

Bhatara v Kolaj

2020 NY Slip Op 32475(U)

June 9, 2020

Supreme Court, Queens County

Docket Number: 704156/13

Judge: Leonard Livote

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This opinion is uncorrected and not selected for official publication.

Short Form Order

FILED

6/11/2020
9:51 AM

NEW YORK SUPREME COURT - QUEENS COUNTY

COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Acting Supreme Court Justice

IA Part 33

ATUL BHATARA and USHA HOLDINGS, LLC,
Plaintiffs

Index Number 704156/13

- against -

Motion Date 3/3/20

PAUL KOLAJ, JOHN KOLAJ, FAMIGLIA-
DEBARTOLO, LLC, FAMOUS FAMIGLIA
HOLDINGS, LLC, DB PIZZA, LLC, FAMIGLIA
INTERNATIONAL, INC., FAMIGLIA- NOTICE
DEBARTOLO OPERATIONS, LLC, FAMIGLIA-
DEBARTOLO FRANCHISE SYSTEMS, LLC, FD LEASING
GROUP, LLC, FAMOUS FAMIGLIA BRANDS, LLC,
FF FRANCHISE SYSTEMS LLC, FAMIGLIA-DEBARTOLO
BRANDS, LLC, and FRIENDSHIP RESTAURANT
GROUP, LLC,

Motion Seq. No. 4

Defendants.

X

The following papers numbered 1- 11 read on this motion by defendants John Kolaj, Famous Famiglia Holdings, LLC, Famiglia International, Inc., Famiglia-DeBartolo Operations, LLC, Famiglia-DeBartolo Franchise Systems, LLC, FD Leasing Group, LLC, Famous Famiglia Brands, LLC, FF Franchise Systems LLC, and Famiglia-DeBartolo Brands, LLC (collectively, the "Newly-Added Defendants"), pursuant to CPLR § 3211(a)(8) and CPLR § 306-b, dismissing the Newly Added Defendants from this action for lack of personal jurisdiction; and

a cross motion by plaintiffs to extend the time to serve the newly added defendants.

Papers
Numbered

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Reply Affidavits	

Upon the foregoing papers, the motion and cross motion are determined as follows:

Plaintiffs Atul Bhatara and USHA Holdings LLC (collectively, the “Original Plaintiffs”) commenced this action against Paul Kolaj, Giorgio Kolaj, Famiglia-DeBartolo LLC and Friendship Restaurant Group (collectively, the “Original Defendants”) in September 2013 by filing a summons with notice. The Original Plaintiffs’ complaint (the “Original Complaint”), filed in April 2014. In January 2019, literally weeks before the statute of limitations would have expired based on the version of the facts alleged by the Original Plaintiffs, the Original Plaintiffs moved: (1) to amend the Original Complaint to add the ten Newly-Added Defendants (plus one other entity) as defendants in this action; (2) to add plaintiff Vishal Sharma (“Sharma,” and, collectively with the Original Plaintiffs, the “Current Plaintiffs”); and (3) to remove Giorgio Kolaj (“Giorgio”) as a defendant based upon his discharge in bankruptcy.

This Court granted that motion in a decision and order dated June 29, 2019 (the “June 29 Order”), which was entered by the Clerk of the Court on July 17, 2019. Thereafter, on August 1, 2019, the Current Plaintiffs filed their supplemental summons (the “Supplemental Summons”) and their amended complaint (the “Amended Complaint”) via the NYSCEF system, which constituted the commencement of this action as to the Newly-Added Defendants.

On August 21, 2019, the Original Defendants except for Giorgio (the “Amended Original Defendants”) filed an answer to the Amended Complaint. The 120-day period for serving the Newly-Added Defendants with the Supplemental Summons and Amended Complaint pursuant to CPLR § 306-b, measured from the date the Supplemental Summons and Amended Complaint were filed on August 1, expired on November 29, 2019. None of the Newly-Added Defendants were served before that date, and no motion to extend the Current Plaintiffs’ time to serve has been filed.

On December 3, 2019, the Current Plaintiffs e-filed affidavits of service indicating that three of the Newly-Added Defendants had been served with the Supplemental Summons and Amended Complaint through the Delaware Secretary of State on December 2, 2019: Famous Famiglia Holdings, LLC, Famiglia-DeBartolo Franchise Systems, LLC, and FF Franchise Systems LLC. On December 10, 2019, the Current Plaintiffs filed an affidavit of service indicating that Famiglia-DeBartolo Operations, LLC had been served on December 5 through the Florida Secretary of State. On December 17, the Current Plaintiffs e-filed four more affidavits of service indicating that Famiglia International, LLC, Famiglia International, Inc., FD Leasing Group LLC and Famous Famiglia Brands, LLC had been served through the New York Secretary of State on December 10, 2019. Two of the Newly-Added Defendants, John Kolaj and Famiglia-DeBartolo Brands LLC, still have not been served.

Plaintiff cross-moves to extend the time to serve the Newly-Added Defendants. As a threshold matter, the plaintiffs' claim that they were misled by defense counsel is belied by the record.

CPLR 306-b permits the courts to extend a plaintiff's time to serve a summons and complaint upon good cause shown or in the interest of justice. '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' (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105). In determining whether to grant an extension of time to serve a summons and complaint pursuant to CPLR 306-b, due diligence is only one factor to consider along with expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiffs' request for the extension of time, and prejudice to the defendants. Some factors favoring an extension are timely service within the 120-day period allowed by CPLR 306-b which was later found to be defective and the fact the defendants had actual notice of the claim and/or of the action (*Rosenzweig v 600 N. St., LLC*, 35 AD3d 705, 705-06 [2d Dept 2006]).

Applying these factors to the instant case, plaintiff has established both good cause and that it is in the interests of justice to extend the plaintiff's time to serve the movants.

Accordingly, the cross-motion to extend is granted and it is,

ORDERED, that the plaintiffs' time to serve Famous Famiglia Holdings, LLC, Famiglia-DeBartolo Franchise Systems, LLC, FF Franchise Systems LLC., Famiglia-DeBartolo Operations, LLC' Famiglia International, LLC, Famiglia International, Inc., FD Leasing Group LLC, and Famous Famiglia Brands, LLC is extended nunc pro tunc to the time each was served; and it is further,

ORDERED, that the plaintiffs' time to serve John Kolaj and Famiglia-DeBartolo Brands LLC is extended for 60 days from the time of filing of this Order with notice of entry; and it is further,

ORDERED, that defendants motion is granted only to the extent that should defendant's further move to the court upon conclusive proof that plaintiffs have failed to timely serve John Kolaj and Famiglia-DeBartolo Brands LLC as allowed herein, the action will be dismissed as against them.

Any other and/or further relief not specifically addressed is denied.

This constitutes the Order of the Court.

Dated: June 9, 2020



A.J.S.C.

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**COUNTY CLERK
QUEENS COUNTY**