

<b>Oliva v Long Is. R.R. Co.</b>
2019 NY Slip Op 34526(U)
March 21, 2019
Supreme Court, Nassau County
Docket Number: Index No. 610542/17
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - IAS/TRIAL PART 20  
Present: Hon. Sharon M.J. Gianelli, J.S.C.

\_\_\_\_\_X  
BENEDETTO A. OLIVA and BARBARA E.  
OLIVA,

*Plaintiffs,*

Index No. 610542/17

-against-

Motion Seq. Nos. 01,02

THE LONG ISLAND RAIL ROAD COMPANY,

*Defendant.*

\_\_\_\_\_X

Papers submitted on this motion:

- Plaintiff's Notice of Motion \_\_\_\_\_X
- Affirmation in Support \_\_\_\_\_X
- Defendant's Cross-Motion \_\_\_\_\_X
- Plaintiff's Reply and Opposition to Cross-Motion \_\_\_\_\_X
- Defendant's Reply \_\_\_\_\_X

Plaintiffs move pursuant to CPLR § 306 -b extending time to serve the summons and complaint in the interest of justice. Defendant cross-moves to dismiss the complaint pursuant to CPLR § 306-b asserting that the summons and complaint were not filed timely and the action should be dismissed because Plaintiff has not demonstrated good cause or that an interest of justice extension to serve the summons and complaint should be granted.

*Underlying Facts/Procedural History*

This is a negligence action in which Plaintiffs seek to recover for personal injuries allegedly sustained by them as a result of a Long Island Rail Road Company ("LIRR") train collision that occurred on October 8, 2016. The collision was with a maintenance train traveling on the same track as the Eastbound LIRR train in which Plaintiffs were passengers. The location of

occurrence was approximately one-half mile east of the New Hyde Park train station (*see* Summons and Complaint, Plaintiffs' Exhibit "E").

Plaintiff commenced this action by filing a Summons and Complaint on or about October 5, 2017.

On December 27, 2016, notices of claim for each Plaintiff were timely served upon the Defendant and Defendant acknowledged receipt (*see* Plaintiffs' Exhibit "A", Notices of Claims and Affidavits of Service; Exhibit "B", LIRR letter).

On January 11, 2017, counsel for LIRR acknowledged its representation of Defendant and made LIRR equipment involved in the subject accident available for inspection (*see* Plaintiffs' Exhibit "C", letter from Defendant's counsel).

By notice to take oral examination pursuant to New York Public Authorities Law § 1276(4), Defendant's counsel requested an oral examination of each of the Plaintiffs to take place on March 23, 2017 (*see* Plaintiffs' Exhibit "D", Defendants Notices to take oral exam of Plaintiffs).

Oral examinations were conducted pursuant to Defendants notices at American Stenographic Reporters conducted by Defense counsel (*see* Plaintiffs' Affirmation at para. 9, 10).

Thereafter, Plaintiffs state that Defendant was not served with the summons and complaint. Plaintiffs' counsel asserts that his legal assistant, employed at that time, was directed to forward the summons and complaint and notice of e-filing to the process server. This did not occur. Upon

reviewing this former legal assistant's work, it was discovered by counsel that this was not done.

Thus, Plaintiffs now seek leave of Court to belatedly serve the summons and complaint.

The within application was made on December 20, 2018 and was marked submitted on February 21, 2019.

### *Analysis*

Pursuant to CPLR § 306-b, a Plaintiff is required to serve a defendant within 120 days of the commencement of the action. "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" (CPLR 306-b). Therefore, in order for Plaintiff to prevail, it has to establish either that it has good cause for the failure to serve Defendant within 120 days of the commencement of the action, or that the court should grant the extension in the interest of justice (*see Leader v. Maroney, Ponzini & Spencer*, 97N.Y.2d 95 [2001]; *Busler v. Corbett*, 259 A.D.2d 13 [4<sup>th</sup> Dept. 1999]).

"An extension of time for service is a matter within the court's discretion" (*Chan v. Zoubarev*, 157 A.D.3d 851 [2d Dept. 2018] quoting *Leader v. Maroney, Ponzini & Spence, supra*. 'Good cause' and 'interest of justice' are two separate and independent statutory standards (*see Leader v. Maroney, Ponzini & Spencer, supra* at 104).

To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (*see Leader v. Maroney, Ponzini & Spencer, supra* at 105-06). Good cause will not exist where a

plaintiff fails to make any effort at service (*see Valentin v. Zaltsman*, 39 A.D.3d 852 [2d Dept. 2007]; *Lipschitz v. McCann*, 13 A.D.3d 417 [2d Dept. 2004]), or fails to make at least a reasonably diligent effort at service (*see e.g. Kazimierski v. New York Univ.*, 18 A.D.3d 820 [2d Dept. 2005]; *Baione v. Central Suffolk Hosp.*, 14 A.D.3d 635, 636-637 [2d Dept. 2005]).

“If good cause for an extension is not established, courts must consider the ‘interest of justice’ standard of CPLR 306-b (*see e.g. Busler v. Corbett*, 259 A.D.2d 13, 17 [4<sup>th</sup> Dept. 1999]). The interest of justice standard does not require reasonably diligent efforts at service, but courts, in making their determinations, 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 (*see Mead v. Singleman*, 24 A.D.3d 1142, 1144 [3d Dept. 2005]), as its factors also 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 the plaintiff for an extension, and prejudice to the defendant (*see Leader v. Maroney, Ponzini & Spencer, supra* at 105-106; *Matter of Jordan v. City of New York*, 38 A.D.3d 336, 339 [1<sup>st</sup> Dept. 2007]; *Estey-Dorsa v. Chavez*, 27 A.D.3d 277 [1<sup>st</sup> Dept. 2006]; *Mead v. Singleman, supra* at 1144; *de Vries v. Metropolitan Tr. Auth.*, 11 A.D.3d 312, 313 [1<sup>st</sup> Dept. 2004]).

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 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.

*Leader v. Maroney, Ponzini & Spencer, supra.*

Here, applying an interest of justice analysis, under the facts presented, Plaintiffs application is Granted. The summons and complaint demonstrate the merits of the action, the summons and complaint were timely filed, the statute of limitations expired by the time Plaintiffs moved to extend the time for service and there is no demonstrable prejudice to the Defendant which would militate against granting the extension of time to serve Defendant (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *Matter of 76 S. Central Assoc. v. Department of Assessment*, 157 A.D.3d 666 [2d Dept. 2018]; *Gabbar v Flatlands Commons, LLC*, 150 AD3d 1084, 1084-1085 [2017]; *Rudd v. City of New York*, 115 A.D.3d 729 [2d Dept. 2014]; *Abu-Aqlein v El-Jamal*, 44 AD3d 884, 885 [2007]; *Rosenzweig v 600 N. St., LLC*, 35 AD3d 705, 706 [2006]); *Beauge v New York City Tr. Auth.*, 282 AD2d 416 [2001]; 667 *Busler v Corbett*, 259 AD2d 13 [1999]; *cf. Bahadur v New York State Dept. of Correctional Servs.*, 88 AD3d 629, 630 [2011]). Specifically, it has been demonstrated by Plaintiffs that Defendant had notice of the facts of the accident immediately upon its occurrence; immediately investigated the accident and equipment (see Plaintiffs Exhibit "F"); had notice of the specific claims of these Plaintiffs within the statutory period for filing the Notices of Claim; and took testimony from the Plaintiffs. Under these facts, the Court determines that late service is appropriate in the interest of justice.<sup>1</sup>

Accordingly, it is hereby

**ORDERED**, that Plaintiff's application for an extension of time to serve DEFENDANT THE LONG ISLAND RAIL ROAD COMPANY, pursuant to CPLR § 306(b) is **GRANTED**

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<sup>1</sup> The Court need not rule upon the issue of due diligence in light of its determination. In any event, good cause has been demonstrated in this Court's view since it is apparent Plaintiffs complied with all of the requisite requirements up until the point where law office failure resulted in a lack of service upon Defendant.

and Plaintiffs' time to serve this Defendant is hereby extended for 120 days from the date of entry of this decision and Order; and it is further


**ORDERED**, that Defendant's application pursuant to CPLR § 306 -b to dismiss the complaint is **DENIED**; and it is further

**ORDERED**, that upon receipt of an answer interposed by Defendant, Plaintiffs are directed to file a request for a preliminary conference with the Court.

All applications not specifically addressed herein are **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: March 21, 2019  
Mineola, New York



**HON. SHARON M. J. GIANELLI,**  
Justice of the Supreme Court

**ENTERED**  
MAR 28 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE