

**J.P. v Plainedge Union Free Sch.
Dist. Bd. of Educ.**

2018 NY Slip Op 34068(U)

July 25, 2018

Supreme Court, Nassau County

Docket Number: 611218-17

Judge: Robert A. Bruno

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This opinion is uncorrected and not selected for official publication.

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

-----X
J.P., as Father and Natural Guardian for A.P.,

TRIAL/IAS PART 13

Plaintiffs,

Index No.: 611218-17

-against-

Submission Date: 5-9-18
Motion Sequence: 001, 002

PLAINEDGE UNION FREE SCHOOL DISTRICT
BOARD OF EDUCATION PLAINEDGE UNION
FREE SCHOOL DISTRICT, ANITA RODRIGUEZ,
and "MARIO" DOE,

DECISION & ORDER

Defendants.

-----X

Sequence #001

Papers Numbered

Notice of Motion, Affirmation & Exhibits 1

Sequence #002

Notice of Cross-Motion, Affirmation & Exhibits..... 2

Affirmation in Opposition and in Reply 3

Upon the foregoing papers, the following motions are determined as set forth below:

Sequence #001: Defendants' motion for an Order pursuant to CPLR §3211(a)(8), §308(2), and §306-b, dismissing the action against defendants ANITA RODRIGUEZ and MARIO D'ANTONIO, sued herein as "MARIO" DOE, as personal jurisdiction has not been obtained; severing said defendants from the action and amending the complaint to reflect same; and for the entry of judgment in favor of said defendants, together with the costs and disbursement of this action.

Sequence #002: Plaintiff's motion for an Order pursuant to CPLR §306-b, to extend plaintiff's time to serve defendants ANITA RODRIGUEZ and "MARIO" DOE, and to compel defendants to provide the last known addresses of these defendants, or to deem the summons and complaint served upon the current and ongoing counsel of these defendants.

This action arises from an incident that allegedly occurred on July 21, 2015, in which the infant plaintiff A.P., a then seven year old child with autism, was left on a school bus in the bus yard by defendants ANITA RODRIGUEZ ("RODRIGUEZ"), the bus matron, and MARIO D'ANTONIO s/h/a "MARIO" DOE ("D'ANTONIO"), the bus driver. The action was

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commenced by electronic filing of the Summons and Verified Complaint on October 20, 2017 (*Mot. Exh. A*). According to the Affidavits of Service, sworn to on February 15, 2018, and February 22, 2018, respectively (*Mot. Exh. E*), defendants D'ANTONIO and RODRIGUEZ were served with the Summons and Complaint pursuant to CPLR §308(2) by leaving the documents with "(JOHN DOE) (REFUSED FULL NAME) CO-WORKER", a person of suitable age and discretion, on February 13, 2018 at "C/O BOARD OF EDUCATION PLAINEDGE UNION FREE SCHOOL DISTRICT, 241 WYNGATE DRIVE, MASSAPEQUA, NY 11758."

Defendants now move to dismiss the action as against defendants RODRIGUEZ and D'ANTONIO on the ground the Summons and Complaint were never properly served upon them, and thus jurisdiction over them was never acquired. In particular, defendants maintain that delivery was made to a place that was not the actual place of business of RODRIGUEZ or D'ANTONIO. According to the Affidavit of Peter Porrazzo (*Mot. Exh. F*), Assistant Superintendent for Business for defendant the PLAINEDGE UNION FREE SCHOOL DISTRICT (the "DISTRICT"), RODRIGUEZ and D'ANTONIO were not employed by the DISTRICT on February 13, 2018 or any time thereafter. They were last employed by the DISTRICT on August 13, 2015. Moreover, neither RODRIGUEZ nor D'ANTONIO has authorized the DISTRICT to accept service on their behalf. Defendants argue that, insofar as these defendants were not properly served, and the statutory time period for effecting service has expired, the action against RODRIGUEZ and D'ANTONIO must be dismissed.

Plaintiff cross-moves to extend the time for service pursuant to CPLR §306-b on the grounds it has established "good cause" for the delay and that an extension would serve the interests of justice. In particular, plaintiff asserts that reasonable diligence was used in attempting to serve RODRIGUEZ and D'ANTONIO at their previous place of employment within the statutory period. Moreover, plaintiff argues, plaintiff did not know that said defendants were no longer employed by the DISTRICT. Plaintiff was unable to locate any other address for said defendants – D'ANTONIO's last name was unknown until the filing of the instant motion, and RODRIGUEZ could not be located without further identifying information other than her name and position with the DISTRICT.

CPLR §306-b permits the Court to extend a plaintiff's time for service of the summons and complaint beyond the statutory 120-day period "upon good cause shown" or "in the interest of justice." The Court of Appeals has confirmed that the two standards are separate and distinct. The "good cause" standard requires a showing of reasonable diligence in effectuating service. See *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105. Generally, the party seeking relief must show that the failure to serve process in a timely manner was a result of

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circumstances beyond his or her control. *Bumpus v New York City Tr. Auth.*, 66 A.D.3d 26, 32, (2d Dept. 2009). See also *Frank v Garcia*, 84 A.D.3d 654 (1st Dept. 2011).

Where no good cause is shown, relief may be granted pursuant to the "interest of justice" standard. That is a broader, more flexible, standard, which may accommodate late service due to mistake, confusion or oversight, so long as there is no prejudice to the defendant. See *Leader*, 97 NY2d 95, 104-105. Application of the interest of justice standard requires a careful analysis of the factual setting of the case, and a balancing of the competing interests of the parties. *Leader*, 97 NY2d at 105. The factors to be considered include: (1) plaintiff's reasonable diligence in attempting to effect service; (2) the expiration of the applicable statute of limitations; (3) the meritorious nature of the cause of action; (4) the length of the delay in service; (5) the promptness of the request for an extension of time; and (6) the prejudice to the defendant. No one factor is determinative. The court may consider any factor relevant to the exercise of its discretion, consistent with the express legislative intent to serve the interests of justice. *Leader*, 97 NY2d at 105-106.

At minimum, the Court finds that an extension of time is warranted under the "interests of justice" standard. The Court considers that: (i) plaintiff made a reasonable attempt to effect service within the statutory time period and cross-moved for appropriate relief within one month of receiving proof that service was not properly effected; (ii) the action appears to be meritorious on its face; (iii) defendants have not shown prejudice to either RODRIGUEZ or D'ANTONIO, insofar as counsel has appeared and answered on their behalf, and the litigation is in its initial stages.

To the extent that plaintiff seeks to compel the DISTRICT to provide the last known address of RODRIGUEZ and D'ANTONIO, the Court finds such relief appropriate under the circumstances. Insofar as defendants do not address this issue in their opposition, it is deemed conceded. *Kuehne & Nagel v Baiden*, 36 NY2d 539 (1975); *Brown v George*, 138 AD3d 466 (1st Dept. 2016); *McNamee Const. Corp. v City of New Rochelle*, 29 AD3d 544, 545-546 (2d Dept. 2006); *Failla v Amodeo*, 220 AD2d 965 at n.3 (3d Dept 1996). Notably, defendants do not deny that such information is discoverable pursuant to CPLR §3101 or offer any basis for withholding it.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

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ORDERED, that defendants' motion for an Order pursuant to CPLR §3211(a)(8), §308(2), and §306-b, dismissing the action against defendants RODRIGUEZ and D'ANTONIO, as personal jurisdiction has not been obtained; severing said defendants from the action and amending the complaint to reflect same; and for the entry of judgment in favor of said defendants, together with the costs and disbursement of this action (*Sequence #001*) is *denied*; and it is further

ORDERED, that plaintiff's motion for an Order pursuant to CPLR §306-b, to extend plaintiff's time to serve defendants RODRIGUEZ and D'ANTONIO, and to compel defendants to provide the last known addresses of these defendants, or to deem the summons and complaint served upon the current and ongoing counsel of these defendants (*Sequence #002*) is *granted*, to the extent that: (1) defendants shall provide plaintiff with the last known addresses of RODRIGUEZ and D'ANTONIO within thirty (30) days of the date hereof; and (2) plaintiff is granted an extension of time to effect service upon RODRIGUEZ and D'ANTONIO for up to 120 days following receipt of said information.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: July 25, 2018
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED
AUG 07 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE