

<b>Kerman v Moshenyat</b>
2018 NY Slip Op 31784(U)
July 19, 2018
Supreme Court, Kings County
Docket Number: 500351/2018
Judge: Marsha L. Steinhardt
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19<sup>th</sup> day of July 2018.

P R E S E N T:

HON. MARSHA L. STEINHARDT,  
Justice

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FAYE KERMAN as Executrix of the Estate of  
ROBERT AZZARA, and FAYE KERMAN,  
Individually,

Plaintiff,

**DECISION AND ORDER**  
Index No. 500351/2018

-against-

REUVAN MOSHENYAT, YITZCHAK MOSHENYAT,  
DAVID ROSENTHAL, RALPH PINCHINAT, MICHAEL  
W. GREENE, PARINITA C. AMIN, BORIS KHOVETS,  
SAMIR FARHAT, HASSAN FARHAT EDWARD STOLYAR,  
GENE PESOLA, ADVANCED MEDICAL GROUP, P.C.,  
MOSHENTAT'S GASTROENTEROLOGY O.B.S., P.C.,  
HIGHWAY IMAGING ASSOCIATES LLP, BAY RIDGE  
MEDICAL IMAGING, P.C. ALAN BERLLY, HIGHWAY  
RADIOLOGY ASSOCIATES, LLP, and THE NEW YORK  
COMMUNITY HOSPITAL OF BROOKLYN, INC.,

Defendants.

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The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_

Cross Motion \_\_\_\_\_

\_\_\_\_\_ 2 \_\_\_\_\_

Reply \_\_\_\_\_

\_\_\_\_\_ 3 \_\_\_\_\_

Defendants, Michael W. Greene and Parnita C. Amin, move this Court for an Order dismissing Plaintiff's complaint as to them based on the fact that the Court lacks personal jurisdiction. Plaintiff cross-moves seeking an Order deeming service upon the above named

Defendants to be both timely and proper or, in the alternative, to extend the time to effectuate service of process.

This is an action sounding in medical malpractice. On or about March 4, 2013, Robert Azzara initiated an action, alleging, in sum and substance, failure to diagnose and treat lung cancer. Action was joined. Three years later (March 14, 2016), Mr. Azzara died. Ultimately, his mother, Faye Kerman, was named Executrix of his estate. Pursuant to an Order of a (now retired) Judge of this Court, the original action was dismissed, without prejudice, as to all Defendants, and Plaintiff was permitted six months from the date of the dismissal to commence a new action. On January 8, 2018, Plaintiff refiled the Complaint against the moving Defendants and issue was joined by each of them on March 23. They now move to dismiss said Complaint, alleging that personal service upon them was improper and did not confer personal jurisdiction. The statute of limitations has expired.

Plaintiff submits an affidavit of service by Robert Ford indicating that he was instructed to serve a Summons and Complaint on Michael Greene at 6740 3<sup>rd</sup> Avenue, Brooklyn, NY, 11220. That upon arrival at said location, he was informed by a clerk named Maria B. that Dr. Greene was an employee at that office. That he served Maria B., a person of suitable age and discretion, with the Summons and Complaint and that on the next day (January 25, 2018) he mailed a copy to the same address. It is Dr. Greene's position, that the location of Lenox Hill Radiology that was chosen as the place of service (6740 3<sup>rd</sup> Avenue, Brooklyn) was not, and never had been, his actual place of business and that the person to whom it was delivered (Maria B.) was totally unknown to him. That he was never contacted by anyone with reference to service of the Summons and Complaint, and that he has never received a copy of same, either

personally, or from anyone else.

Plaintiff submits a second affidavit of service by Carl Miller stating that he was instructed to serve a Summons and Complaint on Parinita Amin at 1485 5<sup>th</sup> Avenue, Apt. 14A, New York, NY, 10035. That upon arrival at the building, doorman Matthew Dillard advised him that Parinita Amin lived at that address and that he served the Summons and Complaint upon said doorman, a person of suitable age and discretion. Three days later (February 12), he mailed a copy of the Summons and Complaint to Dr. Amin at the same address. Dr. Amin, on the other hand, submits an affidavit stating that she has not resided at the Fifth Avenue address since 2012 and that she currently resides and, at all times relevant, resided in Westchester County. That she never received a copy of the Summons and Complaint and that neither Matthew Dillard (or Dollard) nor anyone else at the New York County address is authorized to accept legal process on her behalf.

It is the position of both moving Defendants that “the Court lacks personal jurisdiction over them, by reason of improper, incomplete and otherwise defective service” and that Plaintiff’s action against them should be dismissed, pursuant to CPLR §3211(a)(8). They do not dispute the affidavits of service, more or less conceding that the Summonses and Complaints were left at the places and with the people named, as indicated by the process servers. Rather, they both clearly state that at no time were they served with process. That as a result, any action purportedly pending against them is a nullity and should be dismissed.

Plaintiff opposes Defendants’ motion and cross-moves seeking either a declaration, by the Court, that the moving Defendants were properly served or, in the alternative, for an extension of time to effect service, pursuant to CPLR§306-b. They call to the Court’s attention

the fact that the instant action is a re-filing of a previously filed action. That both the original and subsequent Complaints were answered by each Defendant. That although each Defendant claims that they did not personally receive a copy of the Summons and Complaint, neither states that they are unaware of the action. At the oral argument of the motions, Plaintiff made clear that co-Defendant, Bay Ridge Medical Imaging, P.C., with which each Defendant is somehow affiliated, received a Summons and Complaint in a proper and timely fashion.

CPLR § 306–b states:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause 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 120–day service provision of CPLR 306–b can be extended by a court, upon motion, “upon good cause shown or in the interest of justice” (*CPLR § 306–b*). “‘Good cause’ and ‘interest of justice’ are two separate and independent statutory standards” (*Bumpus v. New York City Transit Auth.*, 66 AD3d 26, 31 [2d Dept 2009]). “To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service” (*id.* at 31). “Good cause will not exist where a plaintiff fails to make any effort at service or fails to make at least a reasonably diligent effort at service” (*id.* at 32). “By contrast, good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control (*id.* at 32).

“Among the factors bearing upon “interest of justice” as a basis for extending the time to

serve process is whether the defendant will experience prejudice as a result of the extension. Defendant's awareness that commencement of an action has been attempted within the required time limit will help the plaintiff establish lack of prejudice" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C306-b:3 [note: online version]).

"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" (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]). "Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter" (*id.* at 105). "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" (*id.* at 105-106). "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" (*id.* at 106).

Although this action has a long and tortured history, it is undisputed that it was originally commenced during the lifetime of Mr. Azzara and that the underlying facts have not changed by virtue of the appointment of the Executrix. Further, there is no claim that the moving Defendants were unaware of the action pending against them. The gravamen of Defendants' motion is that they were served at locations with which they had no relation. (Wrong work place; wrong address). The attorneys representing both Defendants is acquainted with the allegations in the

Complaints.

The Motion, brought on by Defendants Greene and Amin, for an Order dismissing Plaintiff's Complaint due to lack of personal jurisdiction over said Defendants, by the Court, is granted and the case is dismissed as to them. In addition, the Cross-Motion, brought on by Plaintiff to extend the time within which to effect service upon said Defendants is granted, both for good cause shown and in the interest of justice and she is hereby granted 120 days from the date of entry of the Order within which she may effect service.

This constitutes the opinion, decision and Order of this court.

ENTER,

MA

HON. MARSHA L. STEINHARDT

J.S.C.