

Antenor v Nature Med. of N.Y, P.C.
2017 NY Slip Op 33111(U)
December 6, 2017
Supreme Court, Nassau County
Docket Number: 606711/16
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SONIE ANTENOR,

Plaintiff,

- against -

NATURE MEDICAL OF NEW YORK, P.C.,
ARISTOCRAT PLASTIC SURGERY, P.C., KEVIN
TEHRANI, FOREST DAY SPA, LLC and RIDGEWOOD
HEALTH & BEAUTY CENTER, INC.,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 606711/16
Motion Seq. Nos.: 02, 03
Motion Dates: 09/07/17
10/10/17

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 03), Affirmation, Affidavit and Memorandum of Law	2
Affirmation in Opposition to Cross-Motion (Seq. No. 03) and in Reply to Motion (Seq. No. 02) and Exhibits	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Kevin Tehrani, M.D. s/h/a Kevin Tehrani ("Dr. Tehrani") moves (Seq. No. 02), pursuant to CPLR § 3211(a)(8), for an order dismissing the Verified Complaint as against him on the ground that he was never served with process and plaintiff's time to do so has expired.

Plaintiff opposes the motion and cross-moves (Seq. No. 03), pursuant to CPLR § 306-b, for an order extending the time to serve defendant Dr. Tehrani. Defendant Dr. Tehrani opposes

the cross-motion.

Plaintiff commenced this action with the filing of a Summons and Verified Complaint on or about September 1, 2016. *See* Defendant Dr. Tehrani's Affirmation in Support Exhibit A.

In support of the motion (Seq. No. 02), counsel for defendant Dr. Tehrani submits, in pertinent part, that, "[b]ased upon the date the Complaint was filed, and pursuant to C.P.L.R. § 306-b, plaintiff was required to serve process upon the defendants within 120 days of September 1, 2016, or by approximately January 2, 2017. Service of process was purportedly made upon Aristocrat Plastic Surgery, P.C., through the Secretary of State, on or about December 29, 2016.... However, Dr. Tehrani has never been served with process as an individual defendant in this case. An Answer to plaintiff's Complaint was served by your Affirmant on behalf of Aristocrat Plastic Surgery, P.C. ('Aristocrat') on or about January 24, 2017.... An Answer has not been served as to Dr. Tehrani, as plaintiff's Summons & Complaint has never been served upon him. Subsequent to service on behalf of Aristocrat, a motion for summary judgment was made on behalf of Aristocrat. That motion has been granted ..., and Aristocrat is no longer a defendant in the case. In that motion, the Court was advised that Dr. Tehrani had never been served with process, a point never disputed by plaintiff's counsel. Annexed to the motion filed on behalf of Aristocrat was the affidavit of Dr. Tehrani.... Therein, Dr. Tehrani, the director and sole shareholder of Aristocrat Plastic Surgery, P.C., attests that he was never served with process in this action as an individual defendant. There is also no affidavit on file with the Clerk of this Court regarding service upon Dr. Tehrani. Plaintiff's time to serve Dr. Tehrani expired on or about January 2, 2017. As such, there is no pending action against Dr. Tehrani. Moreover, given allegations of negligent medical treatment on March 1, 2014, the 2 ½ year statute of limitations applicable to plaintiff's claims expired on September 1, 2016. As such, plaintiff is precluded from re-filing an action against Dr. Tehrani." *See* Defendant Dr. Tehrani's Affirmation in

Support Exhibits A-E.

In opposition to the motion (Seq. No. 02) and in support of the cross-motion (Seq. No. 03), counsel for plaintiff argues, in pertinent part, that “[o]n April 13, 2017, Kevin Tehrani appeared in this action to move for dismissal of the action pursuant to CPLR 3212 and CPLR 3012-a.... [T]he Court should deny the motion of Dr. Tehrani because he has waived his objections to personal jurisdiction by making an informal appearance to move for dismissal on a basis other than personal jurisdiction.... [T]he Court should grant the Plaintiff additional time to formally serve Dr. Tehrani in the interests of justice because the statute of limitations has expired, the Plaintiff has presented a meritorious cause of action against Dr. Tehrani, and there will be no prejudice to Dr. Tehrani because he has notice of the proceedings and indirectly participated in them for several months.”

Counsel for plaintiff submits that, “[w]hen a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court’s jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court. [citation omitted]. A party informally appears when it seeks relief unrelated to any defect in (*sic*) jurisdictional defect that would necessitate the assumption that jurisdiction has been obtained. [citation omitted].... In the present case, Dr. Tehrani made an informal appearance when he appeared and moved for relief pursuant to CPLR 3212 and CPLR 3012-a. By making this motion he participated on the merits of the action because he was specifically seeking dismissal of the action on its merits. Further, by making a motion for relief that was unrelated to his objection to personal jurisdiction, it is proper for the Court to assume he consented to personal jurisdiction. By joining in the motion of Aristocrat Plastic Surgery, that did not raise any issue of personal jurisdiction, Dr. Tehrani informally appeared and waived his objection.”

As to the request for an extension of time to serve defendant Dr. Tehrani, counsel for plaintiff contends that plaintiff has established a meritorious cause of action and that “there is no prejudice to Dr. Tehrani as he has indirectly participated in this action since the preparation (*sic*) answer for Aristocrat Plastic Surgery by providing information about his business relationships with the Plaintiff and the other defendants. As the sole shareholder of Aristocrat, Dr. Tehrani has been on notice of the action and had an opportunity to prepare his defense since the time Aristocrat received service of process. Lastly, as the statute of limitations for both medical malpractice and negligence causes of actions has expired a dismissal of this action for lack of personal jurisdiction would bar litigation of this matter on its merits.”

In opposition to the cross-motion (Seq. No. 03) and in reply to the motion (Seq. No. 02), counsel for defendant Dr. Tehrani argues, in pertinent part, that, “[p]laintiff’s counsel requests an extension of time to serve Dr. Tehrani pursuant to CPLR § 306-b. That provision requires dismissal of an action, on motion, when the defendant is not served with process within 120 days of the commencement of the action. While the Court may extend the time for service, plaintiff must show either good cause for doing so, or that an extension should be given in the ‘interests of justice.’ Plaintiff’s counsel has failed to demonstrate that either prong applies in this case. In fact, the case law cited by plaintiff’s counsel in his memorandum of law actually mandates that plaintiff’s application must be denied.... Here, plaintiff had never made any attempt to serve Dr. Tehrani, and has failed to offer any excuse as to why service was never attempted. It should be pointed out that, during an appearance before this Court on September 7, 2017, when Dr. Tehrani’s motion for dismissal was originally to be heard, representations were made by plaintiff’s counsel, Mr. Yadgarov, to this Court that Dr. Tehrani had in fact been served with process. This was obviously not true. Setting aside this misrepresentation made to the Court, the procedural history of this case, up to this point, demonstrates that plaintiff has no basis for a ‘good cause’ extension. The treatment at issue occurred on March 1, 2014, 3 ½ years ago. The action was filed electronically on September 1, 2016, the very day the 2 ½ year statute of

limitations applicable to plaintiff's claims of medical malpractice against defendants would have expired.... From that point, plaintiff had 120 days to serve Dr. Tehrani with process. Service of process was not made upon Dr. Tehrani within that timeframe (*sic*). In fact, plaintiff's counsel has not submitted any evidence to this Court that any effort was made to serve Dr. Tehrani, despite the fact that he operated medical offices in both Manhattan and Great Neck, Long Island, New York, and could readily have been located and served. Thereafter, your affirmant's office appeared on behalf of Aristocrat Plastic Surgery, P.C. only ..., and shortly thereafter moved for summary judgment as to that defendant. In the papers filed with that motion, your affirmant made clear that Dr. Tehrani has never been served, and that the motion for summary judgment was being made on behalf of Aristocrat only.... Plaintiff's counsel opposed the application for summary judgment as to Aristocrat, yet did not dispute that Dr. Tehrani had never been served and was therefore not a party to the action, and made no application to the Court at that time to extend there time to serve Dr. Tehrani. Your Honor granted Aristocrat's motion for summary judgment. At that point, neither Aristocrat, by virtue of the Court's order, nor Dr. Tehrani, by virtue of never having been served with process, were defendants in the action. However, at the suggestion of the Court, a motion for a final order of dismissal was made on behalf of Dr. Tehrani.... Here, plaintiff's counsel demonstrated no diligence in serving Dr. Tehrani. We are now more than nine (9) months beyond the expiration of the 120 day period to serve Dr. Tehrani, with plaintiff's counsel having made no effort to serve him prior to making this cross-motion dated October 3, 2017, and not offering any reason whatsoever for their failure to serve him.... Plaintiff's counsel's lack of diligence, and delay in making their application for an extension, warrants a finding that the 'interests of justice' would not be served by allowing plaintiff's counsel to serve Dr. Tehrani at this late juncture." *See* Defendant Dr. Tehrani's Affirmation in Opposition and in Reply Exhibits A-D.

Counsel for defendant Dr. Tehrani further asserts that, "[p]laintiff's argument that Dr. Tehrani has waived his right to contest jurisdiction, has absolutely no merit. As he was never

served with process, an Answer has never been served on his behalf. The motion originally filed in this action seeking summary judgment, was filed only on behalf of Aristocrat, a point made very clear in the original motion papers.... Your affirmant recorded my representation of Dr. Tehrani on August 1, 2017, only after this Court granted Aristocrat's motion for summary judgment, in order to file the instant motion for dismissal.... By no means has Dr. Tehrani done anything which should be taken as a waiver of his right to contest personal jurisdiction in this case. Dr. Tehrani has not sought dismissal 'on a basis other than personal jurisdiction.' The very basis of this motion is that the Court lacks personal jurisdiction over Dr. Tehrani because he was never served with process." See Defendant Dr. Tehrani's Affirmation in Opposition and in Reply Exhibit E.

Notably, "[w]here a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." See *Lang v. Wycoff Heights Medical Center*, 55 A.D.3d 793, 866 N.Y.S.2d 313 (2d Dept. 2008); *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dept. 2007); *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 (1974); *Daniel B. Katz & Assoc. Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 937 N.Y.S.2d 236 (2d Dept. 2011); *Marist College v. Brady*, 84 A.D.3d 1322, 924 N.Y.S.2d 529 (2d Dept. 2011); *Alden Personnel, Inc. v. David*, 38 A.D.3d 697, 833 N.Y.S.2d 136 (2d Dept. 2007). Nevertheless "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Cornely v. Dynamic HVAC Supply, LLC*, *supra* at 987. See also *Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dept. 2012); *Armouth Intern., Inc. v. Haband Co., Inc.*, 277 A.D.2d 189, 715 N.Y.S.2d 438 (2d Dept. 2000).

The Court finds that it is without dispute that plaintiff failed to serve the Summons and Verified Complaint upon defendant Dr. Tehrani within the one hundred twenty (120) day deadline as set forth in CPLR § 306-b. Plaintiff's counsel himself has admitted same. The Court

further finds that plaintiff's arguments in opposition to defendant's motion (Seq. No. 02) are without merit.

CPLR § 306-b states, in part, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

In order to be entitled to an extension of the one hundred twenty (120) day deadline for the service of process for "good cause," plaintiff must, at the very least, establish that he or she had been reasonably diligent in their attempts to serve process on the defendant. *See Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 736 N.Y.S.2d 291 (2001). Reasonable diligence should be found to exist where plaintiff had actually "served" process within the one hundred twenty (120) day period and then promptly sought an extension when defendant contended that the service might be defective. *See Stryker v. Stelmak*, 69 A.D.3d 454, 892 N.Y.S.2d 102 (1st Dept. 2010).

The alternative "interest of justice" standard is more flexible and broader than the "good cause" standard and can apply to late service that results from any mistake, confusion, oversight or other law office failure, as long as there is no prejudice to the defendant. *See Leader v. Maroney, Ponzini & Spencer, supra*. The "interest of justice standard" causes the court to analyze the entire factual setting of the case and to balance all of the competing interests presented by the parties. In addition to due diligence, factors considered by the courts in applying the "interest of justice" standard include the expiration of the statute of limitations, the meritorious nature of the cause of action, the promptness of plaintiff's motion for an extension and the presence of prejudice to the defendant; also, the reason for plaintiff's failure to timely serve, the potential impact of granting the motion on any pending judicial proceedings and whether the plaintiff acted in good faith. *See id.* In short, courts will focus on all the equitable arguments that either side is capable of mustering. For example, a CPLR § 306-b extension has been granted, in the

“interest of justice,” where timely service of process has been made but subsequently found to be defective. *See Chiaro v. D'Angelo*, 7 A.D.3d 746, 776 N.Y.S.2d 898 (2d Dept. 2004).

In the instant matter, counsel for plaintiff has failed to demonstrate that they have been reasonably diligent in their attempts to serve process on defendant Dr. Tehrani. In fact, there is no evidence that counsel for plaintiff ever attempted service upon defendant Dr. Tehrani. Furthermore, when looking at the factors considered by the courts in applying the “interest of justice” standard, the Court finds that the “interests of justice” would not be served by allowing plaintiff to serve defendant Dr. Tehrani at this late juncture.

Accordingly, defendant Dr. Tehrani’s motion (Seq. No. 02), pursuant to CPLR § 3211(a)(8), for an order dismissing the Verified Complaint as against him on the ground that he was never served with process and plaintiff’s time to do so has expired, is hereby **GRANTED**.

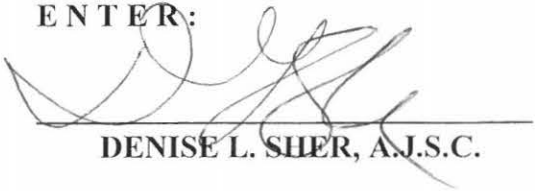
Plaintiff’s cross-motion (Seq. No. 03), pursuant to CPLR § 306-b, for an order extending the time to serve defendant Dr. Tehrani, is hereby **DENIED**.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on December 18, 2017, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED
DEC 12 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:


DENISE L. SIER, A.J.S.C.

Dated: Mineola, New York
December 6, 2017