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| <b>Harvardsky Prumyslovy Holdings v Kozeny</b>                                                                                                                                                                                                                   |
| 2015 NY Slip Op 31682(U)                                                                                                                                                                                                                                         |
| September 2, 2015                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 651826/2012                                                                                                                                                                                                                                       |
| Judge: Ellen M. Coin                                                                                                                                                                                                                                             |
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## SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

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 HARVARDSKY PRUMYSLOVY HOLDING, AS.-  
 V LIKVIDACI,

Plaintiff,

INDEX NO. 651826/2012  
 MOTION DATE July 22, 2015  
 MOTION SEQ. NO. 005  
 E-FILED

-against-

VIKTOR KOZENY and LANDLOCKED SHIPPING  
 COMPANY,

Defendants.  
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The following papers, numbered 1, were read on this motion to amend and to extend the time for service:

PapersPapers Numbered

Notice of Motion-Affidavits-Exhibits

1

Answering Affidavits-Exhibits

2

Reply Affidavits

3

Cross-Motion      **X No**

Plaintiff moves for an order (1) granting it leave to amend its complaint and (2) extending its time to serve defendant Viktor Kozeny. Defendant Landlocked Shipping Company (Landlocked) opposes the motion.

Under CPLR 3025(b), permission to amend a pleading, or to supplement it by setting forth additional or subsequent transactions or occurrences, "shall be freely given upon such terms as may be just." In determining whether to permit amendment, the court considers whether there will be prejudice or surprise to the opposing party. Prejudice means that the party opposing the amendment has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position. (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981]). In addition, a plaintiff seeking to amend is required to make an evidentiary showing that the new claim to be asserted can be supported. (*JP Morgan Chase Bank, N.A. v Low Cost Bearings N.Y. Inc.*, 107 AD3d 643, 644 [1<sup>st</sup> Dept 2013]).

Here plaintiff does not seek to assert any new cause of action. Instead, it shows that a significant new fact has developed since the filing of the original complaint: the High Court in Prague, Czech Republic, revoked the original judgment on

which this action was predicated and issued a revised judgment. Without more, this would constitute a sufficient evidentiary basis for the proposed amendment. In addition, plaintiff seeks to add facts to support its existing causes of action. Landlocked does not claim that these allegations constitute a surprise or otherwise are improper.

Contrary to Landlocked's assertion, its need for discovery does not constitute substantial prejudice. (*Forty Cent. Park South, Inc. v Anza*, 130 AD3d 491 [1<sup>st</sup> Dept 2015]). Indeed, notwithstanding the age of this case, the preliminary conference was not held until April 1, 2015, and the deadline for filing a note of issue is not until May 15, 2016. In the circumstances, Landlocked can hardly claim that permitting the amendment would preclude it from obtaining discovery. Accordingly, so much of the motion as seeks to amend the complaint is granted.

"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, 495 [1<sup>st</sup> Dept 2012][citation omitted]). As the Court of Appeals has confirmed, the "good cause" and "interest of justice" prongs of the section constitute separate grounds for extensions, and are defined by separate criteria. (*Id.*).

A good cause extension requires a showing of reasonable diligence in attempting to effect service upon a defendant. Good cause is likely to be found where the plaintiff's failure to timely serve process is a result of circumstances beyond its control, such as difficulties with service abroad through the Hague Convention. (*Id.*, citing *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 32 [2d Dept 2009]). Here, however, while plaintiff alleges that it will have to serve defendant Kozeny via the Hague Convention, it fails to allege that it has made any efforts since it commenced this action in 2012 to serve him. Accordingly, this case does not qualify for an extension under the "good cause" exception. (*Mead v Singleman*, 24 AD3d 1142, 1144 [3<sup>rd</sup> Dept 2005]).

Under the "interest of justice" prong of CPLR 306-b, a court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor..., 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." (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]).

Here, as noted, plaintiff has made no effort to serve Kozeny

with process, but this is only one factor to be considered on an interest of justice analysis. (*Id.*; *Sutter v Reyes*, 60 AD3d 448, 449 [1<sup>st</sup> Dept 2009]). Moreover, notwithstanding plaintiff's change of counsel, plaintiff's request for the extension of time to serve Kozeny comes almost three years after it commenced this action.

Nevertheless, there are factors which support an interest of justice extension. This action seeks to enforce a foreign judgment entered in 2010, for which the statute of limitations is twenty years (CPLR § 211(b)). Were the court to deny the motion, plaintiff could commence a new action against Kozeny and, as Landlocked concedes, seek consolidation with the instant case.

As to the merits of the action, Landlocked's arguments for denial of enforcement of the foreign judgment as against its co-defendant, Kozeny, are just that, unsupported by affidavit or other proof. Finally, given its own delay in seeking discovery, Landlocked fails to demonstrate prejudice either to itself or to Kozeny from plaintiff's delay. Accordingly, the court finds as a matter of its discretion that plaintiff is entitled to an extension of time in which to serve Kozeny with process in the interest of justice. (*Sutter v Reyes*, 60 AD3d at 449). It is therefore

ORDERED that plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon defendant Landlocked Shipping Company upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendant Landlocked Shipping Company shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the motion for an extension of time to serve defendant Viktor Kozeny is granted, and the time to serve defendant Viktor Kozeny is extended to and including December 6, 2015.

This constitutes the decision and order of the Court.

Dated: September 2, 2015

  
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Ellen M. Coin, A.J.S.C.

Non-final disposition