

Wray v Montefiore Med. Ctr.

2017 NY Slip Op 33250(U)

February 14, 2017

Supreme Court, Bronx County

Docket Number: 22573/2014E

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
DENISE WRAY,

Plaintiff(s),

- against -

INDEX NO: 22573/2014E

MONTEFIORE MEDICAL CENTER, MONTEFIORE
MEDICAL GROUP, JONATHAN SWARTZ, M.D.,
and WILLIAMSBRIDGE FAMILY PRACTICE,

DECISION/ORDER

Defendant(s).

-----X

HON. DOUGLAS E. MCKEON

Defendants' motion to dismiss the complaint is denied, and plaintiff's cross motion for an extension of time to serve defendants with the initiatory papers (see CPLR 306-b) is granted.

On June 5, 2014, plaintiff commenced this medical malpractice action against defendants. Affidavits of service were prepared reflecting the following:

- service on defendant Montefiore Medical Center on July 11, 2014 by delivery of the process to Jacqueline Richardson "as Risk Management Admin. for Montefiore" at 730 Brook Avenue in the Bronx.
- service on defendant Montefiore Medical Group on July 11, 2014 by delivery of the process to "Diane C. as Office Admin./Receptionist for Montefiore Medical Group" at 440 White Plains Road, Eastchester, NY.
- service on defendant Swartz on July 11, 2014 by delivery of the process on a person of suitable age and discretion (Richardson, a risk management administrator) at 730 Brook Avenue with a follow-up mailing of the process on an unspecified date (but within 20 days of the delivery of the process) to an unspecified person or entity at an

- unspecified address.¹
service on defendant Williamsbridge Family Practice on July 11, 2014 by delivery of the process to Anne Salazar, the entity's office manager, at 3448 Boston Road in the Bronx.

None of the affidavits contain a description of the person to whom the process was delivered. Prior to the current motion practice, no affidavit of service had been filed.

Defendant Montefiore Medical Group served an answer, filed on July 2, 2015, that contained an affirmative defense of lack of personal jurisdiction. The crux of that defense is that Montefiore Medical Group was not served with the process. The remaining defendants served a joint answer, also filed on July 2, 2015, that contained a similar want-of-personal-jurisdiction defense.

By a stipulation among the parties, dated August 5, 2015, it was agreed that defendants' time in which to move to dismiss the complaint for lack of personal jurisdiction was extended eight months from the date of the stipulation.

Defendants move jointly to dismiss the complaint² under CPLR 3211(a)(8). They contend that none of the defendants were served with the process, the time to effect service under CPLR 306-b has long since passed, and the action must therefore be dismissed. Defendants also contend that the affidavits of service are facially defective because they do not contain descriptions of the individuals to

¹With regard to the mailing, the affidavit of service states that "[a]n additional copy of the [summons and complaint] was also mailed via USPS First Class mail within 20 days upon service."

²The motion appears to have been made within the period provided by the stipulation, and plaintiff does not contend that the motion is untimely.

whom the process was allegedly delivered (see CPLR 306[b]). Relying on several affidavits, defendants argue that, as a matter of fact, none of them were served.

In support of their motion, defendants submit the pleadings, the affidavits of service, and affidavits from various individuals. The first affidavit is from Salazar, the administrative supervisor of defendant Williamsbridge Family Practice. She averred that she never received a copy of the summons and complaint. The second affidavit is from Richardson, the operational manager of defendant Montefiore Medical Center's facility at 730 Brook Avenue. She averred that she never received a copy of the summons and complaint. The third affidavit is from Rita Punch, the office manager of defendant Montefiore Medical Center's facility at 440 White Plains Road. She averred that on July 11, 2014 no one named "Diane C." was employed at the facility. Moreover, Punch averred that she never received a copy of the summons and complaint. The fourth affidavit is from Kelly Kukura, the administrative secretary of the department of risk management of defendant Montefiore Medical Center. She outlined the record keeping practices of that department as they relate to summonses and complaints received by it, and attested, based on her review of the relevant records, that no summons and complaint from this action was received. The fifth affidavit is from defendant Swartz, who averred that he did not receive a copy of the summons and complaint.

Plaintiff cross-moves for an extension of time within which to effect service of process (see CPLR 306-b). Plaintiff's counsel provides the following narrative regarding what occurred after the June 5, 2014 commencement of the action.

In July 2014, he sent copies of the initiatory papers to Lawson Legal Services for service to be effected on defendants. During a court appearance on December 10, 2014, defendants' counsel informed plaintiff's counsel "that there were issues to be resolved... concerning the[] representation of the defendants and nothing of substance could be accomplished until [defense counsel's] role was explicitly defined."

Plaintiff's counsel received a correspondence in May 2015 from the United States of Department of Health and Human Services (HHS) indicating that the state medical malpractice claim could not proceed because, at the time the relevant medical services were rendered to plaintiff, defendants were acting as agents or employees of the federal government. After receiving that correspondence, plaintiff's counsel submitted a claim form to HHS. In October 2015, plaintiff's counsel received a letter from the United States Attorney's office (Southern District of New York), informing him that, at certain times plaintiff received treatment from defendants, defendants were employees of the Public Health Service ("PHS"), that the exclusive tort remedy against employees of the PHS is a claim under the Federal Tort Claims Act ("the Act"), and that the federal courts have exclusive jurisdiction over claims under the Act. Plaintiff's counsel attempted to reach an agreement with the federal government regarding which aspects of the state court action should be removed to federal court, but no agreement was reached. Defendants' motion to dismiss followed.

Upon receiving defendants' motion, plaintiff's counsel reached out to the

principal of Lawson Legal Services to discuss defendants' claims of lack of service with the process server. However, neither plaintiff's counsel's phone calls to Lawson Legal Services nor his emails thereto were returned, and the entity's address proved to be a mail drop. Based on plaintiff's counsel's review of the service issue, he did "not believe that [he] [could] state with any degree of confidence that service was appropriately made on any of the[] defendants or that [he] could rely on [the process server] to appear at a [traverse] hearing..."

Based on the particular facts and circumstances underlying this action, plaintiff seeks an interest-of-justice extension of time within which to effect service on defendants (see CPLR 306-b). Plaintiff contends that such an extension is warranted because (1) she did engage a process server within the 120-day period within which to serve the process (evidencing diligence), (2) defendants have not been prejudiced by the delay in proper service, (3) the statute of limitations has now expired on plaintiff's claims, (4) plaintiff has a meritorious claim, and (5) public policy favors the resolution of disputes on their merits.

Plaintiff relies on, among other things, selected documents from plaintiff's medical record, correspondence from plaintiff's counsel to individuals and entities that indicate that plaintiff was actively pursuing her claim, correspondence from the federal government relating to plaintiff's potential claim under the Act, and the CPLR 3012-a certificate of merit.

In reply, defendants argue that plaintiff was aware at the December 10, 2014 court appearance that defendants were not served, yet plaintiff made no effort to

rectify the lack of service until defendants moved to dismiss. Defendants question why plaintiff did not review the court's records to check whether affidavits of service were filed (because if plaintiff did she would have learned that affidavits were not filed). Defendants also argue that plaintiff did not submit any evidence in admissible form evincing the merit of her claim. Lastly, defendants contend that plaintiff has an adequate remedy in federal court by way of a claim under the Act.

CPLR 306-b provides, in relevant part, that

“service of the summons and complaint... shall be made within one hundred twenty days after the commencement of the action or proceeding...If 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.”

“The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including 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...”

“The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative — the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served” (Leader v Maroney Ponzini & Spencer, 97 NY2d 95, 105-106 [2015]).

Here, defendants have moved to dismiss the complaint and plaintiff has

cross-moved for an interest-of-justice extension. The court therefore has two options: dismiss the action, or extend plaintiff's time to effect service (Henneberry v Borstein, 91 AD3d 493 [1st Dept 2012]).

Several factors weigh in defendants' favor. First, plaintiff exercised little diligence to effect timely service on defendants. While plaintiff's counsel retained a process serving company shortly after commencing the action, counsel did not review whether service was achieved until long after the 120-day period had expired. Second, plaintiff did not submit any evidence in admissible form (e.g., an expert's affidavit) demonstrating the merits of her medical malpractice claim. Neither the selected documents from plaintiff's medical record nor the attorney-executed CPLR 3012-a(a) certificate of merit evince the merits of plaintiff's claims. Third, the length of delay in service has been considerable. Fourth, and relatedly, plaintiff's request for an extension of time to effect service was not prompt.

Two factors weigh in plaintiff's favor. First, since the commencement of this action, the statute of limitations has run on plaintiff's medical malpractice claim. Second, defendants will not be significantly or substantially prejudiced by the granting of an extension. Approximately two months after the 120-day period to effect service had run, counsel for the parties appeared in court for a conference on the matter. At the latest, defendants had notice of the action six months after the action was commenced and approximately two months after the time to effect proper service expired. Public policy favors plaintiff too. Our courts have a "strong interest in deciding cases on the merits where [reasonably] possible" (Henneberry v

Borstein, 91 AD3d at 497).

After careful review of the unique facts and circumstances of this case, balancing the competing interests of the parties, and giving due consideration to our well-established public policy, the court concludes that, while the issue is a close one, the interest of justice will be served by affording plaintiff an extension.³

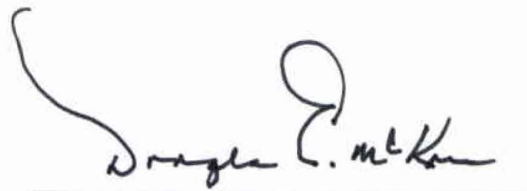
Accordingly, it is hereby ordered that defendants' motion is denied; and it is further,

ORDERED that plaintiff's cross motion is granted; and it is further,

ORDERED that plaintiff's time to serve the summons and complaint is extended until 30 days after service upon her of a copy of this order with notice of entry thereof.

This constitutes the decision and order of this court.

Dated: *February 14, 2017*



Douglas E. McKeon, J.S.C.

³It may come to pass that some, most or all aspects of this action will be removed to federal court. That such a removal may occur, however, is not relevant at this procedural juncture.