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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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SAMUEL ROBINSON,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW NEW YORK, INC., and OSMOSE, INC.

Defendants.

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Index No. 151840/2015

DECISION AND ORDER

Motion Sequence 001

CAROL R. EDMEAD, J.

This is a personal injury action commenced on February 24, 2015, but not served until August 17, 2015, 54 days after the 120-day service deadline had expired. Defendant Osmose, Inc. ("Osmose") therefore moves for dismissal pursuant to CPLR 3211 (lack of jurisdiction) and CPLR 306-b. Plaintiff cross-moves for an extension of time to serve process for good cause shown and/or in the interest of justice.

Background Facts

On June 6, 2012, Plaintiff Samuel Robinson allegedly sustained personal injuries when he was affixing posters to a telephone pole on Osmose's property that gave way when the ground underneath it collapsed.[1] On February 24, 2015, Plaintiff commenced this action by filing a Summons and Complaint, which was served on Osmose on August 17, 2015. Osmose filed its Answer on September 25, 2015, asserting lack of timely service as a defense.[2]

The parties do not dispute the dates of filing or service. Osmose requests dismissal of Plaintiff's Complaint based on Plaintiff's failure to timely serve the Complaint and inability to

[1] The stated basis of venue is Defendant Con Edison's place of business (*Osmose Exh A*).

[2] Con Edison filed its Answer on September 4, 2015 (*ECF* 2) and takes no position on these motions.

demonstrate any entitlement to an extension of such time to serve.

Plaintiff's cross-motion argues that the Court should allow an extension of time, in the interest of justice, to serve process because the statute of limitations has run, meaning that Plaintiff would not be able to re-file upon dismissal; because there would be no prejudice to Osmose due to the relatively short service delay (of 54 days); because there is no prejudice to Osmose in its defense of this action; and because Plaintiff has a viable negligence claim. Plaintiff also argues that good cause for an extension exists because counsel intended to make a diligent and timely effort at service, but was hampered by law office failure caused by the office's pending partnership dispute.

Discussion

CPLR 306-b provides, as relevant herein:

> "Service of the summons and complaint, summons with notice, . . . shall be made within one hundred twenty days after the filing of the summons and complaint, summons with notice . . . . If service is not made upon a defendant within the time period 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"
> (*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]).

After the statute of limitations has expired, a court's only options on a motion to dismiss for improper service of process are outright dismissal or granting a cross-motion for an extension of time to serve process pursuant to CPLR 306-b "upon good cause shown or in the interest of justice" (*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]; *De Vries v Metro. Tr. Auth.*, 11 AD3d 312, 313 [1st Dept 2004]; *see Leader*, 97 NY2d at 101, 736 NYS2d 291, 761 NE2d 1018; *Matter of Richards v. Office of the N.Y. State Comptroller*, 88 AD3d 1049, 1050, 930 NYS2d 501 [3d Dept 2011]).

The "good cause" and "interest of justice" branches of CPLR 306-b, which contemplate separate grounds for an extension of time to serve process and are therefore defined by separate criteria. First, good cause requires a threshold showing that the plaintiff made reasonably diligent efforts to make timely service (*see Leader*, 97 NY2d at 104, 736 NYS2d at 296-97, 761 NE2d at 1023-24)). Here, the Court disagrees with Plaintiff's only argument on this issue: that Plaintiff's "full intention" to serve Osmose constitutes good cause. Such efforts, in addition to intent, are more relevant to demonstrating that an extension is warranted in the interest of justice, which is discussed below.

For example, in *Johnson v. Concourse Village, Inc.*, the court did not find good cause, even where service had been arranged with eight days remaining out of 120-day period and service occurred on 121st day, because diligent efforts were not demonstrated despite the statute of limitations having already passed (69 AD3d 410, 892 NYS2d 358 (1st Dept 2010), *lv denied* 15 NY3d 707, 909 NYS2d 21, 935 NE2d 813; *compare Greco v. Renegades, Inc.*, 307 AD2d 711, 761 NYS2d 426 [4th Dept 2003] [demonstrated difficulty in serving defendant, a member of the military, is good cause]). In the absence of any documented, good faith attempts at service by Plaintiff – indeed, Plaintiff concedes that none occurred because of complications surrounding a law office partnership dispute – good cause has not been demonstrated.

By contrast, the "interest of justice" is a broader and more forgiving standard that requires a balance of the competing interests and may consider any relevant factors including "diligence, or lack thereof, . . . expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause

of action, the length of delay in service,[3] the promptness of a plaintiff's request for the extension of time, and prejudice to defendant[s]" (*Leader*, 97 NY2d at 105--106).

Here, most substantive factors weigh in favor of Plaintiff. First, Osmose was not prejudiced. This is evidenced by the relatively short length of the delay, the fact that Osmose may have been aware of the potential claim through multiple, certified demand letters sent in July and August of 2014 (*see Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept 2011])[4], and because discovery, to some degree, has been exchanged (*Osmose Exhs C, D*; *see Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012]).

Second, construing the complaint in the light most favorable to plaintiff, as is required on consideration of a CPLR 3211 motion to dismiss (*id.*), plaintiff alleges actions and omissions by Osmose that support viable claims for recovery: negligence that resulted in the ground collapsing and injuring Plaintiff seriously (*see, e.g., Nicodene v. Byblos Restaurant, Inc.* 98 AD3d 445, 949 NYS2d 684 [1st Dept 2012] [extension granted in interest of justice where merit of personal injury plaintiff's cause of action was demonstrated by affidavit and defendant would not be prejudiced]).

Third, and perhaps most importantly, dismissal would forever close the courthouse door

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[3] To the extent that Plaintiff argues that his motion is timely, he is technically correct as caselaw holds that until a judgment of dismissal is entered, there exists a pending action in which a plaintiff may move pursuant to CPLR 306-b for permission to make late service (*Cooke-Garrett v. Hoque*, 2013, 109 AD3d 457, 970 NYS2d 81 [2d Dept 2013] *citing* CPLR 5011; *see generally* Siegel, NY Prac § 409 [5th ed]). However, this rule merely represents the outer limit, so to speak, of when a motion to extend time to serve process may be made.

[4] To the extent that Plaintiff attaches new evidence to its reply, the Court will consider it because of our courts' stated preference for deciding cases on the merits where possible (Henneberry v Borstein, 91 AD3d 493, 497 [1st Dept 2012]), and because the evidence augments and/or clarifies central arguments made in Plaintiff's original cross-motion. For example, Plaintiff's affidavit corrects paragraph 28 of his counsel's affirmation in support and confirms that the location in question is the same one referenced in the Complaint.

to Plaintiff (*see Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept 2011]). Even considering only the evidence presented in Plaintiff's initial cross-motion, this factor, the relatively short delay, and a lack of demonstrated prejudice militate in favor of forgiving the delayed service.

Conversely, the factors weighing in Osmose's favor relate mostly to time: Plaintiff's relative lack of diligence in attempting service within the 120-day period, the delay in serving the complaint after the 120 day period had passed, and the delay in filing its motion to extend time. The cases cited by Osmose generally discuss more egregious delays than the one found here, or are otherwise distinguishable (*see, e.g.*, *Redman v S. Is. Orthopaedic Group, P.C.*, 78 AD3d 1147, 1148 [2d Dept 2010] [one-year delay]; *Riccio v Ghulam*, 29 AD3d 558, 559 [2d Dept 2006] [service never attempted]; *accord Shelkowitz v Rainess,* 57 AD3d 337, 869 NYS2d 87 [1st Dept 2008] [extension unwarranted where requested 20 months after action was filed]; *Okoh v Bunis*, 48 AD3d 357, 357 [1st Dept 2008] [14 month delay]; *Hine v Bambara*, 66 AD3d 1192, 1193 [3d Dept 2009] [Plaintiffs did not request an extension of time until six months after the 120-day period expired and after defendants had moved for dismissal, and meritorious cause of action not established by unsigned, unsworn medical report]; *compare Solano v Mendez*, 114 AD3d 614 [1st Dept 2014] [no prejudice to defendants when cross-motion served four months after the 120–day period had expired]; *Goldstein v Columbia Presbyt. Med. Ctr.*, 1 AD3d 188, 188 [1st Dept 2003, Sullivan, J., concurring] [statute of limitations expired 8 months before statute of limitations expired on wrongful death claim]).

One case, in particular, merits further discussion to illustrate the Court's reasoning here: *Johnson*, 69 AD3d at 411, discussed above under the "good cause" prong, also found that the

"interest of justice" standard was not satisfied. This was due in part to the plaintiff's lack of diligence in filing both the complaint and its request for an extension of time in the face of an imminent statute of limitations (*id.*). Here, *Johnson* is distinguishable because the Appellate Division also weighed that action's lack of merit, vague allegations of injury, and lack of *any* notice (*id.*).

By contrast, Plaintiff makes specific allegations supported by medical records and other evidence, and provided certified notice of a potential claim to the same address where Osmose accepted service (*Pl Reply, Exhs A-D*).[5] These submissions demonstrate merit and lack of prejudice to Osmose, and are therefore particularly significant given our courts' preference for deciding matters on their merits (*Henneberry*, 91 AD3d 493 at 497 [1st Dept 2012]; *see also Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009] [interest of justice excused where notice of claim had provided municipal defendant with notice of occurrence, theory of recovery, and claimed injuries]; *Frank v Garcia*, 84 AD3d 654, 655 [1st Dept 2011] [motion to extend granted despite motion having been filed almost one year after the date of process server's affidavit]. Accordingly, Plaintiff has demonstrated that an extension of time to serve should be granted in the interest of justice. Given that the parties do not dispute that service on Osmose occurred on August 17, 2015, such service is deemed timely, *nunc pro tunc*.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Defendant Osmose's motion to dismiss this action pursuant to CPLR

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[5] The Court notes, however, that inasmuch as it appears that Plaintiff's medical records are not properly redacted (*Pl Reply, Exh C*, p. 3), and Plaintiff shall comply with (22 NYCRR 202.5[e][1][ii]; [2]).

306-b and 3211 is hereby denied; and it is further

ORDERED that Plaintiff Samuel Robinson's cross-motion to extend time pursuant to CPLR 306-b is hereby granted, in the interest of justice, and Plaintiff's service of the Complaint upon Defendant Osmose is deemed timely, *nunc pro tunc*; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 22, 2016, 2:30 p.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the Order and Decision of the Court.

Dated: February 9, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.