

De Lourdes v Lucido
2018 NY Slip Op 34060(U)
January 12, 2018
Supreme Court, Westchester County
Docket Number: 59798/2017
Judge: Charles D. Wood
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
MARIA MEJIA DE LOURDES,

Plaintiff,

- against -

ANTHONY LUCIDO, SR.,

Defendants.

-----X
WOOD, J.

DECISION and ORDER
Sequence Nos. 1&2
Index No. 59798/2017

The following papers were read in connection with defendant's motion to dismiss (Seq 1), and plaintiff's cross-motion pursuant to CPLR 306-b additional time to serve (Seq 2):

- Defendant's Notice of Motion, Counsel's Affirmation, Exhibits.
- Plaintiff's Notice of Cross-Motion, Counsel's Affirmation, Exhibits.
- Defendant's Counsel's Affirmation in Opposition to Cross-Motion.
- Plaintiff's Counsel's Reply Affirmation in Support.

Now, based upon the foregoing, the motions are decided as follows:

In this personal injury action involving a motor vehicle accident on July 31, 2014, on Tarrytown Road in Greenburgh, plaintiff filed a summons and complaint on June 28, 2017, with the Westchester County Clerk's Office. Service of the summons and complaint upon defendant was supposedly effectuated on July 25, 2017, 1:07 P.M., at 20 Otis Avenue in White Plains, by leaving a copy of said documents with Janice Smith, a co-tenant, a person of suitable age and discretion, followed by depositing said documents in the mail to defendant at the above address, his usual place of abode.

On September 11, 2017, defendant interposed an answer to the summons and complaint.

Defendant now challenges said service through his affidavit that he presently resides at 17 Cedarwood Road in White Plains, and has resided there since May 2017. He claims that he submitted a change of address form with the Post Office in May 2017, and had notified the New York State Department of Motor Vehicles of same. At the time of the attempted service in July 2017, at 20 Otis Avenue, the place of service was not his residence or usual place of abode. Thus, he claims he has never been personally served with a copy of the summons and complaint.

As a consequence of failure to effectuate proper service, defendant moves this court for an order pursuant to CPLR 3211 (a)(8) dismissing the instant action and pursuant to CPLR 3211(a)(5) dismissing the within action on statute of limitations grounds.

In response, plaintiff cross moves pursuant to CPLR 306-b permitting plaintiff additional time to service defendant in the interest of justice and/or for good cause. Plaintiff argues that the bare unsubstantiated claim of address change without competent proof and the failure to register with DMV within 10 days prevents defendant from challenging services. Moreover, plaintiff served defendant at his former address within the 120 day period. Thus, plaintiff's failure to timely serve process was a result of circumstances beyond her control. Good cause is shown as plaintiff believes she made reasonably diligent efforts to make timely service. Plaintiff also argues that in the interest of justice her application should be granted, as there was no prejudice to defendant, and the statute of limitations has run, insofar as the motor vehicle accident occurred on July 14, 2014, therefore the three year period elapsed on July 14, 2017.

It is well-settled that an action is commenced by filing a summons and complaint pursuant to CPLR 304 [a]), and service of the summons and complaint . . . shall be made within one hundred

twenty days after the commencement of the action” (CPLR 306-b). A motion pursuant to CPLR 306-b for leave to extend the time for service of a summons and complaint may be granted upon “good cause shown or in the interest of justice” (Wilbyfont v New York Presbyterian Hosp., 131 AD3d 605, 606 [2d Dept 2015]). The determination of whether to grant the extension in the interest of justice is within the discretion of the motion court (Baione v Zambrano, 22 AD3d 698, 699 [2d Dept 2005]). 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 (Bumpus v New York City Transit Auth., 66 A.D.3d 26, 31–32, [2d Dept 2009]). The interest of justice standard is broader than the good cause standard (Bumpus v New York City Transit Auth., 66 AD3d at 32). In deciding whether to grant an extension of time to serve copies of 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 delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (Wilson v City of New York, 118 AD3d 983, 984 [2d Dept 2014]). If good cause for an extension is not established, courts must consider the “interest of justice” standard of CPLR 306-b (Bumpus v New York City Transit Auth., 66 AD3d at 32).

Based upon the record, plaintiff demonstrated a reasonable excuse for the delay in serving a complaint upon defendant and a potentially meritorious cause of action against defendant (Harris v City of New York, 121 A.D.3d 852, 855, [2d Dept 2014]). Given the attempt at service within the 120 day period; relatively short length of the delay; the fact that the plaintiff sought an extension of time to serve the complaint; the fact that statute of limitations has expired, plaintiff has satisfied the good cause and interest of justice standard. Moreover, defendant has not demonstrated that he

would suffer any significant prejudice from allowing the late service of plaintiff's complaint.

In view of the above, and based on the public policy in favor of resolving cases on the merits, plaintiff's cross motion to compel defendant to accept service of the complaint is granted.

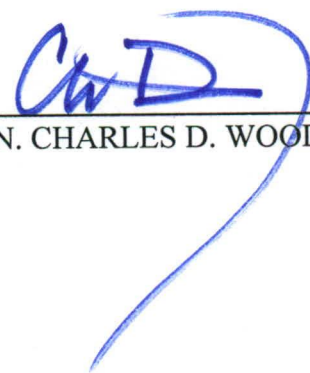
Any other relief requested and not decided herein is denied. The foregoing shall constitute the Decision and Order of this Court.

Accordingly, for the stated reasons, it is hereby

ORDERED, that defendant's motion (Seq 1) to dismiss is denied in its entirety, and the cross motion by plaintiff (Seq 2) for an order pursuant to CPLR Section 306-b extending the time for service of process upon defendant is granted, to the extent that plaintiff is granted an additional 60 days from the entry date of this order to serve defendant of the summons and verified complaint as proposed in plaintiff's papers in accordance with the CPLR; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference Part on *Monday 2/26*, 2018, *at 9:30 AM* in Room 811, at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: White Plains, New York
January 12, 2018



HON. CHARLES D. WOOD, J.S.C.

To: All Parties by NYSCEF