

Segarra v Montefiore Med. Ctr.
2018 NY Slip Op 34173(U)
May 3, 2018
Supreme Court, Bronx County
Docket Number: Index No. 21365/2017E
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
YVETTE SEGARRA,

Plaintiff,

- against -

INDEX NO: 21365/2017E

MONTEFIORE MEDICAL CENTER, YOSSEF
BLUM, M.D., SHYAM KIRAN GANDAM VENKATA
M.D., ALI SADOUGHI, M.D., NURILIGN BILCHA,
M.D., and GAURI KANT BHARDWAJ, M.D.,

DECISION/ORDER

Defendants.
-----X**HON. LEWIS J. LUBELL:**

In this medical malpractice action, plaintiff Yvette Segarra ("plaintiff") alleges negligent treatment by defendants while she was in their care at Montefiore Medical Center. Plaintiff alleges that while she was recovering after a routine knee replacement revision performed by defendant Yossef Blum, M.D., defendants, including movant defendant Nurilign Bulcha, M.D. ("defendant Bulcha") caused plaintiff to suffer an acute narcotic overdose and cardiac arrest, among other injuries. Defendant Bulcha moves to dismiss plaintiff's complaint as against him for lack of personal jurisdiction, claiming that he was not properly served with process pursuant to the CPLR. In opposition, plaintiff argues that the motion should be denied because service of the summons and complaint, accomplished via "nail and mail" at movant's usual place of abode pursuant to CPLR § 308(4), was proper.

In the alternative, plaintiff cross moves for additional time to re-serve defendant Bulcha with a summons and complaint pursuant to CPLR § 306-b.

ARGUMENTS

Defendant Bulcha argues that plaintiff did not undertake significantly prudent steps to ascertain his actual dwelling or usual place of abode prior to serving the summons and complaint. According to defendant Bulcha, plaintiff merely typed his name into Accurint, a *Lexus Nexis* database, to find his residential address. That printout, on its face, indicates that it may contain errors and defects and should not be relied upon as definitively accurate. Defendant Bulcha has submitted a sworn affidavit stating that the Accurint printout is inaccurate, and that he has not resided at the address listed on it for several years. Moreover, defendant Bulcha points out that the printout itself indicates “none found” under the heading “active address.” Indeed the address that defendant Bulcha was purportedly served at, 4225 Carpenter Avenue, is listed under the heading “previous and non-verified address.” Defendant highlights that plaintiff’s process server merely attempted service on a weekday three times with a fourth attempt on a weekday night before opting to proceed by substituted service. Defendant Bulcha contends that plaintiff’s process server’s attempts did not demonstrate the requisite due diligence required to avail plaintiff of substituted “nail and mail” service.

In opposition, plaintiff states that prior to serving defendant Bulcha, she went to significant lengths to ascertain his residential and business addresses and to

properly serve process. For instance, on January 23, 2017, less than a month before the summons and complaint were filed, plaintiff highlights that she utilized the aforementioned *Lexis Nexis* Accurant service for the purpose of obtaining defendant Bulcha's address. The report generated by Accurant listed defendant Bulcha's address as 4225 Carpenter Avenue, Apartment 5A, Bronx, NY 10466-2623. Beyond that, plaintiff states that she also engaged in extensive investigation to determine defendant's business address. Indeed, plaintiff states that she availed herself of several resources pointing to medical practices linked to defendant Bulcha in the Bronx as well as in Alexandria, Virginia. However, plaintiff points out that defendant Bulcha was not listed in either the official New York or the official Virginia physician licensing rolls. Nor did he maintain a profile on the New York State Physician Profile website of the New York Department of Health. Moreover, plaintiff states that she searched for, but was unable to find, an entry for defendant in the New York State Education Department's Office of the Professions database.

Plaintiff was, however, able to determine that defendant Bulcha's National Provider Index ("NPI") number is 1811309511. The NPI registry listed defendant Bulcha's address as 600 East 233rd Street, Bronx, New York. This is the address of defendant Montefiore Hospital Center's Wakefield Campus. Just eight days after filing the summons and complaint, plaintiff states that she attempted to serve defendant Bulcha at both addresses, 4225 Carpenter Avenue, Apartment 5A, and at 600 East 233rd Street, Bronx, New York. Plaintiff annexes the affidavit of service

of process server Steven Trujillo "Trujillo," and highlights that the affidavit shows that on March 1, 2017, at 2:34 p.m., Trujillo attempted service for the first time at the residence address but received no answer. For the second attempt, Trujillo tried a time later in the afternoon, but at 4:31 p.m. received no answer again. Trujillo then confirmed with the building superintendent that defendant lived at 4225 Carpenter Avenue, Apartment 5A. Trujillo next attempted service in the morning, at 11:25 a.m. on March 6, 2017, but again received no answer. On March 8, 2017, Trujillo made a final attempt, his fourth, to serve Dr. Bulcha at 4225 Carpenter Avenue, this time at 9:16 p.m., when someone was likely to be home. Someone was present within Apartment 5A, but that person refused to answer the door. Trujillo then attached the summons and complaint to the door of Apartment 5A. The next day, March 9, 2017, Trujillo completed service under CPLR § 308(4) by mailing via U.S. Mail a copy of the summons and complaint in a postpaid and properly addressed envelope bearing the words " Personal and Confidential" by first class mail to Nurilign Bulcha, M.D., at 4225 Carpenter Avenue, Apartment 5A, Bronx, NY 10466.

Plaintiff argues that out of an abundance of caution, on March 9, 2017, service was also attempted at 600 East 233rd Street, Bronx, New York, defendant's address with the NPI registry. However, the process server was advised by an employee of defendant Montefiore Medical Center that process had to be served on Montefiore Risk Management at 3328 Rochambeau Avenue, 2nd Floor, Bronx, New York. Later

that same day, service was attempted at 3328 Rochambeau Avenue, but the server was told that defendant was no longer employed by Montefiore Medical Center and they were not authorized to accept service on his behalf. Plaintiff submits she once again tried to determine defendant's business address but could not ascertain additional results. Plaintiff argues that her aforementioned efforts demonstrate good faith attempts to properly serve defendant Bulcha. Plaintiff also argues that if this court decides that plaintiff's "nail and mail" efforts were insufficient such that plaintiff requires an extension of time to effect proper service, plaintiff should not be penalized on account of a lack of due diligence for serving defendant at a address that he never stated was no longer his residence. Plaintiff further asserts that defendant's bald assertion that he does not reside at 4225 Carpenter Avenue is belied by the fact that he acquired actual knowledge of this action after service was rendered at that address, and timely filed an answer. Moreover, plaintiff contends that defendant Bulcha has offered no proof that he ever filed a change of address with the U.S. Postal Service, and produces no evidence that he ever initially notified the Department of Motor Vehicles (" DMV") of his residency in New York, as required by VTL § 250.

Defendant Bulcha opposes plaintiff's cross motion for an extension of time to serve him based on good cause or in the interest of justice. Defendant Bulcha argues that plaintiff failed to satisfy the due diligence required under CPLR § 306-b, and did not seek an extension of time to serve prior to expiration of the 120-day

window afforded under the statute.

DISCUSSION

A. Personal Jurisdiction

As the party seeking to assert personal jurisdiction, plaintiff bears the ultimate burden of proof on this issue (see *Jacobs v Zurich Ins. Co.*, 53 AD2d 524 [1st Dept 1976]; *Marist Coll. v Brady*, 84 AD3d 1322, 1323 [2d Dept 2011]). On a motion to dismiss, however, plaintiff must only demonstrate that facts “may exist” to exercise personal jurisdiction over the defendant (see *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407 [2d Dept 2005]; CPLR § 3211 [d]). And, to the extent that the plaintiff seeks disclosure on the issue of personal jurisdiction pursuant to CPLR § 3211(d) “the plaintiff [...] only needs to set forth a sufficient start, and show that its position is not frivolous” (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; see *Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 [2d Dept 2009]; *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]).

CPLR § 301 provides that “[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.” This section codifies a court’s power to exercise a “territorial,” or “presence” jurisdiction over a defendant (see Vincent C. Alexander, Practice Commentaries to CPLR § 301 [2010]), based on his domicile, on any cause of action regardless of where the claim arose (*id.*). “Domicile is established by physical presence in a place in connection

with a certain state of mind concerning one's intent to remain there" (*Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 48 [1989]). Thus, a person can have multiple residences but can have only one domicile (*Antone v General Motors Corp.*, 64 NY2d 20, 30 [1984]).

When the domicile of a party, as here, is in doubt, its determination requires an evaluation of all the circumstances of the case, including "current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes. No single factor is conclusive" (see Wright, Miller & Cooper, Federal Practice & Procedure § 3612, at 529-31 [1984]).

Here, plaintiff has established through the Accurint printout and defendant Bulcha's employment at defendant Montefiore Medical Center that defendant Bulcha was a resident and/or domiciliary in New York at the time the action was commenced against him. Whether or not defendant Bulcha resided at the specific address where plaintiff served him is immaterial to the larger determination of whether this court can exercise jurisdiction over him in accordance with the mandates of CPLR § 301. Since there is sufficient basis to establish that it can, the court's inquiry turns to defendant Bulcha's contention that service of the complaint at an address that he purportedly did not reside at warrants dismissal of the complaint. CPLR § 308

governs the manner of service of a complaint, and mailing a summons and complaint to an incorrect address deprives the court of personal jurisdiction, warranting dismissal of the complaint (*Foster v. Cranin*, 180 AD2d 712 [2d Dept. 1992]). Here, however, there is sufficient reason to believe that defendant Bulcha resided at, and used 4225 Carpenter Avenue as his actual dwelling or usual place of abode prior to the commencement of this action. Moreover, defendant Bulcha's assertions that he does not presently reside at that address are contravened by the fact that he acquired actual knowledge of this action after service was rendered at that address, and timely filed an answer to plaintiff's complaint. Moreover, as plaintiff argues, defendant Bulcha has offered no proof that he ever filed a change of address with the U.S. Postal Service, and produces no evidence that he notified the Department of Motor Vehicles ("DMV") of his residency in New York, as required by VTL § 250. Curiously, defendant does not challenge plaintiff's assertion that the superintendent at 4225 Carpenter Avenue confirmed his domicile there. It is also notably unchallenged that defendant Bulcha maintained his business address with the NPI registry at the location of Montefiore Medical Center, where plaintiff also made efforts to serve him. Based on the foregoing, the court finds that defendant has provided insufficient proof to warrant dismissal pursuant to CPLR § 3211. As such, defendant Bulcha's motion to dismiss is denied, without prejudice to defendant Bulcha renewing the application based on additional proofs, not limited to evidence that either never resided at 4225 Carpenter Avenue or did not have it listed as his

last known address on the date that plaintiff effected service at that location.

B. Extension of Time to Serve

CPLR § 306-b provides, in relevant part, as follows:

Service of the summons and complaint...shall be made within one hundred two days after the filing of the summons and complaint...If service is not made upon a defendant within the time period 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 (see CPLR § 306-b).

On a CPLR § 306-b application, courts can either dismiss an action or extend the time for service of a complaint based on two separate grounds, namely “good cause” or in the “interest of justice” (see *Henneberry v. Borstein*, 91 AD3d 493 [1st Dept. 2012]). “[W]hile ‘good cause’ requires a showing of reasonable diligence, ‘the interest of justice’ standard 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” (*Baumann & Sons Buses, Inc. v Ossining Union Free School Dist.*, 121 AD3d 1110 [1st Dept. 2014] citing *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]; see *Nicodene v Byblos Restaurant, Inc.*, 98 AD3d 445 [1st Dept. 2012]). Indeed, the Court of Appeals has confirmed that the “good cause” and “interest of justice” prongs of the section constitute separate grounds for extensions, to be defined by separate criteria (see *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 [2001]). The good cause standard requires a showing of

reasonable diligence in attempting to effect service upon a defendant (*Henneberry*, 91 AD3d at 496). At least one Appellate Division has suggested that good cause is likely to be found where a plaintiff makes earnest attempts to effectuate service but is circumvented from effectively completing service due to “circumstances beyond [its] control” (see *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 32 [2d Dept. 2009] [noting difficulties of service with a person in military or difficulties with service abroad through Hague Convention]).

The interest of justice standard has been characterized as more flexible than the good cause standard, and accommodates late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant (see *de Vries v. Metropolitan Tr. Auth.*, 11 AD3d 312, 313 [1st Dept. 2004]). To meet the interest of justice standard, “the court must make a careful judicial analysis of the factual setting of the case and a balancing of the competing interests, including the 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” (see *Woods v. M.B.D Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept. 2011]). When adopting the interest of justice standard, courts give considerable weight to whether a plaintiff is able to make a showing of a meritorious cause of action (see *Khedouri v. Equinox*, 73 AD3d 532 [1st Dept. 2010]; *Johnson v. Concourse Vil., Inc.*, 69 AD3d 410 [1st Dept. 2010]).

The court finds that plaintiff exercised due diligence and therefore met the good cause standard when serving defendant Bulcha. Plaintiff timely commenced this action, and attempted service upon defendant at an address, 4225 Carpenter Avenue, that was listed as his last known address in Accurint. Plaintiff also attempted to serve defendant Bulcha at his last known business address, the location of Montefiore Medical Center. Though that did not work, as defendant Bulcha was purportedly no longer employed there at the time that the action was commenced, plaintiff's dual methods of attempting to effectuate service on defendant Bulcha demonstrated due diligence. Indeed, plaintiff has alleged that her diligent efforts to locate and serve defendant Bulcha are evidenced by her hiring of a process server and conducting investigations which showed, among other things, that the address of defendant Bulcha's private residence was not readily available through no fault of plaintiff insofar as defendant Bulcha purportedly failed to regularly update his address in a timely fashion. Thus, good cause has been shown. Furthermore, there is no apparent prejudice to defendant in granting the motion.

Assuming *arguendo* that the present case does not qualify for an extension under the "good cause" exception (see *Mead v. Sirigleman*, 24 AD3d 1142, 1144 [3d Dept. 2005]), this court finds that it qualifies under the "interest of justice" category. Under this prong of CPLR 306-b, the Court of Appeals has instructed that a court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor ..., 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" (*Leader*, 97 NY2d at 105-106, *supra*), Here, plaintiff attempted service on defendant Bulcha's last known address as well as the hospital. These efforts, as detailed above, together with the merits of this action are all factors in concluding that an extension of time is justified in the interest of justice. Furthermore, defendant Bulcha has made no showing of prejudice while plaintiff has shown a meritorious cause of action as against him in light of his role in defendants' alleged negligent acts.

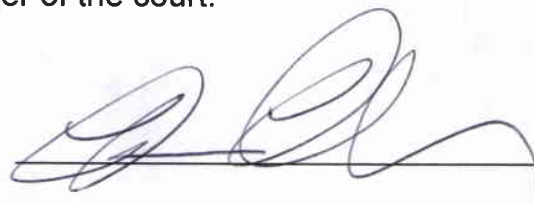
Accordingly, it is hereby

ORDERED that defendant Bulcha's motion to dismiss pursuant to CPLR 3211 is denied without prejudice to defendant renewing that application within 30 days of this order upon the submission of additional proofs, if any, signifying a lack of a connection to the location at which service was effectuated; and it is further

ORDERED that plaintiff's cross motion pursuant to CPLR 306-b for an extension of time to re-serve the summons and complaint upon defendant Bulcha is granted, to the extent that service shall be made within 120 days of the date of this order.

This constitutes the decision and order of the court.

Dated: May 3, 2018



Lewis J. Lubell, J.S.C.