

Moran v Delacruz-Espinal

2020 NY Slip Op 31055(U)

April 24, 2020

Supreme Court, New York County

Docket Number: 151198/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22
Justice

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HOLGER MORAN and MARIELA GUAMAN,

INDEX NO. 151198/2017

Plaintiffs,

MOTION DATE 02/26/2020

- v -

MOTION SEQ. NO. 004

JAMIE R. DELACRUZ-ESPINAL, GODDARD RIVERSIDE
COMMUNITY CENTER, SHEMIR DONALDSON-PRENTISS

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

Before the Court is defendants Goddard Riverside Community Center and Shemir Donaldson-Prentiss' motion for an order pursuant to CPLR 308(2), to dismiss the underlying action with prejudice against said defendants due to plaintiffs' failure to timely serve. Defendant Jaime R. DeLaCruz-Espinal cross-moves for the identical relief. Plaintiff opposes the instant motion and cross-motion, and cross-moves to permit late service of the summons and complaint.

Preliminarily, the Court notes that defendant DeLaCruz-Espinal's cross-motion was initially filed under the incorrect motion sequence number (mot. seq. no. 001 rather than mot. seq. no. 004) but has since been corrected. The Court further notes that plaintiff's cross-motion to permit late service was also filed under the incorrect motion sequence number (mot. seq. no. 003 rather than mot. seq. no. 004) and has not been corrected. However, in the interests of judicial economy, all motions and cross-motions are decided herein.

By way of background, this Court's Decision/Order dated August 1, 2018 previously dismissed this action upon motion. Such 2018 Decision/Order held that plaintiff failed to timely commence this action within the applicable statute of limitations, and further that plaintiff failed to timely serve the summons and complaint pursuant to CPLR 306-b after the filing of the summons and complaint. Upon plaintiffs' motion to reargue, the Court determined, by Decision/Order dated March 12, 2019, that the applicable statutes of limitations fell on a weekend such that plaintiff's commencement of the instant action on the following Monday was timely. The Court further found, that due to the various personal hardships suffered by plaintiff's counsel, plaintiff established good cause for an extension of time to serve defendants. Thus, the Court's March 2019 Decision/Order restored this action to active status and provided plaintiffs with additional time to serve defendants.

Initially, plaintiffs were obligated to effectuate service within one hundred and twenty days of the filing of the Summons and Complaint and failed to do so. Thereafter, pursuant to the Court's March 2019 Decision/Order, plaintiffs were given a second opportunity to timely serve all defendants with the Summons and Complaint. Such Decision/Order directed plaintiffs to serve within 60 days and serve a copy of the Decision/Order upon all parties within 30 days. It is undisputed that plaintiffs failed to timely serve the Court's March 2019 Decision/Order upon defendants, and further failed to timely serve defendants. In fact, plaintiffs have failed to serve defendants to date.

In opposition, plaintiffs concede that service was delayed after the Court's March 12, 2019 Decision/Order which granted additional time for service. Plaintiffs' counsel cited many difficulties, both personal and work related, as the reason for the failure to serve. Notably, most of the difficulties cited by plaintiffs occurred years before plaintiffs' motion to reargue. Although

the Court acknowledges the tragic passing of plaintiff's counsel, Mr. Andrew John Calcagno, the Court notes that Mr. Calcagno was ill and out of the office or indisposed for months prior to his passing and plaintiff's counsel's law firm, Calcagno & Associates LLC, failed to take any steps to properly effectuate service. While the Court is sympathetic to the hardships suffered by plaintiff's counsel, such sympathy must not come at the expense of defendants. At this point, the motor vehicle accident in question occurred over six (6) years ago.

The prejudice suffered by defendants, who would be forced to defend an action, which occurred twice as long ago as the statute of limitations to bring such action, must not be overlooked. Furthermore, plaintiff's counsel failed to take any action in this matter following the expiration of the Court's extension of time to serve, which ran on May 13, 2019. In fact, plaintiffs' counsel chose to do nothing until defendants filed the instant motion in November 2019. Plaintiffs' instant cross-motion seeking another extension of time to serve was not filed until February 2020. Here, defendants have been severely prejudiced by plaintiffs' excessive delay and failure to serve the Summons and Complaint for nearly three years after the expiration of the three-year statute of limitations. Thus, defendants motion and cross-motion to dismiss this action with prejudice is granted, and plaintiffs' cross-motion for an extension of time to serve is denied.

Accordingly, it is

ORDERED that defendants' motion and cross-motion to dismiss the Complaint herein on the grounds that plaintiffs have failed to timely serve defendants pursuant to CPLR § 306-b is granted and the Complaint is dismissed in its entirety with prejudice as against defendants Goddard Riverside Community Center, Shemir Donaldson-Prentiss, and Jaime R. DeLaCruz-Espin s/h/a Jamie R. DeLaCruz-Espinal, with costs and disbursements to said defendants as

taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of defendants dismissing this action; and it is further

ORDERED that plaintiffs' cross-motion to extend the time to serve is denied in its entirety; and it is further

ORDERED that, within 45 days, defendants Goddard Riverside Community Center and Shemir Donaldson-Prentiss shall serve a copy of this order upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court

4/24/20
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: