

**Brown v New York City Health & Hosps. Corp.**

2018 NY Slip Op 31754(U)

July 17, 2018

Supreme Court, Kings County

Docket Number: 511070/16

Judge: Michelle Weston

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At an I.A.S. Trial Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 320 Jay Street, Borough of Brooklyn, City and State of New York, on the 17 of July 2018.

**P R E S E N T:**

HON. MICHELLE WESTON  
Justice

ZINA BROWN

*Plaintiff(s),*

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, KINGS COUNTY HOSPITAL CENTER, ALBERT DUNCAN, M.D., CARINA BIGGS, M.D., QUEENS NASSAU NURSING HOME INC., GILBERT MAKABALI, M.D. and JEAN ANTOINE, M.D.

*Defendant(s).*

**ORDER**

**Index # 511070/16**

The following papers numbered 1 to 3 read on this motion

|                                                                                     | Papers<br>Numbered |
|-------------------------------------------------------------------------------------|--------------------|
| <i>Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed</i> | 1                  |
| <i>Answering Affidavit (Affirmation)</i>                                            | 2                  |
| <i>Reply Affidavit (Affirmation)</i>                                                | 3                  |
| <i>Affidavit (Affirmation)</i>                                                      |                    |

Upon the foregoing papers and after oral arguments heard, the defendant, ALBERT DUNCAN M.D., cross-motion for an order pursuant to CPLR 3211(a)(8) and 306-b dismissing the complaint for failure to timely serve the defendant or in the alternative seeks an extension of time to serve an answer is hereby granted to the following extent:

Defendant contends that since August of 2015, Dr. Duncan has lived and worked in the country of Antigua and Barbuda where he served as the Director of St John's Medical Center. The cross-motion is supported by an affidavit from Dr. Duncan. In October 2016, when plaintiff made a similar motion, counsel reached out to plaintiff and informed him that Dr. Duncan did not reside or work in the United States at the time of the alleged service upon him, therefore service was improper.

The affidavit of service indicates the summons and complaint was affixed to the door at 50 E 40<sup>th</sup>, Brooklyn, New York and alleges that was the defendant's last known address. The process server claims he spoke with a "Jane Doe" who gave a negative reply in response to the inquiry as to the defendant's actual place of business. Dr. Duncan previously practiced medicine at 50 East 40<sup>th</sup> Street, Brooklyn, New York from January 1, 1991 through August 1, 2015. He then moved to Antigua. In July 2016, Dr. Duncan had not practiced medicine at that location for nearly a year. Defendant asserts that since service must be made at the actual place of business, not the last known place of business as asserted by plaintiff's counsel, this did not constitute proper service.

Moreover, the attempted service in New Jersey was similarly insufficient. Service was not attempted at the defendant's actual place of residence or last known address. Rather, defendant did not live at that address in 2016, he lived in Antigua. The defendant's wife and son lived at the New Jersey address. Although the affidavit states it was left with "son", Chris Skervit, Mr. Skervit is his stepson and does not reside at the New Jersey address with his wife. Even assuming substitute service was made upon a person of suitable age and discretion, the affidavit fails to demonstrate that the service was followed up appropriately by mailing.

Finally defendant contends it should be noted that co-defendant NYCHHC, who was properly served would be liable for any acts of negligence asserted against Dr. Duncan.

In opposition, plaintiff contends that they exercised reasonable diligence in attempting service, and since Mr. Duncan had actual notice of the claim through his communications with his attorney, in the interest of justice, requests permission for late service of the summons and complaint.

In accordance with CPLR § 308, an individual may be served by several methods. Under subdivision 2, service can be effectuated by delivering a copy of the summons to a person of suitable age and discretion, at the person's last known address or actual place of business followed by mailing within twenty days thereafter (see, CPLR § 308(2)). "Pursuant to amendments made in 1994 and effective January 1, 1995 (L. 1994, ch. 131, § 1), CPLR 308(6) provides: [f]or purposes of this section, 'actual place of business' shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business" (*Vid v. Kaufman*, 282 AD2d 739 [2d Dept. 2001]). CPLR 308(2) requires strict compliance and thus service must be properly made at the defendant's actual place of business (see, *Kearney v. Neurosurgeons of N.Y.*, 31 AD3d 390, 391 [2d Dept. 2006]; *McCray v. Petrini*, 212 AD2d 676 [2d Dept. 1995]; see also, *Samuel v. Brooklyn Hosp. Center*, 88 AD3d 979 [2d Dept. 2011], *service at the hospital where the defendant had privileges which was connected by tunnel to the actual office of the defendant found insufficient*). "A person's 'actual place of business' must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location" (*Selmani v. City of New York*, 100 AD3d 861

[2d Dept. 2012]; see, *Rosario v. NES Medical Services of New York, P.C.*, 105 AD3d 831 [2d Dept. 2013]). Here, it is clear that the defendant was not served at his actual place of business, but rather at a former place of business. This is insufficient, accordingly, the attempted service pursuant to CPLR § 308(2) was defective.

While plaintiff requests an extension of time to serve the summons and complaint in his reply papers, a motion seeking such relief has not been made to date. Even assuming a proper motion was received, CPLR §306-b provides that the summons and complaint shall be served within 120 days after its filing. In determining whether to grant an extension of time to serve a summons and complaint pursuant to CPLR § 306-b, the court upon good cause shown or in the interest of justice, may extend the time for service.

In determining whether “good cause” exists to extend the time for service, the Court shall consider whether the plaintiff has demonstrated reasonable diligence in attempting service, as well as a meritorious cause of action (*Winter v. Irizzary*, 300 AD2d 472, 473 [2d Dept. 2002]). In addition, an extension may be granted in the “interest of justice,” in which case no showing of reasonably diligent efforts is required (see, *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]). Rather, “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 the delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to the defendant” (*id.* at 105-106). The determination of whether to grant the extension in the interest of justice, remains, within in the discretion of the court (see, *Baione v. Zambrano*, 22 AD3d 698, 699 [2d Dept. 2005]). In the present case neither

contain an attorney's affirmation and is unsupported by any evidence demonstrating that the plaintiff exercised due diligence in attempting to locate the defendant (see, *Silvering v. Sunrise Family Medical, P.C.*, 161 A.D.3d 1021 [2d Dept. 2018]). Based upon the facts as stated above, the plaintiff has failed to demonstrate due diligence and effectuate proper service upon Dr. Duncan.

Accordingly, the cross-motion is granted to the extent that the complaint is dismissed and severed as against the defendant, ALBERT DUNCAN, M.D.; and it is further

Ordered, that the stay is hereby lifted and the caption is amended to read as follows:

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ZINA BROWN

Plaintiff,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, KINGS COUNTY HOSPITAL CENTER, ALBERT DUNCAN, M.D., CARINA BIGGS, M.D., QUEENS NASSAU NURSING HOME INC., GILBERT MAKABALI, M.D. and JEAN ANTOINE, M.D.,

Defendants.

-----X

; and it is further

Ordered, that the defendant shall serve a copy of this decision and order on plaintiff.

This constitutes the decision and order of the Court.

ENTER:

  
**Hon. Michelle Weston**  
J.S.C.