

Borden v Gotham Plastic Surgery, PLLC
2018 NY Slip Op 31013(U)
May 23, 2018
Supreme Court, New York County
Docket Number: 805270/2017
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 805270/2017
BORDEN, KATHERINE
vs
GOTHAM PLASTIC SURGERY, PLLC
Sequence Number : 001
DISMISS

PART 6

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____


Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/23/18


_____, J.S.C.
HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X

Katherine Borden,

Plaintiff,

Index No.
805270/2017

DECISION and
ORDER

- against -

Mot. Seq. #001

Gotham Plastic Surgery, PLLC, Dr. Philip
Miller, Dr. Douglas Steinbrech, Gotham
Plastic Surgery Center, P.C.,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by Katherine Borden (“Borden”), acting pro se, by the filing of a Summons with Notice (“the Summons”) on July 14, 2017. The nature of the action is described as medical malpractice arising from “revision surgeries.” While the Summons does not provide the date of the alleged malpractice, it seeks judgment with interest from January 15, 2015. No affidavit of service was filed.

Presently before the Court is defendants Gotham Plastic Surgery, PLLC a/s/h/a Gotham Plastic Surgery Center, P.C. (“Gotham”), Dr. Philip Miller (“Miller”), and Dr. Douglas Steinbrech (“Steinbrech”) (collectively, “defendants”) for lack of personal jurisdiction due to Borden’s failure to properly and timely effect service of process upon them. In support of the motion, defendants submit the affidavits of Gotham’s Office Manager Bernadette Mahoney (“Mahoney”), Miller, and Steinbrech. Borden submits an affirmation in opposition.

In Mahoney’s affidavit, Mahoney states that on November 13, 2017, a male individual delivered an envelope to the offices of Gotham. Mahoney states that the individual approached her at the front desk of the office and handed her an envelope addressed to Gotham. She was not advised that the envelope contained

legal documents and was not asked whether she was authorized to accept service on behalf of her employer, Gotham. She states that she never received authority to accept service of process on behalf of Gotham.

In their respective affidavits, Miller and Steinbrech state that they have never been served with a copy of the Summons with Notice or received any documentation addressed to their attention with regards to this action.

In opposition to defendants' motion, Borden submits an affirmation in which she requests an enlargement of time to serve defendants in the interest of justice. Borden states that she could not serve defendants because she "could not find a process server who would work with [her]" because she is *pro se*, her "father suddenly died an untimely death", and she "was sick physically and suffering from mental anguish due [to] Defendant's gross negligence." Borden also states that she does not "understand the proper procedures" which is why she "had an independent family friend serve the papers" on Gotham. Borden argues that there is no prejudice in granting an extension because Miller and Steinbrech were aware of the litigation since they contacted their insurance company who in turn contacted Borden. Borden further contends she has a meritorious cause of action.

Legal Standards

CPLR § 3211(a)(8) states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant.

CPLR § 308 authorizes personal service upon a natural person, "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . of the person to be served and . . . by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .". (CPLR § 308[2]). "Personal service by way of delivery to a suitable person at a defendant's actual place of business is allowed because it is presumed that the business relationship between the deliverer and the defendant will induce the prompt redelivery of the summons to the defendant." (*Glasser v. Keller*, 567 N.Y.S.2d 981, 982 [Sup. Ct. 1991]).

CPLR § 311 permits personal service upon a corporation by delivery of Plaintiff's initiatory papers, "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law." (CPLR § 311[a][1]).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). By contrast, a defendant's "sworn non-conclusory denial" of service is sufficient to dispute the veracity or content of a process server's affidavit. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]; *Hinds v. 2461 Realty Corp.*, 169 AD2d 629 [1st Dep't 1991]).

A court may exercise its discretion to extend the 120-day period in CPLR §306-b to enable a plaintiff to properly serve defendants. CPLR §306-b provides that "[i]f service is not made upon a defendant within the [120-day period] provided in this section, the court, upon motion, shall dismiss the action without prejudice... or upon good cause shown or in the interest of justice, extend the time for service."

A "good cause" extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. (*Henneberry v. Borstein*, 91 A.D.3d 493, 496 [1st Dep't 2012]). Good cause has been found where "the plaintiff's failure to timely serve process is a result of circumstances beyond its control." (*Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 32 [1st Dep't 2009]). The "good cause" extension, however, does not include conduct that is considered to be "law office failure." (*Henneberry*, 91 A.D.3d at 496).

An extension "in the interest of justice" is broader and more flexible than a "good cause" extension and can include law office failures as long as there is no prejudice to the defendant. (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105 [2001] ["CPLR 306-b provides for an *additional and broader standard, i.e.,* the 'interest of justice,' to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant"]). A court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor ..., 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.” (*Henneberry*, 91 A.D.3d at 496, citing *Leader*, 97 N.Y.2d at 105-106).

Discussion

Preliminarily, Borden’s submission of an affirmation in opposition to the motion is not proper under the court rules. Under CPLR 2106, an affirmation may be substituted “in lieu of ... and with the same force as an affidavit” when made by an attorney or a physician authorized to practice in the state, and who is not a party to the action. In her affirmation, Borden does not state that she is an attorney or physician authorized to practice in the state. Furthermore, Borden is a party to the action. (*Matter of Nazario v. Ciafone*, 65 A.D.3d 1240, 1241 [2d Dept. 2009]; *LaRusso v. Katz*, 30 A.D.3d 240, 243 [1st Dept. 2006]). Additionally, Borden’s affirmation does not qualify as an affidavit pursuant to CPLR 2308 because it lacks “an appropriate jurat and notary’s signature or other showing of proper administration of the oath.” (*Pierre v. Young*, 39 Misc. 3d 1218(A) at *1 [Sup. Ct. 2013]).

Even if the court were to consider Borden’s affirmation, Borden does not dispute that she did not serve or attempt to serve the individual doctors Miller and Steinbrech. As for Gotham, even though Borden sent someone to serve Gotham, no affidavit of service has been filed or submitted to substantiate that proper service was made. Through Mahoney’s affidavit, Gotham sufficiently demonstrates that service was not properly made because Mahoney is not “an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service” on Gotham’s behalf.

While Borden requests an extension of time to serve defendants, Borden has made no motion seeking the relief. (*Blam v. Netcher*, 17 A.D.3d 495, 496 [2d Dep’t 2005] (“... in the absence of a cross motion the Supreme Court should not have considered the defendant’s informal request for an extension of time to answer...”). Even if such a motion had been made, Borden fails to demonstrate good cause or the interest of justice warrants an extension of time to serve defendants. Here, none of the defendants have been properly served. Gotham was not served in accordance with CPLR 311[a][1] since there was no service upon an authorized agent. Moreover, there have been no efforts to serve the individual doctors Miller and Steinbrech. The time to serve under CPLR §306-b has now

expired.¹ Borden's alleged inability to hire a process server or understand the legal procedures is not an excuse for the failure to properly serve defendants. *See generally Gaudio v. City of New York*, 235 A.D.2d 228 at 228 [1st Dept. 1997] ("Petitioner's ignorance of the law is not an acceptable excuse ..."). Furthermore, Borden provides no explanation as to how she would proceed to effectuate service if afforded another opportunity to do so. Additionally, Borden alleges only in conclusory fashion that she has a meritorious cause of action. She has failed to make any showing of the merit of the claims to be asserted as Plaintiff has yet to file or serve a complaint and the Summons with Notice only identifies the nature of the claim generally.

Wherefore, it is hereby

ORDERED that defendants Gotham Plastic Surgery, PLLC a/s/h/a Gotham Plastic Surgery Center, P.C., Dr. Philip Miller, and Dr. Douglas Steinbrech's motion to dismiss the Complaint based upon lack of personal jurisdiction due to plaintiff's failure to properly and timely effect service of process upon them is granted; and the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: May 23, 2018



Eileen A. Rakower, J.S.C.

¹ As for the statute of limitations on Borden's claims, neither the Summons nor Borden's Affirmation provide the date of the alleged malpractice, although the Summons seeks judgment with interest from January 15, 2015. The statute of limitations on any claim for malpractice that arose on January 15, 2015 has now expired.