

Country-Wide Ins. Co. v Shi Zhang Chan

2016 NY Slip Op 32151(U)

October 18, 2016

Supreme Court, New York County

Docket Number: 161528/14

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 161528/14
Mot. Seq. No. 001

SHI ZHANG CHAN

("Eligible Injured Party Defendant"),

And

A.C. MEDICAL P.C., VITAL CHIROPRACTIC,
MINGMEN ACUPUNCTURE SERVICES P.C., SP
ORTHOTIC SURGICAL & MEDICAL SUPPLY INC.,
KAPPA MEDICAL, P.C., and METROPOLITAN
MEDICAL & SURGICAL, P.C.,

("Medical Provider Defendants"),

Defendant(s).

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVIT ANNEXED	1-2 (Exs. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Country-Wide Insurance Company moves, pursuant to CPLR 306-b, a) to deem service of its summons and complaint on defendants Shi Zhang Chan ("Chan"), A.C. Medical P.C. ("A.C. Medical"), Vital Chiropractic ("Vital"), and Mingmen Acupuncture Services P.C. ("Mingmen") as timely, *nunc pro tunc*; or, in the alternative; b) granting

plaintiff an extension of the 120-day period in which to serve the aforementioned defendants with the summons and verified complaint for “good cause”; and c) for such other and further relief as this Court deems just and proper. After a review of plaintiff’s papers and the relevant statutes and case law, plaintiff’s motion, which is unopposed, is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the captioned declaration judgment action, arising from a motor vehicle accident on May 17, 2014, by filing a summons and verified complaint on November 19, 2014. Ex. A. On December 19, 2014, the paralegal for plaintiff’s counsel provided a process server with the summons and verified complaint so that those documents could be served on defendants. Ex. C. Thereafter, plaintiff purported to serve defendants with process and filed the affidavits of service with this Court on April 30, 2015. Ex. D.

On December 30, 2014, defendant Mingmen was purportedly served by mail. Ex. D.

On February 4, 2015, defendant A.C. Medical was purportedly served by affix and mail service at 10:15 a.m. Ex. D. Prior efforts were made to serve A.C Medical on January 27, 2015 at 3:30 p.m. and on January 31, 2015 at 4:45 p.m. Ex. D.

On February 24, 2015, defendant Chan was purportedly served by affix and mail service at 11:08 a.m. Ex. D. Prior efforts to serve Chan were made on February 4, 2015 at 12:16 p.m. and on February 10, 2015 at 11:14 a.m. Ex. D.

On February 24, 2015, defendant Vital was purportedly served by affix and mail service at 11:23 a.m. Ex. D. Prior efforts were made to serve Vital on February 4, 2015 at 11:46 p.m. and on February 10, 2015 at 11:31 a.m. Ex. D.

Plaintiff now moves, pursuant to CPLR 306-b, to deem service of its summons and complaint on defendants Chan, A.C. Medical, Vital, and Mingmen as timely, *nunc pro tunc* or, in the alternative, for an extension of the 120-day period in which to serve the aforementioned defendants with the summons and verified complaint for “good cause”.

PLAINTIFF’S ARGUMENT:

Plaintiff argues that it is entitled to an extension of time to serve the summons and complaint pursuant to CPLR 306-b for “good cause” because it made a diligent effort to serve defendants Chan, A.C., Vital, and Mingmen within 120 days after the filing of the summons and complaint and it did not receive the affidavits of service back from its process server until it was too late to file them with this Court within the time period set forth in CPLR 308(4). In the alternative, it asserts that it is entitled to an extension pursuant to CPLR 306-b in the interest of justice.

LEGAL CONCLUSIONS:

Pursuant to CPLR 306-b, the summons and complaint must be served within 120 days after the action is commenced (here May 17, 2014). If service is not completed within such time, the court may, upon motion, dismiss the action without prejudice or, in its discretion, grant an extension of time to effectuate service “upon good cause shown or in the interest of justice.” CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 (2001). To obtain a “good cause” extension, a plaintiff must demonstrate reasonable diligence in attempting to serve a defendant. *Id.*, at 104.

Here, it is evident that plaintiff did not demonstrate its entitlement to an extension of time for “good cause” given that it did not demonstrate reasonable diligence in attempting to serve Chan, A.C. Medical, Vital, or Mingmen within 120 days after the filing of the summons and complaint. Initially, since plaintiff cannot serve A.C. Medical or Vital by affix and mail service pursuant to CPLR 308(4) since they are corporations and not natural persons (*see Matter of Wilner v Beddoe*, 102 AD3d 582, 583 [1st Dept 2013]),¹ service upon those entities was a nullity. Service upon Mingmen by mail was similarly defective. There is no indication in the motion that plaintiff made any attempt to serve A.C. Medical, Vital, or Mingmen, each a corporation, by personal delivery to their respective registered agents or to the secretary of state as required by Business Corporation Law §§ 306, 307.

Nor did plaintiff make a reasonable effort to serve Chan, who is a natural person, pursuant to CPLR 308. As noted above, the affidavit of plaintiff’s process server reflects that Chan was purportedly served by affix and mail service on February 24, 2015 at 11:08 a.m. and that prior efforts to serve Chan were made on February 4, 2015 at 12:16 p.m. and on February 10, 2015 at 11:14 a.m. Ex. D. These three attempts to serve Chan “failed to establish that the ‘due diligence’ requirement of CPLR 308(4) was met” since they were made “on weekdays during normal business hours or when it could reasonably have been expected that [Chan] was in transit to or from work (citations omitted).” *Earle v Valente*, 302 AD2d 353 (2d Dept 2003).

Given plaintiff’s failure to establish “good cause” for failing to timely serve the affidavits of service, this Court turns to its alternative argument that it is entitled to an extension of time in the

¹Although neither the caption nor the affidavit in support of the motion refer to Vital as a corporation, the New York State Department of State website lists the said entity as “Vital Chiropractic, P.C.”

interest of justice. Under the “interest of justice” standard, “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.’” *Id.*, quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105-106.

Plaintiff has failed to establish that it is entitled to an extension of time in the interest of justice. As noted above, plaintiff failed to establish reasonable diligence in attempting to serve Chan, A.C. Medical, Vital, or Mingmen within 120 days after the filing of the summons and verified complaint. Since plaintiff’s declaratory judgment claim is not time-barred (see CPLR 214[2]), the Statute of Limitations provides no basis upon which to grant an extension of time in the interest of justice. Further, plaintiff has not submitted any proof upon this motion regarding the merit of its claim.

Plaintiff’s delay in serving the summons and verified complaint is clearly substantial. Although this action was commenced on November 19, 2014, nearly two years ago, Chan, A.C. Medical, Vital, and Mingmen have yet to be served with process. Similarly, plaintiff inexplicably failed to request an extension of time to serve the aforementioned defendants until June of 2016, approximately 19 months after the commencement of the action. *See Shelkowitz v Rainess*, 57 AD3d 337 (1st Dept 2008) (“interest of justice” extension denied where plaintiff did not seek such relief until 20 months after the action was commenced).

Although plaintiff claims that Chan, A.C. Medical, Vital, and Mingmen would not be prejudiced by the granting of its motion since said defendants were already on notice [of the claim] from the denial letter that [it] sent out on August 20, 2014” (Aff. In Supp., at par. 13), no such denial

letter is appended to the motion. Although this Court located the denial letter, dated August 20, 2014, as an exhibit to a motion made in this action by plaintiff under motion sequence 002 (NYSCEF Doc. No. 25), this Court nevertheless declines to grant the relief sought given the extreme delay in service and plaintiff's failure to proffer an acceptable excuse for its delay in moving for an extension of time at this late date.

Therefore, in light of the foregoing, it is hereby:


ORDERED that plaintiff's motion is denied; and it is further,

ORDERED that a preliminary conference is to be held in this matter on November 22, 2016 at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: October 18, 2016

ENTER:



KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT