

Taylor v Simone
2016 NY Slip Op 31272(U)
June 30, 2016
Supreme Court, New York County
Docket Number: 805427-2014
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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ARNOLD TAYLOR and RENEE TAYLOR,

Plaintiff,

Index No. 805427-2014

-against-

DECISION/ORDER

Motion Sequence 001

MARIA VALERIA SIMONE, M.D., TRACEY D.
ARNELL, M.D., ALODIA ASHENDA GABRE-KIDAN,
M.D., IN-KYONG KIM, M.D., MELISSA B. BAGLOO,
M.D., ALEX ORTEGA, M.D., JESSICA A. COOKSEY,
M.D., SWETA R. PATEL, PA-C, THE NEW YORK AND
PRESBYTERIAN HOSPITAL, JOHN DOE DEFENDANT
MDS 1-10 and JANE DOE R.N. DEFENDANTS 1-10,

Defendants.

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HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Amended Notice of Motion, Affirmation & Collective Exhibits Annexed.....	<u>1, 2, 3</u>
Notice of Cross-Motion, Affirmation & Collective Exhibits Annexed.....	<u>4, 5, 6</u>
Affirmation in Opposition to Cross-Motion and In Further Support of Motion...	<u>7</u>

In this medical malpractice action, defendant Jessica A. Cooksey, M.D. (Cooksey) moves by amended notice of motion dated November 6, 2015 for an order dismissing the complaint of plaintiffs Arnold Taylor and Renee Taylor (plaintiffs) pursuant to CPLR § 306-b for plaintiffs failure to serve her within 120 days of the filing of plaintiffs' amended summons and verified complaint. Alternatively, Cooksey moves to dismiss the complaint as barred by the statute of limitations. Plaintiffs oppose the motion and cross-move for an order deeming Cooksey properly served or, in the alternative, granting them an extension of time pursuant to CPLR § 306-b for service nunc pro tunc as of January 30, 2015.

Plaintiffs commenced this action by filing a summons and verified complaint on November 17, 2014. Cooksey was not served with the summons and verified complaint. Plaintiffs filed an amended summons and verified complaint on January 30, 2015 which,

according to plaintiffs' affidavit of service, were served upon Cooksey on October 5, 2015. CPLR § 306-b provides that service of a summons and complaint shall be made within 120 days of filing the complaint with the clerk of the court. Plaintiffs, therefore, had until May 30, 2015 to effectuate service of the amended summons and verified complaint upon Cooksey. If, as here, service is not made within the 120 day time frame, a party's time to serve may be extended "upon good cause shown or in the interest of justice" (*see* CPLR § 306-b). "Good cause shown" and the "interest of justice" are separate and distinct standards for an extension of time (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 761 NE2d 1018, 736 NYS2d 291 [2001]; *Matthews v St. Vincent's Hosp. & Med. Cent.*, 303 AD2d 327 [1st Dept 2003]). The legislative history indicates that the interest of justice standard is a broader standard designed "to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant" (Report of Commercial and Fed Litig Section Comm on CPLR, Bill Jacket, L 1997, ch 476, at 14). As explained by the Court of Appeals, "[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" (*Leader* at 105). Thus, a court "may 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 105-106). No single factor is determinative. To establish the requisite good cause, reasonable diligence in attempting service must be shown (*Spath v Zack*, 36 AD3d 410 [1st Dept 2007]).

An extension of time for service is not warranted under the "interest of justice" prong of CPLR § 306-b. Plaintiffs did not make a request for an extension of time until approximately one year after the filing of the amended summons and verified complaint when plaintiffs cross-moved for such relief in response to Cooksey's motion to dismiss (*see Shelkowitz v Rainess*, 57 AD3d 337 [1st Dept 2008]). Plaintiffs nearly 12 month delay in seeking an extension of time also undermines the "good cause" argument in support of their extension request (*see Johnson v Concourse Vil., Inc.*, 69 AD3d 410 [1st Dept 2010]). Moreover, there is no evidence, other than plaintiffs' counsel's conclusory assertion, that Cooksey's employment with the University of Chicago since 2011¹ was not readily ascertainable and plaintiffs' single attempt to serve Cooksey at 622 W. 168th Street, New York, New York on an unspecified date is not supported by an affidavit from a process server and does not establish reasonable diligence on the part of plaintiffs in attempting to effect service (*id.*; *Redman v South Is. Orthopaedic Group, P.C.*, 78 AD3d 1147 [2d Dept 2010]). Plaintiffs have also failed to submit competent medical evidence establishing that their action against Cooksey has merit (*Posada v Pelaez*, 37 AD3d 168 [1st Dept 2007]). In light of plaintiffs lack of due diligence and the long delay in notifying Cooksey of the action, which has caused her substantial prejudice, an extension of time is unwarranted and plaintiffs' action against Cooksey must be dismissed (*Ekbatani v Rockefeller Ctr. Props.*, 300 AD3d 347 [1st Dept 2006]).

Plaintiffs' cross-motion for an order that Cooksey was properly served pursuant to CPLR

¹ Cooksey avers that she moved to Chicago in 2015 when she began her employment with the University of Chicago Medical Center.

§ 308 [2] is also denied as plaintiffs have not submitted an affidavit of service supporting their claim that Cooksey was served with the amended summons and verified complaint on January 30, 2015.

In accordance with the foregoing, it is hereby

ORDERED that defendant Jessica Cooksey, M.D.'s motion to dismiss is granted and the complaint against her is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
ARNOLD TAYLOR and RENEE TAYLOR,

Plaintiff,

Index No. 805427-2014

-against-

MARIA VALERIA SIMONE, M.D., TRACEY D.
ARNELL, M.D., ALODIA ASHENDA GABRE-KIDAN,
M.D., IN-KYONG KIM, M.D., MELISSA B. BAGLOO,
M.D., ALEX ORTEGA, M.D., SWETA R. PATEL, PA-C,
THE NEW YORK AND PRESBYTERIAN HOSPITAL,
JOHN DOE DEFENDANT MDS 1-10 and
JANE DOE R.N. DEFENDANTS 1-10,

Defendants.

-----X

and it is further

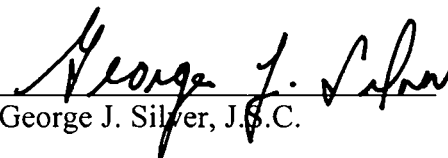
ORDERED that moving defendant is to serve a copy of this order with notice of entry upon the County Clerk (60 Centre St., Room 141B) and the Clerk of the Trial Support Office (60 Centre St., Room 158) who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that plaintiffs' cross-motion is denied; and it is further

ORDERED that moving defendant is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties are to appear for a status conference on October 19, 2016 at 2:30 p.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007..

Dated: 6/30/16
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER