

De Baez v Solomon
2019 NY Slip Op 32445(U)
August 15, 2019
Supreme Court, New York County
Docket Number: 805348/18
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN PART 11

Justice

TOMASA RAMIREZ DE BAEZ,

Plaintiff,

- v -

MOLHAM M. SOLOMON, M.D., et al,

Defendants

INDEX NO. :805348/18

MOTION DATE: 8-15-19

MOTION SEQ. NO.:001

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

In this medical malpractice action, defendant Molham M. Solomon, M.D. moves to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, asserting that he was not properly served with the summons and complaint. Plaintiff opposes the motion and cross moves pursuant to CPLR 306-b for a 120-day extension of the time to serve the summons and complaint on Dr. Solomon, and Dr. Solomon opposes the cross motion.

Dr. Solomon argues that the claims against him should be dismissed as plaintiff has not obtained personal jurisdiction over him as he was not served at his actual place of business. In particular, in his affidavit in support of the motion to dismiss, Dr. Solomon avers that although the affidavit of service shows that on December 18, 2018, that a summons and complaint was left for him at St Joseph Medical Center located at 127 South Broadway, Yonkers, that address is not his actual place of business. Instead, Dr. Solomon states that his actual place of business is located at 81 South Broadway, Yonkers, NY (hereafter “the Yonkers Office”).

In opposition to the motion and in support of her cross motion, plaintiff submits the affidavit of Caswell Bryan (Bryan), the process server, who attempted to serve Dr. Solomon. Bryan states that he was instructed by plaintiff's counsel to serve Dr. Solomon at the Yonkers Office, but that when he attempted service at the main reception/security desk there, he was told by an individual named "Ms. Cortinas" that "service of legal process was not allowed at this location, that she was not authorized to accept the Summons & Complaint on behalf of Molham M. Solomon, M.D., and that the correct location to serve [him] was at St. Joseph's Medical Center at 127 South Broadway, Yonkers, N.Y." He also was advised that "personnel at St. Joseph's Medical Center were authorized to accept service of the Summons and Complaint on behalf of [Dr. Solomon]." Bryan states that he immediately proceeded to St. Joseph's Medical Center where the receptionist, who identified herself as "Terry Jackson," stated that she was authorized to accept serve on Dr. Solomon's behalf. In further support of the cross motion, plaintiff submits digital photographs taken by Bryan at the time he attempted serve at the Yonkers Office and St. Joseph's Medical Center.

Plaintiff argues that based on the Bryan's affidavit and supporting evidence, plaintiff has shown that there is good cause to extend the time for service based on diligent efforts as plaintiff has not only made diligent efforts to effectuate service but was rebuffed when he attempted to make service at the Yonkers Office which Dr. Solomon states is his actual place of business. In addition, plaintiff asserts that as the statute of limitations expired on January 11, 2019, it would be "a grave injustice" to deny an extension of time to serve Dr. Solomon.

In reply, Dr. Solomon argues that plaintiff has not shown "good cause" for an extension of time as Dr. Solomon never tried to conceal his actual place of business and that plaintiff failed to show diligent efforts were made to determine whether Dr. Solomon could be properly served at St Joseph's Medical Center and to determine whether the receptionist there was Dr. Solomon's authorized agent.

Dr. Solomon's arguments in opposition to plaintiff's request for an extension of the time to serve defendant are unavailing as plaintiff has "demonstrated good cause for the extension by showing that [she] has diligently attempted to serve defendants." American BankNote Corp. v.

Daniele, 45 AD3d 338, 340 (1st Dept 2007); see also, CPLR 306-b.¹ Specifically, the record demonstrates that plaintiff attempted service on the receptionist at the Yonkers Office during the 120-day period after filing the summons and complaint and was told that Dr. Solomon was not properly served there, and directed to serve Dr. Solomon at St. Joseph Medical Center where the process server made service and was informed by the receptionist there that she was authorized to accept the papers on Dr. Solomon's behalf. See Henneberry v. Borstein, 91 AD3d 493, 496 (1st Dept 2012)(noting that a "good cause extension requires a showing of reasonable diligence in attempting to effect service upon a defendant")(internal citations and quotations omitted). Nor can it be said that Dr. Solomon will be prejudiced by extending the time for service particularly as it is undisputed that he knows about this action. See Dhuler v. Irac, Inc., 118 AD3d 937, 939 (2d Dept 2014)(granting second extension of time to serve complaint, noting a lack of prejudice since defendant challenging service was represented by counsel, and had filed in answer and thus had notice of the action).²

Alternatively, the extension is properly granted in the interest of justice. The interest of justice standard "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any

¹CPLR 306-b provides, in relevant part, that:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding.... If service is not made upon a defendant within the time 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.

²Contrary to Dr. Solomon's position, Silverling v. Sunrise Family Medicine, P.C., 161 AD3d 1021 (2d Dept 2018), is not controlling here since, in finding no good cause warranting a grant of an extension of plaintiff's time to serve defendant, the court noted that service was made at a location where defendant was no longer employed and that plaintiff sought to extend the time for service more than two years after the expiration of the statute of limitations period.

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 delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." See Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106 (2001). Here, as plaintiff has adequately demonstrated that she will be prejudiced if the extension is not granted as the statute of limitations has expired, that diligent efforts were made to serve Dr. Solomon, that plaintiff was unaware that service was improper until this motion was made and then promptly cross moved for relief, and that Dr. Solomon's ability to defend this action will not be impaired by the delay in service, an extension based on the interests of justice is warranted. Id at 106-107; see also Redmond v. Jamaica Hospital Center, 29 AD3d 768 (2d Dept 2006)(granting an extension of time to serve summons and complaint in medical malpractice action in the interest of justice where physician had not demonstrated prejudice); Darko v. Guerrino, 169 AD3d 768, 770 (2d Dept 2019)(trial court did not abuse its discretion is extending time for service of summons and complaint in medical malpractice action where plaintiff attempted service and statute of limitations expired at time plaintiff sought an extension and there was no demonstrable prejudice to defendant).

In view of the above, it is

ORDERED that the motion by defendant Molham M. Solomon, M.D. to dismiss this action for lack of personal jurisdiction due to improper service of process is denied; and it is further

ORDERED that plaintiff's cross motion to extend the time to serve defendant Molham M. Solomon, M.D. is granted; and it is further

ORDERED that plaintiff's time to serve defendant Molham M. Solomon, M.D. is extended for 120 days from e-filing this order; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street on ~~January 9, 2020~~ (October 17, 2019) at 11 am, although plaintiff may request an earlier date after Dr. Solomon has filed his answer.

DATED: August 15, 2019

J.S.C.

HON. JOAN A. MADDEN

J.S.C.

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