

Kim v City of New York
2020 NY Slip Op 32182(U)
July 2, 2020
Supreme Court, New York County
Docket Number: 153507/2019
Judge: Laurence L. Love
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PRESENT: HON. LAURENCE L. LOVE **PART** **IAS MOTION 62**

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INDEX NO. 153507/2019

MOTION DATE 3/26/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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were read on this motion to/for

DISMISSAL

On or about April 4, 2019, plaintiff filed a summons and complaint alleging that, on January 8, 2018, she was struck by a Komatsu loader owned by Ferrari Holdings, Inc. d/b/a Ferrari Excavating and operated by its employee Michael Joseph Fico. Pursuant to CPLR Section 306-b, the summons and complaint were required to be served upon the defendants within 120 days of April 4, 2019 (August 2, 2019). It is undisputed that said defendants were not served within the required time limit. CPLR 306-b further provides “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.” Moving defendants now move dismiss this action and plaintiff now moves for an extension of time to serve said defendants.

Until such time as a judgment of dismissal for improper service of process is entered, the plaintiff may move pursuant to CPLR 306-b for permission to make late service. *See, Cooke-Garrett v. Hoque*, 109 A.D.3d 457, 970 N.Y.S.2d 81 (2d Dept 2013). As such, plaintiff’s motion is timely.

In support of its motion, plaintiff alleges that “following notice of the collision to the City of New York, the City’s Office of the Comptroller informed the undersigned that the Defendant, Riccelli Trucking, Inc., was a ‘third party [that] may be responsible’” Plaintiff is unable to find its original copy of said letter, however plaintiff admits that same was received in 2018. Plaintiff’s motion is utterly devoid of any justification for its failure to serve the Riccelli defendants in a timely matter and must therefore rely on an extension of time from the “interest of justice” standard.

As discussed in *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105–06 (2001), “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.”

Plaintiff’s motion contains no showing of diligence in its attempt to serve defendants. The statute of limitations has not expired in this action, as such, plaintiff may file a new action against

the instant defendants. Plaintiff did not file the instant motion until January 6, 2020, which is not only after the expiration of its original 120 days to serve, but is after the expiration of an additional 120 days thereafter. Further, the moving defendant's motion contains affidavits from Lucille Nicholson, President of Riccelli Trucking, Inc and Richard J. Riccelli, President of Riccelli Enterprises, Inc., which establish that on January 8, 2018, neither company was the owner of a Komatsu loader, nor does either company employ defendant, Michael Joseph Fico. As such, there has been no showing that plaintiff's action has any merit as against the moving defendants. The sole factor weighing in plaintiff's favor is the lack of prejudice to the moving defendants, which is insufficient to grant plaintiff's cross-motion. Said cross-motion is hereby denied.

ORDERED that the motion of defendants Riccelli Enterprises, Inc. and Riccelli Trucking, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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