

**Placek v JAC**

2016 NY Slip Op 33048(U)

June 6, 2016

Supreme Court, Broome County

Docket Number: 2015-0291

Judge: Jeffrey A. Tait

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 8th day of April 2016.

PRESENT: HONORABLE JEFFREY A. TAIT  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

Paulette Placek,

Plaintiff,

**DECISION AND ORDER**

vs.

**Index No. 2015-0291  
RJI No. 2015-0847-C**

JAC d/b/a JAC-Machines d/b/a JAC, Inc., Boston  
and Bake Rite International, Inc.,

Defendants.

APPEARANCES:

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**HON. JEFFREY A. TAIT, J.S.C.**

This matter is before the Court on both the motion of the plaintiff Paulette Placek for an order deeming the defendant JAC d/b/a JAC-Machines d/b/a JAC, Inc., Boston properly served or alternatively granting Ms. Placek additional time to serve JAC and extending her time to respond to the defendant Bake Rite International, Inc.'s discovery demands and the cross motion of JAC to dismiss the complaint with prejudice.

**Background**

The complaint, which was filed in this action on February 4, 2015, alleges Ms. Placek suffered injuries on February 6, 2012 when she was operating a bread slicing machine while working in the bakery department of a local Price Chopper supermarket in Chenango Bridge, NY. It alleges that JAC is the manufacturer of that machine and Bake Rite was the distributor.

The summons and complaint were served on Bake Rite, which served an answer on March 10, 2015 together with discovery demands. When Bake Rite did not receive responses, it sent Ms. Placek's counsel a "good faith" letter requesting such responses. Conferences were subsequently held with the Court, at which plaintiff's difficulty in serving JAC and the lack of discovery responses were discussed. After sending Ms. Placek's counsel a second "good faith" letter on November 3, 2015, Bake Rite moved to compel Ms. Placek to serve responses to its discovery demands and for a conditional order of preclusion should responses not be forthcoming. That motion was heard January 29, 2016. A Conditional Preclusion Order was signed on February 19, 2016 providing 45 days for Ms. Placek's response to the discovery

demands. The Order was filed and notice of entry was served in early March 2016.

JAC asserts that it was not properly served in this action.

The motion was filed on March 8, 2016 and the cross motion was filed on March 31, 2016. Both the motion and cross motion were heard April 8, 2016. Just prior to that time, Ms. Placek served responses to the Bake Rite discovery demands.

### **Law**

Ms. Placek seeks, and JAC opposes, any extension of time to serve the complaint in this matter. JAC seeks dismissal of the complaint.

CPLR §306-b allows the Court to extend the time to serve a defendant beyond the 120 days provided upon good cause shown or in the interest of justice. In order to timely serve the defendants in this case, service should have been made by June 4, 2015 (i.e., 120 days after the February 4, 2015 filing date).

It has been established that “reasonable diligence in attempting to effect service” is required to establish good cause for an extension to effect service. Reasonable diligence is not required to establish entitlement to an extension “in the interest of justice.”

The 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. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the 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.

*(Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106 [2001]).*

Failure to timely serve within the 120 days was excused in the interest of justice where “service was attempted several times, albeit ineffectively” and the “plaintiff moved for an extension before the 120-day time period expired, which may be seen as an indication of diligence” (*Mead v. Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]). The Court noted that “[P]ublic policy favors resolution of cases on the merits” (*id.*). Expiration of the statute of limitations does not establish prejudice to the defendant (*Dujany v. Gould*, 63 AD3d 1496, 1498 [3d Dept 2009]).

Even where there is a clear lack of diligence, an extension of time for service may be granted. For example, it was not an abuse of discretion to extend the time for service where there was a “demonstration of merit, the expiration of the statute of limitations and, given plaintiff’s communication and cooperation with defendant’s insurance carrier well prior to the commencement of the action, the lack of any prejudice to defendant” (*Heath v. Normile*, 131 AD3d 754, 756 [3d Dept 2015]). In that case, even the plaintiff’s failure to file a formal cross motion was not fatal to the request for an extension of time for service (*see id.*). The time for service was extended in the interests of justice where “[P]laintiff timely purported to serve defendant in a manner (now determined to be defective) that was approved by Supreme Court, the statute of limitations ha[d] run and defendant was not prejudiced because he actually received notice of the action” (*Wishni v. Taylor*, 75 AD3d 747, 749 [3d Dept 2010]).

On the other hand, it was not an abuse of discretion to dismiss the complaint based on improper and untimely service where it “was neither filed nor provided to the Sheriff for service . . . until one day before the time expired, and defendants were not served until seven to nine days thereafter” and there was no indication of any earlier attempts at service and no

explanation for the delay (*Hine v. Bambara*, 66 AD3d 1192, 1193 [3d Dept 2009]). The Court also noted that the plaintiffs did not request an extension of time for service until six months after the 120-day period expired and after defendants moved for dismissal (*see id.*).

Ms. Placek also seeks, and Bake Rite opposes, an extension of time for service of responses to Bake Rite's discovery demands subject to the conditional order of preclusion.

Even where a conditional order of preclusion has been granted, a further extension may be warranted (*Cohen v. Cohen*, 228 AD2d 961 [3d Dept 1996] [where time to serve responses had been extended despite issuance of a conditional order of preclusion]; *see also Callanan Rd. Improvement Co., Inc. v. State of New York*, 54 AD2d 1024 [3d Dept 1976] [extension of conditional order of preclusion was not an abuse of discretion]).

### **Arguments of the Parties and Analysis**

#### **Extension of time to serve the complaint**

It appears that plaintiff's counsel first attempted to serve the summons and complaint on JAC in February 2015 via personal service by mail pursuant to CPLR 312-a, but JAC did not complete the acknowledgment of service form or deliver it to the plaintiff's counsel. Plaintiff's counsel made a second attempt at service through the secretary of state and by registered mail in September 2015.

In his affirmation, plaintiff's counsel states he was not aware that JAC had not been properly served until Bake Rite served its motion to compel and summarizes the circumstances in that regard. He also points out that JAC has been copied on correspondence and documents in this action beginning as early as April 2015 and that the allegedly defective bread slicer JAC

manufactured was returned to JAC in March 2012.<sup>1</sup> He contends JAC was aware of the injury shortly after it occurred and knew this litigation was in progress and therefore would not be surprised or prejudiced by this action.

JAC's counsel acknowledges knowledge of plaintiff's attempts to serve it, but points out that it was never properly served and the time in which to do so expired on June 4, 2015. JAC asserts that the statute of limitations has now expired and asks that the Court dismiss the complaint against it with prejudice.

On this record, it appears that JAC was aware of the allegedly defective bread slicer within a month of Ms. Placek's injury and of the pendency of this action shortly after it was commenced. In light of that, the prior attempts at service, the expiration of the statute of limitations, the lack of any prejudice to JAC, and the preference for resolving cases on the merits, the motion for an extension of time to serve JAC is granted in the interest of justice. Ms. Placek shall have until June 27, 2016 to effect proper service of the summons and complaint on JAC.

#### **Extension of time for discovery responses**

Plaintiff's counsel seeks an additional 60-90 day period for service of responses to the discovery demands subject to the conditional order of preclusion in order to have all parties participate in discovery. He argue that Ms. Placek cannot respond meaningfully to Bake Rite's discovery demands and interrogatories without discovery from JAC.

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<sup>1</sup> Plaintiff's counsel also asserts that all similar machines were removed from all Price Chopper locations within days of the injury.

Bake Rite opposes the request, asserting that its demands seek a variety of information, including photographs, statements, medical and speaking authorizations, and lists of Ms. Placek's providers and claimed injuries.

As Bake Rite's counsel correctly points out, the CPLR does not require a party to produce discovery which is not in its possession (*see Barber v. BPS Venture, Inc.*, 31 AD3d 897 [3d Dept 2006]). Accordingly, the lack of discovery from JAC provides no basis or reason to delay responding to Bake Rite's demands. Rather, Ms. Placek shall respond to Bake Rite's discovery demands and interrogatories based on the information known to her and the documents she does have within her possession, custody, or control (*see CPLR 3120[1][i]*).

Given the case law which permits the further extension of time even where a conditional order of preclusion has been granted and the preference for deciding cases on the merits, the motion to extend the time to serve responses to Bake Rite's discovery demands is granted and the time to serve responses is extended to June 27, 2016.<sup>2</sup>

### **Conclusion**

The motion for an extension of time to serve JAC is granted and Ms. Placek shall have until June 27, 2016 to effect proper service of the summons and complaint on JAC.

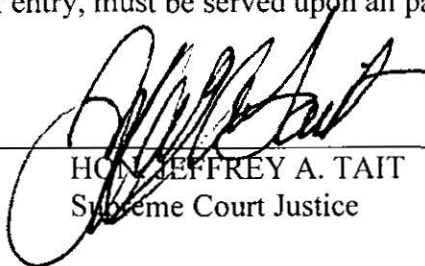
The motion to extend the time under the conditional order of preclusion to serve responses to Bake Rite's discovery demands is granted and the time to serve responses is extended to June 27, 2016.

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<sup>2</sup> As noted previously, there were indications that Ms. Placek served responses to the Bake Rite discovery demands at the beginning of April 2016, so that the extension to June 27, 2016 may not be needed. However, to the extent that the timeliness of such responses remained in dispute, this resolves that issue.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: June 6, 2016  
Binghamton, New York



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HON. JEFFREY A. TAIT  
Supreme Court Justice

**FILED**  
JUN 08 2016  
BROOME COUNTY CLERK