

**Silva v Kings County Pub. Admr.**

2019 NY Slip Op 34920(U)

April 26, 2019

Supreme Court, Kings County

Docket Number: Index No. 510947/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 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 the 26<sup>th</sup> day of April, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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ROBERTO SILVA,

*Plaintiff,*

Index No.: 510947/2017

DECISION AND ORDER

- against -

KINGS COUNTY PUBLIC ADMINISTRATOR  
AS THE TEMPORARY ADMINISTRATOR OF  
THE ESTATE OF RAM GUDA, MOHAMMED AHAD,

*Defendants.*

Motions Sequence #1, #2

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

|   | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Cross Motion and       |                        |
| Affidavits (Affirmations) Annexed.....  | <u>1/2, 3/4</u>        |
| Opposing Affidavits (Affirmations)..... | <u>5, 6,</u>           |
| Reply Affidavits (Affirmations).....    | <u>7, 8,</u>           |

After a review of the papers and oral argument the Court determines as follows:

This action concerns a motor vehicle accident that allegedly occurred on June 16, 2014.

The Plaintiff Roberto Silva (hereinafter the "Plaintiff") who was apparently operating the vehicle that he owned, was involved in a collision with a vehicle owned and operated by Defendant Ram Guda (hereinafter "Defendant Guda") and also with a vehicle owned and operated by Defendant Mohammed Ahad (hereinafter "Defendant Ahad"). The Plaintiff alleges in his complaint that the alleged motor vehicle collision occurred at the intersection of East 110<sup>th</sup> Street at or near its intersection with Lexington Avenue, in the County of New York, State of New York.

Defendant Ahad now moves (motion sequence #1) for an Order pursuant to CPLR 3211(a)(8) dismissing the Plaintiff's Amended Verified Complaint. Defendant Ahad argues that the Complaint should be dismissed because the Court lacks personal jurisdiction over Defendant Ahad. Specifically, Defendant Ahad contends that he was never served with the summons and complaint, and that the Plaintiff failed to properly file proof of service pursuant to VTL §253.

The Plaintiff opposes the motion and cross moves (motion sequence #2) for separate relief. The Plaintiff contends that the motion should be denied as Defendant Ahad was served pursuant to VTL §253 and Plaintiff attaches to his Affirmation in Opposition to Defendant Ahad's Motion an affirmation of service and a written acknowledgment from the New York State Secretary of State. As part of the Plaintiff's motion, the Plaintiff seeks an Order 1) pursuant to CPLR 306-b extending the time of service upon Defendant Ahad, 2) permitting the filing of the affirmation of compliance *nunc pro tunc*, 3) compelling the Defendants to produce an original death certificate and affidavit of heirship for Defendant Guda, 4) for leave to serve Defendant Guda by alternative means.<sup>1</sup> In opposition, Defendant Ahad contends that the Plaintiff did not properly serve Defendant Ahad pursuant to VTL §253, the statute of limitations has run as against Defendant Ahad and that Plaintiff has not provided sufficient evidence of the reason for the delay in service in order to satisfy CPLR 306-b's interest of justice element.

The Plaintiff claims that he properly served Defendant Ahad pursuant to VTL §253. VTL §253 provides for service of process on non-residents who were involved in motor vehicle accidents in New York State. VTL §253(2) provides in pertinent part that proof of service shall be filed as follows:

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<sup>1</sup> On December 12, 2018, the parties entered into an Order on Consent that granted the Plaintiff's application (motion sequence #3) substituting the Public Administrator of Kings County for Defendant Ram Guda. As a result, those aspects of motion sequence 2 relating to Defendant Guda will not be addressed in this motion and are otherwise denied as academic.

The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, an affidavit of compliance herewith, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail, in accordance with the rules and customs of the post-office department; or, if acceptance was refused by the defendant or his agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by or on behalf of the plaintiff that notice of such mailing and refusal was forthwith sent to the defendant by ordinary mail; or, if the registered or certified letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail.

Turning to the merits of Defendant Ahad's motion made pursuant to CPLR 3211(a)(8), and also the Plaintiff's application made pursuant to CPLR 306-b, the Court finds that the Plaintiff should be granted an extension of time to serve Defendant Ahad, in the interest of justice. Even assuming, *arguendo*, that the Plaintiff did not provide sufficient evidence that he had initially complied with VTL §253, since he did not file an affirmation of service separate and apart from that found in the Plaintiff's Affirmation in Opposition, the Court does find that the Plaintiff's application should be granted pursuant to CPLR 306-b. "The 120-day service provision of CPLR 306-b can be extended by a court, upon motion, "upon good cause shown or in the interest of justice" (CPLR 306-b). "Good cause" and "interest of justice" are two separate and independent statutory standards." *Bumpus v. New York City Transit Auth.*, 66 A.D.3d 26, 31, 883 N.Y.S.2d 99, 105 [2<sup>nd</sup> Dept, 2009]. Good cause requires reasonably diligent efforts at service, while the interest of justice standard will depend on "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." *Id.* The statute of limitations has expired and any delay in the instant proceeding was not due to the

Plaintiff's conduct during this litigation.<sup>2</sup> Moreover, Defendant Ahad makes no showing of prejudice other than a conclusory assertion. *See 76 S. Cent. Assocs., LLC v. Dep't of Assessment*, 157 A.D.3d 666, 666, 66 N.Y.S.3d 620, 621 [2<sup>nd</sup> Dept, 2018]. As a result, the Court grants the Plaintiff's application seeking leave pursuant to CPLR 306-b for a period of sixty days and as a result denies that aspect of Defendant Ahad's motion seeking to dismiss the instant complaint for lack of personal jurisdiction.

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


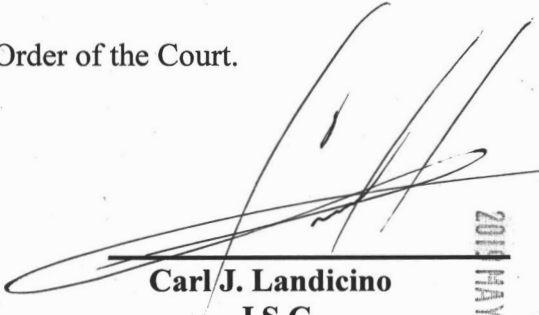
Defendant Ahad's motion (motion sequence #1) is denied.

Plaintiff's motion (motion sequence #2) is granted to the extent provided herein.

Any relief not specifically addressed in the above Decision and Order is hereby denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

**Carl J. Landicino**  
J.S.C.

2019 MAY -2 AM 8:30  
KINGS COUNTY CLERK  
FILED

<sup>2</sup> The death of Defendant Guda and the application to install the Kings County Public Administrator as the temporary administrator for the estate of Defendant Guda resulted in a prolonged stay period.