

**Huston v New York-Presbyterian Brooklyn
Methodist Hosp.**

2018 NY Slip Op 33227(U)

December 6, 2018

Supreme Court, Kings County

Docket Number: 501534/18

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of December, 2018.

PRESENT:

HON. GENINE D. EDWARDS,

Justice

-----X

SHANNA HUSTON,

Plaintiff,

- against -

DECISION and ORDER

Index No. 501534/18.

Motion Sequences 1-2

NEW YORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL ALSO KNOWN AS NEW YORK METHODIST HOSPITAL, CURTIS SCOTT HAMMERMAN, M.D. MAYA LIN, M.D. PAMELA LEVINE, M.D. AND JESSICA VANHOOREES, M.D. ,

Defendants.

-----X

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-2 3-4
4 5
6-7 8

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Upon the foregoing papers defendant, Curtis Scott Hammerman, M.D. (Hammerman), moves for an order and judgment, pursuant to CPLR 3212, 3211 (a) (8), CPLR 308 and CPLR 306-b, dismissing the complaint with prejudice as against him for lack of personal jurisdiction and failure to timely serve the summons and complaint.

Plaintiff Shanna Huston (plaintiff) cross-moves for an order (1) extending her time to effect service of process upon defendant Hammerman, pursuant to CPLR 306-b, (2) compelling him to provide his current address, pursuant to CPLR 3118, or (3) permitting plaintiff to serve defendant Hammerman's counsel, pursuant to CPLR 308 (5).

Background

On December 19, 2015, plaintiff went to the emergency room at New York Presbyterian Brooklyn Methodist Hospital (Methodist Hospital) with an injury to her right arm. Plaintiff thereafter commenced a medical malpractice action by filing a summons and verified complaint on January 24, 2018 against Methodist Hospital and defendants Hammerman, Maya Lin, M.D. (Lin), Pamela Levine, M.D. (Levine), and Jessica VanHoores, M.D. (VanHoores). Plaintiff alleged that the named defendants failed to properly diagnose and treat her injury. In particular, plaintiff alleged that defendant Hammerman, the radiologist who read her x-rays, issued an erroneous finding.

Plaintiff's original summons and complaint identified defendant Hammerman as "Scott Hammerman, M.D.," employed by defendant Methodist Hospital. Plaintiff first attempted service upon "Scott Hammerman, M.D.," through Methodist Hospital on January 25, 2018, but learned that no such person was employed by Methodist Hospital. Defendants Methodist Hospital, Lin, Levine and VanHoores, interposed an answer on February 8, 2018.

After investigating and discovering defendant Hammerman's full name, plaintiff amended her complaint. A supplemental summons and amended complaint was filed on February 22, 2018, naming defendant Hammerman as "Curtis Scott Hammerman." Plaintiff alleged that she attempted service once again, this time upon "Curtis Scott Hammerman," in March 2018, at Brooklyn Radiology Services located within Methodist Hospital. Plaintiff was then informed that defendant Hammerman was not employed at Brooklyn Radiology Services and that such services were contracted to off-site companies during the hours plaintiff received services. Plaintiff alleged that she attempted service upon Hammerman a third time, at Imaging On Call in Fishkill, New York, on May 17, 2018, where defendant Hammerman was employed at the time of the alleged malpractice. However, it is uncontested that Hammerman was no longer employed at Imaging On Call at the time of that attempted service.

Defendant Hammerman filed an answer dated June 4, 2018, asserting, inter alia, affirmative defenses that "[t]his Court lacks jurisdiction over the person of Defendant, Curtis Scott Hammerman, M.D." and that defendant Hammerman was improperly served.

Defendant Hammerman now moves for an order, pursuant to CPLR 3211 (a) (8) dismissing the action insofar as asserted against him for lack of personal jurisdiction due to improper service of the summons and complaint. In opposition, plaintiff does not dispute that she failed to effectuate service at Hammerman's "actual place of business" pursuant to CPLR 308 (2). Rather, plaintiff cross-moves for an order, pursuant to CPLR

306-b, extending her time to effectuate proper service of the supplemental summons and amended complaint upon Hammerman.

Discusson

Here, considering all relevant factors, the record supports granting plaintiff's cross-motion to extend her time to properly serve the supplemental summons and amended complaint. 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. Service pursuant to CPLR 308 (1) and (2) shall be made by (1) delivering the summons within the state to the person to be served; or (2) delivering the summons within the state to a person of suitable age and discretion at the actual place of business, or

"where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing." CPLR 308 (4).

For 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.” CPLR 308 (6); *Selmani v. City of New York* 100 A.D.3d 861, 954 N.Y.S.2d 580 (2d Dept. 2012); *Rosario v. NES Med. Servs. of N.Y., P.C.*, 105 A.D.3d 831, 963 N.Y.S.2d 295 (2d Dept. 2013).

“When deciding whether to grant an extension of time to serve a summons and complaint in the interest of justice, 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 [potentially] 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 defendant.” *Thompson v. City of New York*, 89 A.D.3d 1011, 933 N.Y.S.2d 701 (2d Dept. 2011).

The Court of Appeals has made clear that there are two distinct standards and that, while “good cause” requires a showing of reasonable diligence, “the interest of justice” has a broader scope, which can encompass late service due to “mistake, confusion or oversight, so long as there is no prejudice to the defendant.” *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 736 N.Y.S.2d 291 (2001); *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 883 N.Y.S.2d 99 (2d Dept. 2009).

In determining whether “good cause” exists to extend the time for service, the court shall consider, as mentioned, whether the plaintiff has demonstrated reasonable diligence in attempting service as well as a meritorious cause of action. *Winter v. Irizzary*, 300 A.D.2d 472, 751 N.Y.S.2d 415 (2d Dept. 2002). In addition, an extension

may be granted in the “interest of justice,” and then no showing of reasonably diligent efforts is required. *Leader*, 97 N.Y.2d 95. 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. *Baione v. Zambrano*, 22 A.D.3d 698, 802 N.Y.S. 2d 383 (2d Dept. 2005).

Here, plaintiff exercised diligence by timely filing and attempting to serve defendant Hammerman with the summons and complaint thrice, at three separate locations within the 120-day period following the filing of the summons and complaint. The affidavit of Jonathan Croston, paralegal at Mangan Ginsberg, LLP, plaintiff’s counsel, recounts the various searches performed and attached the printed results of the investigation indicating that Hammerman worked at Imaging On Call. Plaintiff only learned that the last attempt at service was defective when Hammerman moved to dismiss pursuant to CPLR 3211 (a) (8) and it became known that Hammerman was no longer employed at that facility. *Chan v. Zoubarev*, 157 A.D.3d 851, 69 N.Y.S.3d 695 (2d Dept. 2018); *Thompson*, 89 A.D.3d 1011; *DiBuono v. Abbey, LLC*, 71 A.D.3d 720, 895 N.Y.S.2d 726 (2d Dept. 2010); *Earle v. Valente*, 302 A.D.2d 353, 754 N.Y.S.2d 364 (2d Dept. 2003). If the Court were to decide not to grant an extension of time for the plaintiff

to serve the summons and complaint, the statute of limitations would in all likelihood bar plaintiff's claims against one particular defendant while claims against the remaining defendants for the same incident would proceed. *Thompson*, 89 A.D.3d 1011; *DiBuono*, 71 A.D.3d 720. Therefore, the Court finds that the plaintiff acted diligently to effect service, even though the service proved deficient. The Court also finds that plaintiff promptly requested an extension once the service defect was revealed, and there is no demonstrable prejudice to defendant. *DiBuono*, 71 A.D.3d 720. Plaintiff demonstrated that there is a potentially meritorious claim, and Hammerman failed to present any demonstrable prejudice attributable to the delay in service as the parties are now conducting discovery.

Under CPLR 308 (5), a court is vested with “the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308 (1), (2), and (4) are ‘impracticable.’” *Matthews v. Barrau*, 150 A.D.3d 836, 55 N.Y.S.3d 282 (2d Dept. 2017); *Born To Build, LLC v. Saleh*, 139 A.D.3d 654, 31 N.Y.S.3d 545 (2d Dept. 2016); *In re Kaila B.*, 64 A.D.3d 647, 883 N.Y.S.2d 132 (2d Dept. 2009); *Home Fed. Sav. Bank v. Versace*, 252 A.D.2d 480, 675 N.Y.S.2d 131 (2d Dept. 1998). “Although the impracticability standard ‘is not capable of easy definition’ (*Markoff v. South Nassau Community Hosp.*, 91 A.D.2d 1064, 458 N.Y.S.2d 672 (2d Dept 1983), it does not require the applicant to satisfy the more stringent standard of ‘due diligence’ under CPLR 308 (4), or to make a showing that ‘actual prior attempts to serve

a party under each and every method provided in the statute have been undertaken.”

Astrologo v. Serra, 240 A.D.2d 606, 659 N.Y.S.2d 481 (2nd Dept. 1997) quoting *Kelly v.*

Lewis, 220 A.D.2d 485, 632 N.Y.S.2d 186 (2nd Dept. 1995). “Once the impracticability

standard is satisfied, due process requires that the method of service be ‘reasonably

calculated, under all the circumstances, to apprise’ the defendant of the action.

Contimortgage Corp. v. Isler, 48 A.D.3d 732, 853 N.Y.S.2d 162 (2nd Dept. 2008) citing

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). As stated above,

plaintiff attempted service upon Hammerman at three different times and three different

locations. The first two attempts were reasonably based on the information plaintiff

obtained. The affidavit of paralegal Croston shows that the investigation led plaintiff to

the last attempted service at the Fishkill location. Accordingly, it is

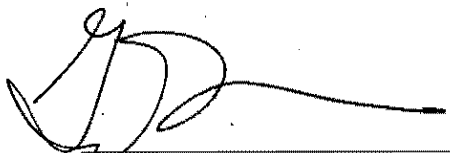
ORDERED that the branch of the plaintiff’s cross-motion, pursuant to CPLR 306-b, seeking an extension of time to serve the summons and complaint upon defendant Hammerman in the manner described herein is granted to the extent that service shall be made within 60 days after service of this order with notice of entry; and it is further

ORDERED that the branch of the plaintiff’s cross-motion, pursuant to CPLR 308 (5), seeking to serve defendant Hammerman by alternative means is granted, and plaintiff shall serve the supplemental summons and amended complaint upon defendant Hammerman via his attorneys, Gordon & Silber, P.C.; and it is further

ORDERED that defendant Curtis Scott Hammerman's motion to dismiss the amended complaint as against him, is denied as moot.

This constitutes the decision and order of the court.

ENTER



J. S. C.

HON. GENINE D. EDWARDS

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