

Hussein v Moline

2016 NY Slip Op 33201(U)

March 31, 2016

Supreme Court, Bronx County

Docket Number: Index No. 23533/2015E

Judge: Douglas E. McKeon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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AMINATU HUSSEIN and GODFRIED BRENYA,

Plaintiff(s)

- against -

INDEX NO: 23533/2015E

CLELIA MOLINE, M.D., MERCY OBSTETRICS
AND GYNECOLOGY, P.C., MONTEFIORE
MEDICAL CENTER and QUEST DIAGNOSTICS
INCORPORATED,

DECISION/ORDER

Defendant(s)

-----X
HON. DOUGLAS E. MCKEON

Motion by defendant, Clelia Moline, M.D., for an order dismissing the claims against her for lack of personal jurisdiction and amending the caption to remove her name from it, and cross-motion by plaintiff for an order deeming the affidavits of service in this matter timely filed, *nun pro tunc*, or, in the alternative, extending plaintiff's time to serve movant pursuant to CPLR § 306-b are decided as follows.

Plaintiff failed to properly serve movant with two copies of the Summons and Complaint. Plaintiffs also failed to file an affidavit of service. Plaintiffs have now run out of time to properly serve Dr. Moline in this matter. As such, the action was not properly commenced and jurisdiction never obtained. In opposition, plaintiffs argue that the motion should be denied because movant has failed to raise a triable issue

of fact sufficient to counter the statements in the affidavit of service that she was properly served. They further argue that jurisdiction attaches because the delivery and mailing requirements were satisfied and the requirement that proof of service be filed with the Clerk of the Court is merely a step in making service complete and failure to do so is a mere irregularity which should not result in dismissal of the action.

Plaintiff has demonstrated that a copy of the Summons and Complaint was delivered to defendant's actual place of business where service was accepted by an individual who indicated she was authorized to accept on behalf of movant. This is demonstrated by the affidavit of service executed by plaintiff's process server. A second copy was mailed via first-class mail which is also attested to by the process server. Defendant's claim that she did not receive the follow-up mailing is irrelevant as the CPLR does not impose a requirement that the defendant receive the mailed copy. Plaintiff filed the affidavit of service on October 26th and argues that although this was filed outside the 20 day window set forth in CPLR § 308(2), this error is a mere irregularity and not permissible grounds for dismissal.

Movant has shown that service upon her was not proper as it was not completed by October 27, 2015. Instead, it was completed on November 6, 2015. Furthermore, plaintiff's affidavit of service should have been filed by August 5, 2015 and it was not despite being on notice of the defect in service as of the filing of Dr. Moline's answer on August 24, 2015. The statute of limitations in the underlying

claim expired before service was completed. Because of this, movant argues that plaintiff's failure to complete service within 120 days and before the expiration of the statute of limitations is a jurisdictional defect.

Movant argues that the compelling fact in this matter is that service of Dr. Moline was not complete until after the time to complete service and after the expiration of the statute of limitations. She argues that it would be prejudicial and vitiate the function of the statute of limitations if plaintiff were permitted to fail to escape the consequences of improperly commencing an action within the statute of limitations.

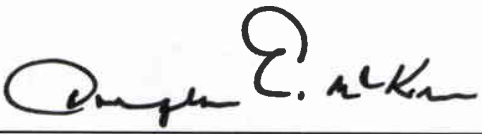
The motion is denied and the cross-motion granted herein. The Court of Appeals holding in Leader v. Maroney 97 NY2d 96 (2001) is similar. There, the Court affirmed the lower Court's decision to grant the plaintiff an extension of time to serve the defendant's pursuant to CPLR § 306-b where plaintiff made such a motion after the expiration of the applicable statute of limitations and after the expiration of the 120 day period to complete service under CPLR § 306-b. The Court noted that the statute had been amended in 1997 to add flexibility so that the filing of proof of service, a ministerial act, would not inappropriately take on jurisdictional significance.

Plaintiff has shown reasonable diligence in serving process upon defendant and the process server timely served her at her actual place of business and timely mailed the second copy to her actual place of business. The affidavit of service was

electronically filed prior to the expiration of the 120 day period. Additionally, the interest of justice support the granting of the relief request herein pursuant to CPLR §306-b as the applicable statute of limitations has expired since the action was commenced.

So ordered.

Dated: 3/31/16



Douglas E. McKeon, J.S.C.