

Country-Wide Ins. Co. v Connolly
2017 NY Slip Op 30489(U)
March 16, 2017
Supreme Court, New York County
Docket Number: 159531/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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COUNTRY-WIDE INSURANCE COMPANY,

Index No. 159531/15

Plaintiff,

Motion seq. no. 001

-against-

DECISION AND ORDER

BRIAN CONNOLLY,

Defendant.

-----X
BARBARA JAFFE, J.:

For plaintiff:

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By notice of motion, plaintiff moves for an order deeming its pleadings timely served *nunc pro tunc*, or pursuant to CPLR 306-b and 308(5) for an order granting it an extension of time to serve defendant using an alternative method of service. Defendant opposes and cross moves for an order dismissing the action for lack of personal jurisdiction. Plaintiff opposes.

I. BACKGROUND

In 2015, the parties engaged in no-fault arbitration by which defendant was awarded \$67,000 in unreimbursed medical expenses, and which a master arbitrator affirmed. During the pendency of those proceedings, by letter addressed to plaintiff dated July 22, 2014, defendant's attorney noted his substitution as counsel and requested that "all future correspondence and communication regarding [defendant's] claim [be] sent to [his firm's] office." (NYSCEF 7).

On September 16, 2015, plaintiff commenced this action pursuant to Insurance Law

§ 5106 seeking a trial *de novo* on defendant's no-fault claim, as the arbitration award exceeded the statutory threshold. (NYSCEF 1).

By affidavit dated October 1, 2015, plaintiff's process server attests that he was unable to serve defendant at his last known address, a homeless shelter, and was informed by "security" that defendant had moved out. (NYSCEF 9-10). On October 14, 2015, plaintiff's process server served the pleadings on the law firm that had represented defendant in the arbitration, identifying in his affidavit one "Natasha" as an agent authorized to accept service of behalf of the "corporation/partnership/trust/LLC described in [the pleadings] as said defendant." (NYSCEF 8).

On August 3, 2016, defendant commenced an article 75 proceeding in this court to confirm the arbitration award. (NYSCEF 18). On September 12, 2016, plaintiff efiled this motion. (NYSCEF 3).

II. CONTENTIONS

Plaintiff alleges that it attempted to serve defendant at his last known address, a homeless shelter, but was advised that he no longer resided there and was not provided a forwarding address. As defense counsel asked that plaintiff send him all correspondence related to the underlying arbitration, and as defendant retained the same counsel to represent him in the article 75 proceeding, plaintiff argues that defendant's attorney is an agent pursuant to CPLR 308(3) who could accept service on his behalf. Alternatively, plaintiff argues that it undertook reasonably diligent efforts to serve defendant, that defense counsel otherwise had notice of the action, and that an extension of time either for good cause or in the interest of justice is warranted. (NYSCEF 4).

In opposition, and in support of his cross motion to dismiss, defendant contends that service was improper and that plaintiff took no further action to ascertain his whereabouts or request leave to serve him by an alternative method, which it belatedly attempts now over a year after commencing the action. Not only did plaintiff not comply with CPLR 308, he argues, it failed to serve him within 90 days of receipt of the arbitration award as required under Insurance Law § 5106. Defendant denies that his attorney became an agent for service simply by representing him in a separate action, and argues that permitting an alternative method of service is inappropriate absent any indication that personal service on defendant was impracticable. He argues that the public policy favoring arbitration outweighs the public policy favoring resolution of disputes on the merits, the latter justifying an extension under CPLR 306-b. Moreover, given plaintiff's participation in the underlying arbitration and appeal, and defendant's article 75 petition, it has had an ample opportunity to litigate the merits of defendant's no-fault claim and thus, in the interest of justice, the action must be dismissed. (NYSCEF 15).

In reply and in opposition to the cross motion, plaintiff alleges that it first commenced this action in the Civil Court, properly served defendant, and that defense counsel filed a pre-answer motion to dismiss. Thus, it maintains that counsel's denial here that he does not represent defendant is disingenuous and prejudicial. It also argues that defendant's article 75 proceeding must be stayed pending resolution of his underlying no-fault claim. (NYSCEF 19).

In reply, defendant claims that absent personal jurisdiction over him, this action does not preclude his article 75 proceeding. (NYSCEF 23).

III. ANALYSIS

A. Service on law firm

One method by which personal service may be effected upon a natural person is by “delivering the summons within the state to the agent for service of the person to be served as designated under rule 318” (CPLR 308[3]). An attorney is not automatically deemed an agent of his or her client for purposes of accepting service on the client’s behalf “absent proof that a defendant has designated his or her attorney as an agent for the acceptance of process.” (*Born To Build, LLC v Saleh*, 139 AD3d 654, 655 [2d Dept 2016]; see *Howard B. Spivak Architect, PC v Zilberman*, 59 AD3d 343, 344 [1st Dept 2009]).

Here, even though defendant retained the same counsel for the underlying arbitration and appeal, the Civil Court action, and the pending article 75 proceeding, and even though counsel offered to accept all correspondence pertaining to defendant’s no-fault claims, absent any indication that defendant designated counsel as an agent authorized to accept service of process on his behalf, plaintiff’s attempt at service on the law firm is ineffective. (See *Matter of Fagelson v McGowan*, 301 AD2d 652, 653 [2d Dept 2003], *lv denied* 100 NY2d 503 [absent evidence that objectors in article 78 proceeding designated their attorney to accept service of process on their behalf, court did not obtain jurisdiction over them]).

B. Extension of time to serve defendant

After commencing an action by filing a summons and complaint, the plaintiff must serve the defendant with the pleadings by any method prescribed under the CPLR within 120 days of the date it commenced the action. (CPLR 306-b). The court may extend the time for service “upon good cause shown or in the interest of justice.” To demonstrate good cause, the plaintiff

must show that it undertook reasonably diligent efforts to serve the defendant. To demonstrate that an extension is warranted in the interest of justice, on the other hand, the court “may consider diligence, or lack thereof,” along with other factors such as the “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]; *Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009]). The determination is committed to the court’s discretion and will not be disturbed even where some factors weigh in favor of an extension, but others do not. (*Petracca v Hudson Tower Owners LLC*, 139 AD3d 518, 519 [1st Dept 2016]).

Here, factors weighing against permitting an extension include: (1) the 90-day statute of limitations to bring an action pursuant to Insurance Law § 5106 has long expired, (2) the merit of plaintiff’s claim is dubious in light of defendant’s prevailing at arbitration and on appeal to the master arbitrator, (3) plaintiff’s delay of almost a year to seek an extension, and (4) plaintiff’s failure to demonstrate that it took further steps to ascertain defendant’s whereabouts after its first and only attempt at serving him. Although defendant is unlikely prejudiced given his attorney’s notice of the action (*see eg Owens v Chhabra*, 72 AD3d 664, 665 [2d Dept 2010] [one factor favoring extension is “fact that the defendant had actual notice of the claim and/or of the action”]), this factor is outweighed by other applicable factors, and thus, under either the “good cause” or “interest of justice” exception, plaintiff fails to justify an extension of time. (*See Druyan v Bd. of Educ. of City Sch. Dist. of City of New York*, 128 AD3d 617, 618 [1st Dept 2015] [affirming denial of request for extension where petitioner did not seek extension until expiration of statute of limitations, provided no excuse for delay, and claim lacked merit]).

As plaintiff is not entitled to an extension, I need not address whether it demonstrates that personal service was impracticable so as to permit an alternative method of service pursuant to CPLR 308(5).

C. Defendant's cross motion

A defendant may move to dismiss an action based on the court's lack of personal jurisdiction. (CPLR 3211[a][8]). To defeat the motion, the plaintiff "need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court" (*Shatara v Ephraim*, 137 AD3d 1248, 1249 [2d Dept 2016]), which is satisfied by "presenting sufficient evidence, though affidavits and relevant documents," demonstrating the court's jurisdiction over the defendant (*Coast to Coast Energy, Inc. v Gasarch*, 146 AD3d 654, 655 [1st Dept 2017]).

Here, plaintiff's affidavit of service, wherein the affiant erroneously describes the law firm as defendant, fails to establish *prima facie* that the court obtained jurisdiction over defendant absent any indication that defendant's attorney and/or law firm was an agent authorized to accept service of process on his behalf. (*See supra*, III.A.). Moreover, plaintiff provides no authority for the proposition that defendant's attorney became the designated agent for accepting service of process based on his representation of defendant in prior and other pending actions.

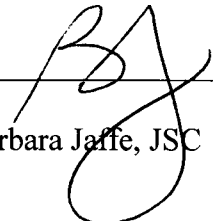
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order deeming service effective *nunc pro tunc*, or alternatively, for an order permitting an extension of time to serve defendant, is denied; and it is further

ORDERED, that defendant's cross motion for an order dismissing the complaint for lack of personal jurisdiction is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment in favor of defendant.

ENTER:



Barbara Jaffe, JSC

DATED: March 16, 2017
New York, New York