

Rojas v Concannon
2017 NY Slip Op 30409(U)
February 22, 2017
Supreme Court, New York County
Docket Number: 805249/2016
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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MARITZA ROJAS,

Plaintiff,

Index No. 805249/2016

-against-

Decision and Order

EILEEN M. TRAVERS CONCANNON, M.D., DENISE WEST, N.P., ALBERTO D. URENA, M.D., DOSHI DIAGNOSTIC IMAGING SERVICES, P.C., NIGHT AND DAY MEDICAL ASSOCIATES, P.C., and NY HISPANIC FAMILY MEDICAL, P.C.,

Defendants.
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In this medical malpractice action alleging a failure to diagnose breast cancer, co-defendant Eileen M. Travers Concannon (defendant) currently moves to dismiss the case as against her based on failure to timely serve her with the complaint. Plaintiff filed her complaint in the court’s e-filing system on June 16, 2017. Defendant filed her motion papers on December 12, 2016, plaintiff opposed and cross-moved for permission to extend the 120-day period on December 29, 2016, and the motion was fully submitted on January 6, 2017.

To support her motion, defendant submits plaintiff’s affidavit of service showing that on July 22, 2016 the process server delivered the summons and verified complaint to “John” Cruz, the doorman for the building located at 353 East 83rd Street. In her affidavit, however, she explains that her daughter – Eileen M. Concannon – lives at this address, and that she never has lived there, doesn’t know “John” the doorman, and does not accept mail or packages there. Thus, she contends, she has not been served properly. Further, as more than 120 days have passed since the filing of the complaint, she states, it is too late for plaintiff to remedy the situation and the

action against her should be severed and dismissed. She also explains that she is a New York-licensed physician who “read[s] and evaluate[s] charts and imaging generated at various Doshi centers in New York and prepare[s] reports.”

Plaintiff opposes the motion and cross-moves for permission to serve the summons and complaint outside of the 120-day period. She filed her cross-motion on December 29, 2016. According to plaintiff, Doshi Diagnostic Imaging Services, P.C. (Doshi) employed defendant and therefore the two are united in interest and the Court should deem the service to be proper. Plaintiff states that she underwent mammograms and breast ultrasounds at Doshi on August 5, 2011, August 15, 2011, January 15, 2013, February 5, 2013, January 16, 2014, October 7, 2014, January 19, 2015, and January 22, 2015, and that defendant evaluated all of the 2011, 2014, and 2015 studies.

Moreover, plaintiff states there is good cause permitting her to serve under CPLR 306-b. She recounts her efforts to serve defendant. She attempted service on the doctor at her listed place of employment, only to find out that defendant no longer worked there; and tried a New Jersey residence, only to find out that defendant no longer lived there. Plaintiff claims she believed in good faith that she served the correct party until she received this motion. She argues that even though she served defendant’s daughter rather than defendant herself, there is no prejudice because, based on the motion at hand, it is clear that defendant received the papers within the 120-day period for service. She suggests that defendant and her daughter collaborated to keep the improper service a secret from plaintiff until 120 days had passed. Finally, plaintiff says, with respect to the action itself, that defendant misread the studies, thus leading to a failure to diagnose and treat plaintiff’s cancer in a timely fashion.

In reply, defendant states that plaintiff's medical history is irrelevant. She contends that plaintiff's reliance on a "united-in-interest" argument is misplaced. According to defendant, plaintiff's efforts to serve her were far from diligent. She additionally argues that plaintiff's accusations regarding her alleged attempts to avoid timely service are without basis and irrelevant, as neither she nor her daughter had to notify plaintiff that defendant had not been served properly. She concludes that therefore there is no reason the Court should grant the cross-motion and allow plaintiff to perform late service.

Rather than evaluate plaintiff's "united-in-interest" argument, the Court analyzes the cross-motion under CPLR 306-b. This provision holds that, although "a plaintiff must still serve a defendant within 120 days after the filing of the action," if the plaintiff does not serve within this period the action is not dismissed automatically. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 101 (2001). Instead, the statute provides that, upon application, the court may extend the time for service for good cause or in the interest of justice. Id. In considering such applications, courts keep in mind the "strong interest in deciding cases on the merits where possible." Hernandez v. Abdul-Salaam, 93 A.D.3d 522, 522 (1st Dep't 2012). Courts evaluate "good cause" and "interest of justice" separately. Henneberry v. Borstein, 91 A.D.3d 493, 496 (1st Dep't 2012). For good cause, courts look to a party's diligence in attempting to perform service. In addition to diligence, courts consider the merit of the action, the length of the delay, and prejudice, among other factors. Id. The Court has discretion in reaching its determination, Leader, 97 N.Y.2d at 101, and it may weigh and consider the factors accordingly. Nicodene v. Byblos Restaurant, Inc., 98 A.D.3d 445, 446 (1st Dep't 2012).

The Court concludes that an extension is appropriate under both a good cause and an interest of justice analysis. Plaintiff showed good cause, as she made several attempts to serve defendant within the 120-day period. Moreover, she believed that she had been successful based on the fact that the daughter, whom plaintiff improperly served, shares her mother's name. Moreover, plaintiff filed this cross-motion for leave to serve within a few weeks of the time defendant filed her motion to dismiss.

Further, although the Court agrees that plaintiff's insinuations about defendant's alleged schemes have no bearing on the issue, it does find that the interest of justice weighs in plaintiff's favor based on the fact that defendant received a copy of the complaint within the statutory time frame. Defendant is incorrect that plaintiff's recitation of the facts of her claims against defendant are irrelevant, as an interest of justice analysis may include consideration of plaintiff's prima facie case and the judiciary's interest in providing litigants with the opportunity to have their day in court. In addition, as stated, plaintiff's efforts to properly serve defendant within the 120-day period, the delay of around two-and-a-half months between the expiration of that period and her application, militates in favor of plaintiff. Significantly, defendant does not assert that she would be prejudiced by the extension.

The Court has considered all the parties' additional arguments and they do not change the analysis. Moreover, defendant included a copy of the summons and complaint with her motion papers, and plaintiff included the pleadings with her cross-motion. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is granted and the complaint is deemed served upon defendant Eileen M. Travers Concannon; and it is further

ORDERED that defendant shall have thirty days from the date of the filing of this order to answer the complaint; and it is further

ORDERED that all parties shall appear in Part 6, room 690, 60 Centre Street, for a preliminary conference on Tuesday, March 21, 2017, at 2:15 p.m.

Dated: Feb. 22, 2017

ENTER:



JOAN B. LOBIS, J.S.C.