the subject premises" (Affirmation in Support of Plaintiffs' Cross-Motion, ¶ 5).

Now before the Court is a motion by Samiro to dismiss the complaint, pursuant to CPLR 3211(a)(8), CPLR 311(a)(2)¹, and Business Corporation Law § 306(b)(1), on the basis that the Court lacks personal jurisdiction over Samiro because it was never served with the summons and complaint. Plaintiffs cross-move under CPLR 306-b, arguing that an extension of time to serve defendant is warranted under both the "good cause" and "interest of justice" standards of CPLR 306-b.

BACKGROUND

Plaintiff commenced this action on September 9, 2013 and hired a process server to complete service upon all defendants. On September 11, 2013, the summons and complaint were served upon "SSI Inc sueded [sic] herein as Samiro Services, Inc." through the Secretary of State (Notice of Motion, exhibit B). Samiro filed and served an answer to plaintiffs' summons and complaint on or about November 26, 2013, asserting as its nineteenth Affirmative Defense that the court does not have personal jurisdiction due to improper service upon said defendant.

In support of its motion Samiro avers that "'SCIENTIFIC' is not the same entity as 'SSI Inc.' and has no relationship or affiliation of any kind with 'SSI Inc.'" (see Affidavit of David Klein, ¶ 8). In response, plaintiffs allege that they were unaware that there were any issues with respect to the service of the summons and complaint upon Samiro until it brought the herein motion to dismiss on January 23, 2014.

STANDARDS OF LAW

Under CPLR 3211(a)(8), "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court has not jurisdiction of the

¹ The Court notes that while Samiro states in its Notice of Motion that it is moving to dismiss under CPLR 311(a)(2), the papers in support of its motion state that dismissal is appropriate under CPLR 311(a)(1). The Court believes that stating CPLR 311(a)(2) was an error and shall analyze the motion as if Samiro is moving pursuant to CPLR 311(a)(1).

person of the defendant.” The relevant portions of CPLR 311(a)(1) state, “personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.”

Business Corporation Law § 306(b)(1) states that, “service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state... duplicate copies of such process together with the statutory fee, which fee shall be taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served. . .”

CPLR 306-b states in relevant part that, “if service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.”

DISCUSSION

“CPLR 306-b authorizes an extension of time for service in two discrete situations: ‘upon good cause shown’ or ‘in the interest of justice’ (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012], quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). Additionally, whether “an extension of time for service [is granted under CPLR 306-b] is a matter within the court’s discretion” (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). When requesting an extension to serve based on good cause, a plaintiff must show reasonable diligence in attempting to effect service upon a defendant (*Henneberry*, 91 AD3d at 496). Good cause is likely to be found where the plaintiff’s failure to timely serve process is a result of circumstances beyond its control (*id.*).

Even if a plaintiff cannot satisfy the good cause requirement, an extension may still be granted under the interest of justice prong (*Moundrakis v Dellis*, 96 AD3d 1026, 1027 [2d Dept 2012]; see *Bumpus v New York City Transit Authority*, 66 AD3d 26 [2d Dept 2006] [holding that plaintiff failed to satisfy good cause requirement for extension, but that extension was warranted in the interests of justice]). The 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 (*Leader*, 97 NY2d at 105). “A court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, 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” (*id.* at 106). “The interest of justice standard accommodates late service that might have been due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant” (*Henneberry*, 91 AD3d 493 at 496).

Although ultimately defective, the Court finds that plaintiffs have established good cause under CPLR 306-b, as they made a diligent attempt to serve the herein defendants within 120 days of the timely filing of the summons with notice by hiring a process server (*Henneberry*, 91 AD3d at 181 [an extension of time to serve granted even though action was filed one month before the statute of limitation was set to expire, as plaintiff had diligently attempted to effect service of process by hiring a process server]). Plaintiffs attest that they reasonably believed that each party in the action was properly served, because they hired a process server, “licensed by the State of New York, to serve each party” (see Notice of Cross-Motion). Plaintiffs further state that they were unaware that service was defective until they received defendant’s instant motion to dismiss on January 23, 2014, and that this was well beyond the 120-day period for service pursuant to CPLR 306-b (*id.*).

Under the interests of justice prong, the dismissal of plaintiffs’ action against Samiro would prejudice plaintiffs because the statute of limitations for plaintiffs’ negligence claims have

expired (see *Moundrakis*, 96 AD3d 1026 at 1027 [extension was warranted under interest of justice as “the statute of limitations had expired at the time plaintiff made her motion, there was evidence of a potentially meritorious cause of action, and there was no demonstrable prejudice to the defendant”]; *Lippett v Education Alliance*, 14 AD3d 430, 431 [1st Dept 2005]; *Beauge v New York City Tr. Auth.*, 285 AD2d 416, 416 [2d Dept 2001] [extension granted because “plaintiff’s claims would be extinguished without an extension since the Statute of Limitations has expired”]).

Furthermore, Samiro filed an answer and therefore had actual notice of the action. As a result, Samiro fails to show any prejudice if the plaintiffs’ motion for an extension of time to serve is granted, other than having to defend the action (see *Griffin v Our Lady of Mercy Med. Ctr.*, 276 AD2d 391 [1st Dept 2000]; *Chiaro v D’Angelo*, 7 AD3d 746, 746 [2d Dept 2004] [no prejudice to defendants who had actual notice of the action]). An extension in the interest of justice is warranted because Samiro has not established that, as a result of plaintiffs’ failure to serve it timely or plaintiffs’ delay in seeking an extension, that it “lost some special right, or incurred some change of position or some significant expense” (*Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009]). Moreover, Samiro’s reliance on *Murphy* in support of its motion to dismiss is misplaced, as in that instance the court denied the defendant’s motion to dismiss and granted the plaintiff’s motion for an extension of time to re-serve under CPLR 306-b (see *Murphy v Reuben Hoppenstein, M.D.*, 279 AD2d 410, 410 [1st Dept 2001] [“such extensions of time should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service”]).

Accordingly, Samiro’s motion to dismiss the complaint is denied without prejudice, and plaintiffs’ cross-motion to extend the time for service of the summons and complaint upon Samiro is granted.²

² The Court notes that pursuant to a Decision and Order of Justice Anil C. Singh, prior to the reassignment of this matter to this Court, defendant Kidde-Fenwal, Inc.’s motion to dismiss for lack of

CONCLUSION

Accordingly it is hereby,

ORDERED that the motion by Samiro Services, Inc. d/b/a Scientific Fire Prevention and Environmental Services Co. to dismiss the complaint pursuant to CPLR 3211(a)(8) and 311 (a)(1) and Business Corporation Law § 306(b)(1) is denied; and it is further,

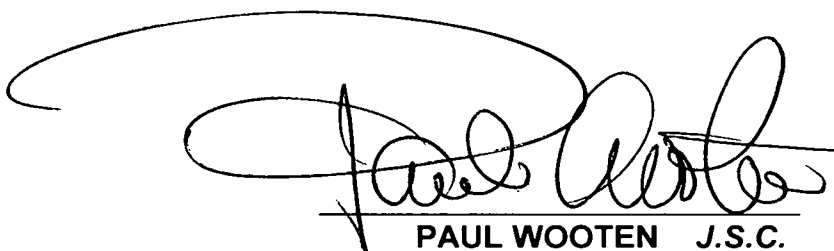
ORDERED that the cross-motion by the plaintiffs, pursuant to CPLR 306-b, for an extension of time to serve the complaint upon defendant Samiro Services, Inc. d/b/a Scientific Fire Prevention and Environmental Services Co. is granted; and it is further,

ORDERED that the summons and complaint in this matter shall be served upon the defendant Samiro Services, Inc. d/b/a Scientific Fire Prevention and Environmental Services Co. in accordance with the Civil Practice Law and Rules within 30 days of Entry of this Order; and it is further,

ORDERED that counsel for the plaintiffs shall serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 8/13/15


PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

personal jurisdiction was denied without prejudice (see Order dated April 17, 2014). Justice Singh further found that good cause existed to grant plaintiffs's cross-motion for an extension of time to serve defendant Kidde-Fenwal with the summons and complaint (see *id.*).