

Country-Wide Ins. Co. v Garvey
2016 NY Slip Op 32365(U)
December 1, 2016
Supreme Court, New York County
Docket Number: 160907/14
Judge: Kathryn E. Freed
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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-

AMANDA GARVEY

("Eligible Injured Party Defendant"),

And

DOSHI DIAGNOSTIC IMAGING SERVICES P.C.,
INTEGRATED NEUROLOGICAL ASSOCIATES
PLLC, DHD MEDICAL P.C., LS MEDICAL P.C.,
DUNAMIS REHAB PT P.C., DR. BRUCE JACOBSON
DC P.C., MASTER CHENG ACUPUNCTURE P.C. AND
DAMADIAN MRI IN CANARSIE, P.C.

("Medical Provider Defendants"),

Defendant(s).

-----X
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-E)

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 the summons and complaint on defendant Amanda Garvey ("Garvey") as timely *nunc pro tunc* or, in the alternative; b) granting plaintiff a 120-day extension of time to serve the summons and complaint on Garvey 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 **granted to the extent set forth below.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff, an insurance company, claims that it is entitled to a declaration that it is not obligated to reimburse defendants for no-fault benefits allegedly provided to Garvey after she was involved in an automobile accident on April 10, 2014. Ex. A. Plaintiff commenced this action by filing a summons and verified complaint on November 3, 2014. Exs. A and B. On or about November 13, 2014, Quadir McCollum, the paralegal assigned to this matter by plaintiff's counsel, gave the summons and complaint to Atlas Process Servers ("Atlas") so that those documents could be served on defendants. Ex. D. The affidavits of service reflect that service of process was made on all defendants except Garvey within 120 days after the summons and complaint were filed with the court. Ex. E.¹

The affidavit of service relating to Garvey reflects that she was served by "affix and mail" at 327 East 93rd Street, Apt. 1R, Brooklyn, New York 11212 on April 2, 2015, a Saturday, at 10:39 a.m. Ex. E. Prior attempts were made to serve Garvey on March 30, 2015, a Wednesday, at 11:43 a.m., and on December 1, 2014, a Monday, at 1:21 p.m. Id.

Plaintiff now moves, pursuant to CPLR 306-b, a) to deem service of the summons and complaint on Garvey as timely *nunc pro tunc* or, in the alternative; b) granting plaintiff a 120-day

¹Th claim against DHD Medical, P.C. was discontinued by stipulation dated January 21, 2015. Ex. C.

extension of time to serve the summons and complaint on Garvey for “good cause”.

POSITION OF THE PLAINTIFF:

Plaintiff argues that this Court should deem service on Garvey as timely *nunc pro tunc* since it established good cause for the delay in serving the said defendant. Specifically, urges plaintiff, it made a reasonably diligent effort to serve Garvey within 120 days after the filing of the summons and complaint. Plaintiff maintains, in effect, that it demonstrated reasonable diligence by giving the summons and complaint to Atlas to serve on its behalf, but that the process server’s delay caused it to complete service past the 120-day period set forth in CPLR 306-b. Plaintiff’s Aff. In Supp., at pars. 7-8. In the alternative, plaintiff asserts that it be granted a 120-day extension of time in which to serve Garvey with process. Further, plaintiff maintains that, if good cause is not found, then this Court should find that an extension of time to serve Garvey should be granted in the interest of justice.²

LEGAL CONCLUSIONS:

Pursuant to CPLR 306-b, the summons and complaint must be served within 120 days after the action is commenced (here November 3, 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).

²This Court notes that the prayer for relief in the interest of justice is set forth neither in the notice of motion nor in plaintiff’s wherefore clause.

To obtain a “good cause” extension, a plaintiff must demonstrate reasonable diligence in attempting to serve a defendant. *Id.*, at 104. Here, as noted above, plaintiff’s counsel asserts that plaintiff demonstrated reasonable diligence by giving the pleadings to Atlas to serve on its behalf, but that the process server did not do so in a timely fashion. In his affidavit in support of the motion, McCollum states that he gave the summons and complaint to a process server on November 13, 2014. Ex. D, at par. 9. Thus, Atlas was provided with an ample opportunity to timely serve all defendants. Indeed, as established by the affidavits of service (Ex. E), all defendants except Garvey were served with process within 120 days after the filing of the summons and complaint. The purported service on Garvey was made on April 2, 2015, approximately one month after the March 3, 2015 expiration of the 120-day period. Ex. E.

Plaintiff’s request for this Court to deem service on Garvey valid *nunc pro tunc* is denied since such service was never properly effectuated. Specifically, the affidavit of service pertaining to the purported affix and mail service on Garvey (Ex. E) does not specify that such attempt at service was made at Garvey’s “actual place of business, dwelling place or usual place of abode”, as required by CPLR 308 (4). *See Feinstein v Bergner*, 48 NY2d 234, 238-239 (1979). Additionally, although attempts at service were made at different times of day on two weekdays and on a Saturday, there is no indication that the process server made any inquiry with respect to Garvey’s “whereabouts, habits, or schedule or times at home, or place of business. These defects undermine [the] ‘due diligence’ [which must be undertaken before resorting to affix and mail service]. *See County of Nassau v Yohannon*, 34 AD3d 620, *O’Connell v Post*, 27 AD3d 630; *Earle v Valente*, 302 AD2d 353; *Annis v Long*, 298 AD2d 340; *DeShong v Marks*, 144 AD2d 623.” *American States Ins. Co. v Casado*, 2011 N.Y. Misc. LEXIS 2371 (Sup Ct New York County 2011).

However, given that plaintiff has demonstrated reasonably diligent efforts to effectuate service within the 120-day period by providing Atlas with the summons and complaint on November 13, 2014, long before the expiration of the said period, this Court, in its discretion, grants plaintiff's motion, pursuant to CPLR 306-b, to the extent that plaintiff shall have 60 days from the date of entry of this order to serve Garvey with the summons and complaint.

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

ORDERED that the motion by plaintiff Country-Wide Insurance Company is granted to the extent of permitting plaintiff an extension of time, pursuant to CPLR 306-b, to serve defendant Amanda Garvey with the summons and complaint; and it is further,

ORDERED that plaintiff Country-Wide Insurance Company is to serve defendant Amanda Garvey with the summons and complaint within 60 days after the entry of this order; and it is further,

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

Dated: December 1, 2016

ENTER:



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