

Philpot v Garbarini

2020 NY Slip Op 31365(U)

May 14, 2020

Supreme Court, New York County

Docket Number: 151570/2019

Judge: W. Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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LARRY PHILPOT,

Plaintiff,

- v -

RICHARD GARBARINI, GARBARINI LAW GROUP, P.C.

Defendant.

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INDEX NO. 151570/2019
MOTION DATE 02/20/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL

This is a legal malpractice action brought by plaintiff Larry G. Philpot.

Defendants, Richard M. Garbarini (Garbarini) and Garbarini Law Group, P.C., represented plaintiff in several copyright infringement lawsuits.

Defendant Garbarini moves, pursuant to CPLR 306-b, to dismiss plaintiff's complaint against him, for failing to serve the summons and complaint within 120 days. Plaintiff cross-moves, pursuant to CPLR 306-b, for an order, nunc pro tunc, extending his time to serve the summons and complaint upon Garbarini, and for an order, pursuant to 22 NYCRR § 202.8 (c), striking defendant's affirmation in support.

Plaintiff filed his summons and complaint on February 13, 2019 (NYSCEF Doc No. 1). Plaintiff's time to serve Garbarini with process pursuant to CPLR 306-b expired 120 days thereafter; however, service upon Garbarini was completed five days late, on June 18, 2019 (NYSCEF Doc No. 19).

Plaintiff then cross-moved for an extension of time to serve Garbarini after Garbarini filed the instant motion.

Pursuant to CPLR 306-b, upon a showing of good cause or in the interest of justice, a party's time to serve may be extended (*de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, 313 [1st Dept 2004]). Here, plaintiff cross-moves for an extension of time based only on the interest of justice. As such, the court examines not only plaintiff's diligence in attempting to effectuate service upon defendant Garbarini, but other factors, such as, expiration of the statute of limitations, any prejudice to defendants, the merits of plaintiff's claims, 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 NY2d 95, 105-106 [2001]).

Defendant argues that plaintiff failed to exercise due diligence in attempting to serve Garbarini and cannot establish the existence of a meritorious cause of action (NYSCEF Doc No. 68 at 10, 15). Defendant cites to *Johnson v Concourse Vil., Inc.* (69 AD3d 410, 411 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]), a personal injury action where the summons and complaint was filed less than a week before the statute of limitations expired and service was completed one day after the 120-day deadline. The Court held that an extension of time in the interest of justice was not warranted in the case due to

[t]he circumstances presented, including that the statute of limitations expired, plaintiff's lack of diligence in prosecuting this action, the lack of probative evidence offered as to the claim's merit, the vague allegations of injury, the lack of notice given of the claim for more than three years and three months, the prejudice to defendants and the several month delay in moving for an extension of the time to serve (*id.*).

Plaintiff counters that a five-day delay in service is inconsequential and non-prejudicial to Garbarini, and the statutes of limitations have expired on his claims for legal malpractice, breach of fiduciary duty and conversion of settlement funds against Garbarini (NYSCEF Doc No. 35 at

2). Plaintiff contends that although he failed to request an extension of time, he has since remedied the situation with the instant cross motion (*id.* at 5). Furthermore, he outlines his efforts in attempting to effectuate service upon Garbarini (NYSCEF Doc No. 35 at 6-9). Lastly, plaintiff argues that he has valid, potentially meritorious claims against Garbarini (*id.* at 10-29).

Plaintiff relies heavily on *Palladino v Sargent* (6 AD3d 1082, 1083 [4th Dept 2004]), a legal malpractice case, where the plaintiff served an individual defendant 24 days after expiration of the 120-day deadline, without first obtaining leave of court (*id.*). The Court held that the client was entitled to an extension of time to serve defendant, nunc pro tunc, in the interest of justice, where the delay was short, the statute of limitations had then expired, and the defendant was represented by the same law firm that accepted service on behalf of the other defendants (*id.*).

Here, like in the *Palladino* case, the delay was short, the statutes of limitations have now expired, and Garbarini is represented by the same attorney as Garbarini Law Group, P.C., a timely-served defendant (*see id.* at 1084 [“we conclude that the . . . defendants received notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections”] [internal quotation and citations omitted]). Accordingly, defendant’s motion to dismiss pursuant to CPLR 306-b is denied and plaintiff’s cross motion, nunc pro tunc, to extend the time in which to effect service of process of the summons and complaint is granted.

Turning to plaintiff’s cross motion to strike counsel’s affirmation for failure to abide by 22 NYCRR § 202.8 (c), which states that “[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law,” the court finds that defendant’s

“minor deviation does not justify striking motion papers” (*Kemper Independence Ins. Co. v E&W Acupuncture P.C*, 2010 NY Slip Op 31342[U] [Sup Ct, NY County 2010]).

CONCLUSION

Based upon the foregoing, it is

ORDERED that defendant Richard M. Garbarini’s motion to dismiss (motion sequence 001) is denied in its entirety; and it is further

ORDERED that plaintiff Larry G. Philpot’s cross motion is granted to the extent of permitting an extension of time nunc pro tunc to serve defendant Richard M. Garbarini, and is otherwise denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/14/2020
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE