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| Yaba v City of New York |
| 2020 NY Slip Op 30307(U) |
| February 5, 2020 |
| Supreme Court, New York County |
| Docket Number: 157357/2019 |
| Judge: Kathryn E. Freed |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 157357/2019

MINERVA YABA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, DEPARTMENT OF HOMELESS
SERVICES, SUS SERVICES FOR THE UNDERSERVED,
UNIQUE WILLIAMS, JOHN DOE, JANE DOE, and
THOMAS MARSH,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4
were read on this motion to/for EXTEND TIME.

In this assault action, plaintiff Minerva Yaba moves, pursuant to CPLR 306-b, for an extension of time to serve defendant Thomas Marsh with process. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly assaulted by defendant Thomas Marsh on July 28, 2018. At that time, plaintiff and Marsh were both residents of a shelter operated by defendant S:US Services for the Underserved (S:US). On July 26, 2019, plaintiff commenced the captioned action by

filing a summons and verified complaint against defendants the City of New York, Department of Homeless Services (DHS), S:US, Unique Williams, John and Jane Does 1-5 (shelter staff), and Marsh. All defendants except Marsh have been served and have answered.

Plaintiff's time to serve defendants with process pursuant to CPLR 306-b expired on November 23, 2019, 120 days after the filing of the summons and verified complaint. On November 19, 2019, counsel for plaintiff emailed a subpoena to counsel for S:US and DHS in an attempt to obtain Marsh's forwarding address so that he could be served. On November 22, 2019, plaintiff's counsel was advised that neither S:US nor DHS had a forwarding address for Marsh under that name or under the name Tanya Price, by which Marsh was also known. Then, on November 25, 2019, the first business day after the expiration of the 120-day period, plaintiff's counsel filed the instant motion to extend the time to serve Marsh.

LEGAL CONCLUSIONS:

In order to obtain an extension of time to serve a defendant with process, a plaintiff must show that good cause or the interests of justice dictate the extension. CPLR 306-b; *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001); *Frank v. Garcia*, 84 AD3d 654, 655 (1st Dep't 2011). Good cause focuses on plaintiff's diligence in attempting to serve defendants and its reasons for not effecting service despite that diligence. Plaintiff's diligence bears on the interests of justice, but the interests of justice standard also encompasses all other circumstances bearing on the determination. *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 104-105.

Good Cause

Plaintiff's motion papers are devoid of any indication that she made a reasonable effort to serve Marsh prior to November 2019, the month in which the 120-day period in which to serve him expired. The alleged effort she made to locate Marsh was by emailing a subpoena seeking Marsh's address to the attorney for S:US and DHS on November 19, 2019, just four days before the 120-day period was to expire. This Court finds that plaintiff's eleventh hour attempt to locate Marsh does not constitute a good faith effort to serve him. Therefore, plaintiff has failed to establish good cause for an extension of time to serve the summons and complaint. *See Cassini v. Advance Publs., Inc.*, 125 A.D.3d 467 (1st Dep't 2015). Thus, this Court will consider the alternative standard for such an extension, that being whether such an extension is warranted in the interests of justice.

Interests of Justice

In determining whether the interests of justice mandate an extension, this Court is required to consider several factors, including the expiration of the statute of limitations, any prejudice to defendants, the merits of plaintiff's claims, as well as plaintiff's diligence in attempting to effectuate service, the length of its delay in service, and the promptness of its request to extend its time to serve process. *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 105-106; *Nicodene v. Byblos Rest., Inc.*, 98 A.D.3d 445, 446 (1st Dep't 2012); *Henneberry v. Borstein*, 91 A.D.3d 493, 496 (1st Dep't 2012).

As noted previously, plaintiff's motion papers reflect that she did not even attempt to obtain Marsh's address until November 19, 2019, just four days prior to the expiration of the 120-day period. There is no indication that plaintiff made any effort, other than this eleventh hour attempt, to serve Marsh within 120 days. Additionally, by delaying, until the last possible day allowed by CPLR 306-b, its request for an extension of time, plaintiff has demonstrated a lack of promptness seeking the relief demanded. On the other hand, however, the one year statute of limitations on plaintiff's assault claim against Marsh expired on July 28, 2019. Therefore, if plaintiff is not granted an extension of time, she will be forever barred from bringing suit against Marsh. Additionally, given that there has been no opposition to the instant motion, there is no proof, or even any indication, that Marsh would be prejudiced if this motion were to be granted.¹ Moreover, it is well settled that public policy favors the resolution of claims on their merits. *Hernandez v. Abdul-Salaam*, 93 A.D.3d 522, 522 (1st Dep't 2012).

In weighing the foregoing factors, this Court finds, in its discretion, that plaintiff should be given a reasonable amount of additional time to serve Marsh. Given that this matter has already been delayed by plaintiff's failure to serve Marsh, this Court grants an extension of 60 days, rather than the three month extension requested by plaintiff.

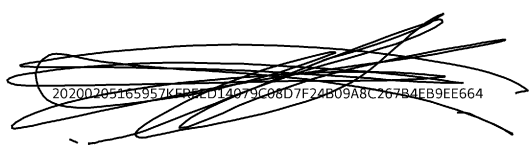
Therefore, in light of the foregoing, it is hereby:

¹ This Court notes, however, that there is no affidavit of service filed on NYSCEF establishing that Marsh was served with the instant motion.

ORDERED that the motion is granted, and plaintiff is permitted an additional 60 days from the date of entry of this order in which to serve defendant Thomas Marsh; and it is further

ORDERED that this constitutes the decision and order of the court.

2/5/2020
DATE



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KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: