

Brown v Jones

2018 NY Slip Op 34468(U)

October 1, 2018

Supreme Court, Kings County

Docket Number: Index No. 521643/17

Judge: Dawn Jimenez-Salta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 88 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 October 1, 2018.

PRESENT:

HON. DAWN JIMENEZ-SALTA,
Justice.

-----X
ANGELA BROWN and MARAQUUS BROWN,

Index No.: 521643/17

Plaintiff,

- against -

DECISION AND ORDER

HILLARY JONES and PV HOLDING CORP.,

Defendant(s).

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

- 1) Defendants Hillary Jones ("Jones") and PV Holding Corp.'s ("PV") Notice of Motion to Dismiss the Complaint, Pursuant to CPLR Section 3211(a) Because of Failure to Complete Service of Process Upon Defendants Within 120 Days of the Filing of the Summons In Addition to Granting Such Other Just and Proper and Further Relief by This Court, dated May 21, 2018;
- 2) Plaintiffs Angela Brown ("Brown") and Maraquus Brown's ("Brown") Notice of Cross Motion: a) to Deem Timely Filed *Nunc Pro Tunc* the Affidavits of Service E-Filed on May 21, 2018 Pursuant to CPLR Section 308(2); b) to Grant Default Judgment Against Defendant Jones Pursuant to CPLR Section 3215; c) to Strike Defendants' Ninth Affirmative Defense pursuant to CPLR Section 3211(b); and d) for Such Other Just, Proper and Equitable and Further Relief by This Court, dated May 30, 2018;
- 3) Defendants Jones and PV's Reply Affirmation and in Opposition to Plaintiffs' Cross Motion, dated June 26, 2018, all of which submitted August 1, 2018.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	Defendants 1 [Exh. A-C]
Notice of Cross-Motion and Affidavits Annexed.....	Plaintiffs 2 [Exh. A-C]
Order to Show Cause and Affidavits.....	
Answering Affidavits.....	Defendants 3 [Exh. A-B]
Replying Affidavit.....	
Supplemental Affidavits.....	
Exhibits.....	
Other [Memoranda of Law]	

Upon the foregoing cited papers, the Decision/Order on these Motions are as follows: Defendants Hillary Jones and PV Holding Corp.'s motion is granted to dismiss the Complaint, pursuant to CPLR Section 3211(a)

because Plaintiffs Angela Brown and Maraquus Brown have not completed service of process upon Defendants within 120 days of the filing of the Summons. It denies Plaintiffs Brown's cross motion: 1) to deem timely filed *nunc pro tunc* the affidavits of service e-filed on May 21, 2018 pursuant to *CPLR Section 308(2)*; 2) for a default judgment against Defendant Jones pursuant to *CPLR Section 3215*; and 3) to strike of Defendants' Ninth Affirmative Defense pursuant to *CPLR Section 3211(b)* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

BACKGROUND AND PROCEDURAL HISTORY

This action arises from an alleged motor vehicle accident on May 14, 2016 on the eastbound Jackie Robinson Parkway in the County of Queens, City and State of New York [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

This action was commenced by the filing of a Summons and Complaint on November 6, 2017 [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

Plaintiffs Brown filed a Supplemental Summons and Amended Complaint on January 30, 2018 [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

Issue was joined with Defendant PV on March 20, 2018 by the service of a Verified Answer. In its Answer, Defendant PV asserted that Plaintiff failed to commence this action in accordance with the directives of *CPLR Article 3* as its Ninth Affirmative Defense [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

In their Notice of Motion to Dismiss the Complaint pursuant to *CPLR Section 3211(a)*, dated May 21, 2018, Defendants PV and Jones¹ emphasize the mandate of *CPLR Section 306-b* to serve the Summons and Complaint within one hundred twenty (120) days after the commencement of the action. It is Plaintiffs' responsibility to shoulder the ultimate burden of proof. They must show, by a preponderance of the evidence, that jurisdiction over Defendants was obtained by proper service of process. See *Munoz v. Reyes*, 40 AD3d 1059 (2nd Dept., 2007). Because the time limits imposed by *CPLR Section 306-b* are jurisdictional, Defendants stress that dismissal is the penalty for non-compliance. See *Mont v. Goldman*, 174 Misc.2d 857 (Sup.Ct. NY County 1997). Due to the passage of more than one hundred twenty (120) days from the filing of the Summons and Complaint, they maintain that the Complaint should be dismissed because service of process has not yet been completed upon them [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

In their Notice of Cross Motion, dated May 30, 2018, Plaintiffs Brown argue that because the affidavits of service on Defendants PV and Jones were filed on May 21, 2018, they should be deemed filed *nunc pro tunc*. See *Pipinias v. J. Sackaris & Sons, Inc.*, 116 AD3d 749 (2nd Dept., 2014). Since the affidavits of service indicate that Defendant PV was served through personal service on the New York Secretary of State on February 27, 2018 and Defendant Jones was served on February 26, 27 and 28 by affixing the Summons and Complaint to the door

¹ Although Defendant Jones is Pro Se, Defendant PV's attorney is representing her for the limited purpose of this application [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

of her DMV verified address as well as mailing a copy, Plaintiffs claim no defect in the affidavits of service. Because of no prejudice to Defendants, they contend that the affidavits of service should be deemed *nunc pro tunc* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

Because service of process was completed on Defendant Jones as of March 1, 2018, Plaintiffs contend that she is in default pursuant to *CPLR Section 3215*. They point to her failure to answer, move or otherwise appear in the instant action. However, in the alternative, Plaintiffs state their willingness to accept an order by this Court, granting Defendant Jones twenty (20) days to answer the Supplemental Summons and Complaint without jurisdictional defenses [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

Because any *CPLR Article 3* irregularities have been or will be cured by their requested relief, Plaintiffs insist that Defendants' Ninth Affirmative Defense be stricken pursuant to *CPLR 3211(b)* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

In their Reply Affirmation and in Opposition to Plaintiffs' Cross Motion, dated June 26, 2018, Defendants counter that Plaintiffs are unsuccessful in their attempt to demonstrate good cause to extend the 120 day service provision of *CPLR Section 306-b*. See *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 736 NYS2d 291 (2001); *Kazimierki v. New York Univ.*, 18 AD3d 820, 796 NYS2d 638 (2nd Dept., 2005); *Baione v. Central Suffolk Hosp.*, 14 AD3d 635, 789 NYS2d 315 (2nd Dept., 2005); *Busler v. Corbett*, 259 AD2d 13, 696 NYS2d 615 (4th Dept., 1999) [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

Defendants assert that Plaintiffs have also failed to show any interest of justice exception for an extension of time to serve them. See *CPLR Section 306-b; Busler v. Corbett, supra; Mead v. Singleman*, 24 AD3d 1142, 806 NYS2d 783 (3rd Dept., 2005); *Leader v. Maroney Ponzini & Spencer, supra; Matter of Jordan v. City of New York*, 38 AD3d 336, 833 NYS2d 8 (1st Dept., 2007); *Estey-Dorsa v. Chavez*, 27 AD3d 277, 813 NYS2d 54 (1st Dept., 2006); *de Vries v. Metropolitan Trans. Auth.*, 11 AD3d 312, 783 NYS2d 540 (1st Dept., 2004); *Hafkin v. North Shore Univ. Hosp.*, 279 AD2d 86, 718 NYS2d 379 (2nd Dept., 2000), *aff'd* 97 NY2d 95 (2001); *Matter of Anonymous v. New York State Office of Children & Family Services*, 53 AD3d 810, 862 NYS2d 392 (3rd Dept., 2008); *Rosenzweig v. 600 N. St., LLC*, 35 AD3d 705, 826 NYS2d 680 (2nd Dept., 2006); *Scarabaggio v. Olympia & York Estates Co.*, 278 AD2d 476, 718 NYS2d 392 (2nd Dept., 2000), *aff'd* 97 NY2d 95 (2001). See also *Rasulov v. Abdullaev*, Index No. 507741/2017 (Sup. Ct., Kings County, Honorable Dawn Jimenez-Salta, J.S.C.) [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

COURT RULINGS

This Court grants Defendants Hillary Jones and PV Holdings Corp.'s motion to dismiss the Complaint pursuant to *CPLR Section 3211(a)* due to Plaintiffs Angela Brown and Maraqus Brown's failure to complete service of process upon Defendants within 120 days of the filing of the Summons. It denies Plaintiffs Brown's cross motion in its entirety [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

CPLR Section 308(4) provides in relevant part:

4. 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 . . .” (emphasis added)

This Court observes that the affidavit of service attesting to the attempted service of the Supplemental Summons, Amended Complaint and E-File Notice upon Defendant Jones shows that it was upon her usual place of abode on March 1, 2018, followed by a mailing on March 2, 2018. Consequently, this Court finds that service of process was never completed pursuant to *CPLR Section 308* because Plaintiffs admit their failure to file any proof of service with the Clerk of this Court until May 21, 2018. Thus, there is no proof of its filing with the Clerk of this Court within twenty (20) days of the mailing of the Supplemental Summons and Amended Complaint on March 2, 2018. See *CPLR Section 308(4); Munoz v. Reyes, supra* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

This Court finds that Plaintiffs have also failed to satisfy either of the standards prescribed by *CPLR Section 306-b* for an extension of time to serve. Plaintiffs have neither shown good cause for the extension nor demonstrated that extending the time to serve pleadings would be in the interest of justice. See *CPLR Section 306-b*. See *Leader v. Maroney, Ponzini & Spencer, supra; Kazimierki v. New York Univ., supra; Baione v. Central Suffolk Hosp., supra; Busler v. Corbett, supra; Mead v. Singleman, supra; Matter of Jordan v. City of New York, supra; Estey-Dorsa v. Chavez, supra; de Vries v. Metropolitan Trans. Auth., supra; Hafkin v. North Shore Univ. Hosp., supra; Matter of Anonymous v. New York State Office of Children & Family Services, supra; Rosenzweig v. 600 N. St., LLC, supra; Scarabaggio v. Olympia & York Estates Co., supra* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

This Court is well aware that the 120 day service provision of *CPLR Section 306-b* can be extended by a court, upon a motion, “upon good cause shown or in the interest of justice”. “Good cause” and “interest of justice” are two separate and independent statutory standards. See *Leader v. Maroney, Ponzini & Spencer, supra* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

To establish good cause, a plaintiff must demonstrate reasonable diligence in his/her attempt of service. See *Leader v. Maroney, Ponzini & Spencer, supra*. It will not exist when a plaintiff fails to make any effort at service or fails to make at least a reasonably diligent effort at service. See *Kazimierki v. New York Univ., supra; Baione v. Central Suffolk Hosp., supra; Busler v. Corbett, supra*. In the present case, because Plaintiffs have offered no reason for their failure to complete service of process upon Defendants within the 120 day period pursuant to *CPLR Section 306-b*, Plaintiffs are unable to establish any good cause to extend their time. See *Leader v. Maroney, Ponzini & Spencer, supra; Kazimierki v. New York Univ., supra; Baione v. Central Suffolk Hosp., supra; Busler v. Corbett, supra* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

This Court observes that the interest of justice standard does not require reasonably diligent efforts at service. However, in rendering their determinations, courts may consider the presence or absence of diligence along with other factors. See *Leader v. Maroney, Ponzini & Spencer, supra*. The interest of justice standard is broader than the good cause standard because its factors include the expiration of the *Statute of Limitations*, the meritorious nature of the action, the length of delay in service, the promptness of a request by plaintiff for an extension and prejudice to defendants. See *Mead v. Singleman, supra; Leader v. Maroney, Ponzini & Spencer Ponzini & Spencer, supra; Matter of Jordan v. City of New York, supra; Estey-Dorsa v. Chavez, supra; de Vries v. Metropolitan Trans. Auth., supra; Hafkin v. North Shore Univ. Hosp., supra*. In fact, the promptness of a request for an extension of time to serve a defendant is a specific factor to be considered by courts in their determination of the “interest of justice” extensions. See *Leader v. Maroney, Ponzini & Spencer, supra; Matter of Anonymous v. New York State Office of Children & Family Services, supra; Rosenzweig v. 600 N. St., LLC, supra; Scarabaggio v. Olympia & York Estates Co., supra* [Defendants 1, Exhs A-C; Plaintiffs 2,

Exhs A-C; Defendants 3, Exhs A-B].

This Court finds that Plaintiffs have failed to show that an extension of time to serve Defendants would be in the interest of justice pursuant to CPLR Section 306-b. See *Busler v. Corbett, supra*; *Mead v. Singleman, supra*; *Leader v. Maroney, Ponzini & Spencer, supra*; *Matter of Jordan v. City of New York, supra*; *Estey-Dorsa v. Chavez, supra*; *de Vries v. Metropolitan Trans. Auth., supra*; *Hafkin v. North Shore Univ. Hosp., supra*. Plaintiffs have failed to offer any evidence to demonstrate the meritorious nature of their action. They have offered no explanation about their delay until after the expiration of the 120 day period pursuant to CPLR Section 306-b. Plaintiffs only do so now in opposition to Defendants' motion to dismiss the Complaint. See CPLR Section 306-b; *Leader v. Maroney, Ponzini & Spencer, supra*; *Matter of Anonymous v. New York State Office of Children & Family Services, supra*; *Rosenzweig v. 600 N. St., LLC, supra*; *Scarabaggio v. Olympia & York Estates Co., supra* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B].

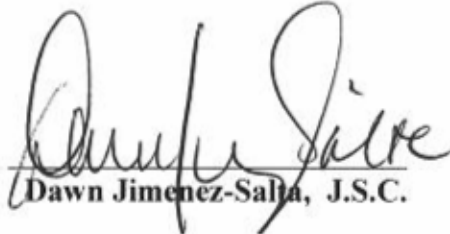
Accordingly, this Court denies Plaintiffs' cross motion in its entirety. Plaintiffs failed to provide the requisite proof to deem timely filed *nunc pro tunc* the affidavits of service e-filed on May 21, 2018 pursuant to CPLR Section 308(2) because they did not properly serve Defendants within the 120 day period. Plaintiff's requests for a default judgment against Defendant Jones pursuant to CPLR Section 3215(f) as well as the striking of Defendants' Ninth Affirmative Defense pursuant to CPLR Section 3211(b) are denied as moot. See CPLR Section 306-b; *Leader v. Maroney, Ponzini & Spencer, supra*; *Kazimierki v. New York Univ., supra*; *Baione v. Central Suffolk Hosp., supra*; *Busler v. Corbett, supra*; *Mead v. Singleman, supra*; *Matter of Jordan v. City of New York, supra*; *Estey-Dorsa v. Chavez, supra*; *de Vries v. Metropolitan Trans. Auth., supra*; *Hafkin v. North Shore Univ. Hosp., supra*; *Matter of Anonymous v. New York State Office of Children & Family Services, supra*; *Rosenzweig v. 600 N. St., LLC, supra*; *Scarabaggio v. Olympia & York Estates Co., supra*. See also *Rasulov v. Abdullaev, supra* [Defendants 1, Exhs A-C; Plaintiffs 2, Exhs A-C; Defendants 3, Exhs A-B]

Based on the foregoing, it is hereby ORDERED as follows:

Defendants Hillary Jones and PV Holding Corp.'s motion to dismiss the Complaint, pursuant to CPLR Section 3211(a) because of the failure to complete service of process upon Defendants within 120 days of the filing of the Summons is GRANTED, and the COMPLAINT is DISMISSED. Plaintiffs Angela Brown and Maraqus Brown's cross motion is DENIED in its ENTIRETY as moot.

This constitutes the Decision and Order of the court.

Date: October 1, 2018
Brown v. Jones et al
(Index Number 521643/17)


Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

2018 OCT 12 AM 8:12
KINGS COUNTY CLERK
FILED

