

Martinez v Joselins Enter. Corp
2017 NY Slip Op 31332(U)
May 15, 2017
Supreme Court, Queens County
Docket Number: 705594/2014
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

ANA MARTINEZ and NIDIA BONIFACIO,

Index No. 705594/2014

Plaintiff,

Motion

Date: February 28, 2017

-against-

Motion Cal. No. 148

JOSELINS ENTERPRISE CORP, ET. AL.,

Motion Sequence No. 1

Defendants.

FILED
MAY 18 2017
COUNTY CLERK
QUEENS COUNTY

The following e-file papers numbered 4-30 submitted and considered on this pre-answer motion by defendant Joselins Enterprise Corp. for an Order pursuant to CPLR 3211 (a) (8) and the cross-motion of plaintiffs Ana Martinez and Nidia Bonifacio for an Order pursuant to CPLR § 306-b to extend the time to serve defendants.

	Papers <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 4-10
Cross-Motion-Affidavits-Exhibits.....	EF 11-28
Affirmation in Opposition-Affidavits-Exhibits.....	EF 29-30

The motion of defendant Joselins Enterprise Corp. for an Order pursuant to CPLR 3211 (a) (8) is granted and the cross-motion of plaintiffs Ana Martinez and Nidia Bonifacio for an Order pursuant to CPLR § 306-b to extend the time to serve defendants is denied. Plaintiffs' verified complaint is dismissed.

Plaintiffs, Ana Martinez (hereinafter "Martinez") and Nidia Bonifacio (hereinafter "Bonifacio"), filed a summons and verified complaint on August 8, 2014. Martinez alleged that she sustained serious injuries as a result of an accident which occurred on August 9, 2011 when a tractor trailer owned by defendants, Joselins Enterprise Corp. and driven by its unknown driver sued herein as John Doe blocked her vision and caused her to enter into the intersection of 91st Avenue and 138th Street where her vehicle came into contact with a third vehicle. Bonifacio was a passenger in

Martinez' vehicle and she alleged that she also sustained injuries in the aforementioned accident. According to the affidavit of service, defendants were served pursuant to Section 253 of the Vehicle and Traffic Law on October 16, 2014. Plaintiffs' process server, Anderson Chan attested to serving copies of the pleadings on the Secretary of State on October 16, 2014, along with the statutory fee of ten dollars. Plaintiffs did not move for a default judgment.

Joselins now makes this pre-answer application to dismiss the matter pursuant to CPLR 3211 (a) (8), alleging that plaintiffs failed to complete service pursuant to section 253 of the Vehicle and Traffic Law. Joselins alleged that the plaintiffs failed to file a signed return receipt and proof of mailing certificate of ordinary mail. Since plaintiffs alleged that the accident occurred on August 9, 2011, defendants contend that plaintiffs cannot bring the action again because the three year statute of limitations for the actions has elapsed (*see* CPLR §214) and the additional six month extension afforded by CPLR § 205 is not applicable to cases which are dismissed due to lack of personal jurisdiction. Plaintiffs have cross-moved for an Order to extend their time to serve defendants pursuant to CPLR § 306-b.

Service of process pursuant to section 253 of the Vehicle Law provides for service of process for non-resident drivers upon the Secretary of State. The statute provides:

The use or operation in this state of a vehicle owned by a non-resident if so used or operated with his permission, express or implied, shall be deemed equivalent to an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident of collision in which such vehicle may be involved which being used or operated in this state in the business of such non-resident or with the permission, express or implied, of such non-resident owner; and such use or operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state and within the territorial jurisdiction of the court from which the summons issues, and that such appointment of the secretary of state shall be irrevocable and binding upon his executor or administrator. (VTL § 253 [1].)

Pursuant to the statute, service of the summons shall be made by mailing a copy to the secretary of state in Albany, New York or by personally delivering to the secretary of state at one of his established offices with a fee of ten dollars "and such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending ... an affidavit of compliance herewith... service of process shall be complete when such papers are filed." (VTL § 253 [2].)

Here, plaintiff failed to comply with the requirements of Section 253 (2) of the Vehicle and Traffic Law, thus, service of process was not made on the defendant Joselins Enterprise Corp. within the statute of limitations (*Zimmerman v Elsner*, 102 AD2d 707 [1st Dept 1984]).

The Court will turn next to address the merits of plaintiffs' cross-motion for an Order extending the time to serve defendants pursuant to CPLR § 306-b. Plaintiffs admit that the service was not completed against defendant under VTL § 253 and requests additional time to serve defendants under CPLR § 306-b under the interest of justice standard. Pursuant to CPLR § 306-b, if service is not made upon the defendant within the statutory time frame, the court, upon plaintiff's motion must dismiss the action without prejudice, or upon good cause shown or in the interest of justice extend plaintiff's time to serve the defendant.

Plaintiffs alleged that they conducted a search of the New Jersey Business Corporation records which demonstrated that defendant's business had dissolved in 2012. After they served process on the New York Secretary of State on October 16, 2014, a copy of the papers were sent to the defendant's known address by certified mail, however, plaintiffs did not receive the certified mail sent to the defendant returned undeliverable. One month after sending, they received an unsigned return receipt and the first class mailing was never returned. Plaintiffs investigation revealed that the letter was not delivered. In August 2016, plaintiffs petitioned for Uninsured Motorist benefits under plaintiff Ana Martinez policy and the Uninsured Motorist insurer made an application to stay arbitration due to the fact that the vehicles involved in the accident were insured. Plaintiffs later discovered that defendant's vehicle was insured by ARI Insurance Company, and plaintiffs served correspondence upon defendant's insurer. Plaintiffs submissions included photographs of the alleged scene of the accident; police accident report; affidavit of Ana Martinez dated February 1, 2017; various medical records. Plaintiffs seek leave to serve defendant in the interest of justice upon the defendant's insurer, Ari Insurance Company.

In opposition to the cross-motion, plaintiffs contended that an extension of time is not warranted in the interests of justice under CPLR § 306-b because plaintiffs delay in this matter is due to their lack of due diligence and that the defendant is now prejudiced since the applicable statute of limitations will be doubled in effect if the Court grants the cross-motion. Defendant stated that plaintiffs alleged that they were injured on August 9, 2011 and filed the action on August 8, 2014, a day before the statute of limitations expired; plaintiffs conceded that they were not diligent in making this application; that it is prejudiced due to the nearly six years which have passed since the occurrence; that plaintiffs waited almost three years following the expiration of the statute of limitations to make the motion.

Under the interest of justice standard under CPLR § 306-b the Court should make a careful analysis of the facts of the case, balancing the competing interests of the parties. The Court may consider the diligent efforts or lack thereof along with any other relevant factors such as the expiration of the statute of limitations, the merit of the case, the length of the delay in service; promptness of the plaintiff's request and the prejudice to the defendant (*Leader v Maroney*, 97 NY2d


95 [2001]).

Here the Court finds that there is no basis to grant plaintiffs cross-motion seeking an extension of time to serve defendant. Plaintiffs established a pattern of lack of due diligence, which included their failure to move for a default judgment within one year after the purported service (CPLR § 3215) and moreover, without any justification, failed to make this application for an extension of time until after defendant challenged service. (See *Slate v Schiavone Const. Co.*, 4 NY3d 816 [2005]; *Hourie v North-Shore Long Island Jewish Health Sys.*, __AD3d__, 2017 NY Slip 03496 [2d Dept 2017]; *Valentin v Zaltsman*, 39 AD3d 852 [2007]; compare *Bumpus v New York City Transit Authority*, 66 AD3d 26 [2d Dept 2009]; *Peguero v Finnie*, 40 AD3d 945 [2d Dept 2007]; *Spath v Zack*, 36 AD3d 410 [2d Dept 2007].)

Therefore, defendant Joselins Enterprise Corp. motion for an Order pursuant to CPLR 3211 (a) (8) is granted and the cross-motion of plaintiffs Ana Martinez and Nidia Bonifacio for an Order pursuant to CPLR § 306-b to extend the time to serve defendants is denied. Plaintiffs' verified complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: May 15, 2017



Hon. Chereé A. Buggs, J.S.C.

FILED
MAY 16 2017
COUNTY CLERK
QUEENS COUNTY