

Zvulon v 62nd St. Props., LLC
2020 NY Slip Op 32983(U)
September 10, 2020
Supreme Court, New York County
Docket Number: 155055/2019
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. 155055/2019

ELANA ZVULON,

MOTION SEQ. NO. 001

Plaintiff,

- v -

62ND STREET PROPERTIES, LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

In this personal injury action, defendant 62nd Street Properties, LLC ("defendant") moves, pursuant to CPLR 3211(a)(5) and (8), for dismissal of the summons and complaint based on the statute of limitations and lack of personal jurisdiction (Docs. 5-12). Plaintiff Elana Zvulon ("plaintiff") opposes the motion and cross moves, pursuant to CPLR 306-b, for an extension of time to serve defendant with the summons and complaint (Docs. 19-27). Defendant oppose the same (Docs. 30-31). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On May 19, 2016, plaintiff was allegedly injured when she fell on the sidewalk abutting a single-family residential building owned by defendant and located at 238 East 62nd Street in Manhattan ("the premises") (Doc. 1). On May 18, 2019, plaintiff filed a summons and complaint

against defendant alleging negligence (Doc. 1). Defendant interposed an answer on August 7, 2019, raising several affirmative defenses (Doc. 4).

Defendant now moves, pursuant to CPLR 3211(a)(8), for dismissal of the summons and complaint based on lack of personal jurisdiction because plaintiff mistakenly served a NY corporation with the same name as defendant instead of defendant, a Delaware corporation (Doc. 6 at 2-3). Defendant also argues that, based on said failure, the three-year statute of limitations on plaintiff's negligence claim has run, warranting dismissal of the summons and complaint pursuant to CPLR 3211(a)(5) (Doc. 6 at 3-4).

Plaintiff opposes the motion and cross moves, pursuant to CPLR 306-b, for an extension of 90 days from the date of this order to serve defendant with the summons and complaint, arguing that said extension should be granted under either the "good cause" or "interest of justice standard" (Doc. 27 ¶ 15-23). Plaintiff submits, *inter alia*, an affidavit of service from her process servicing company, PM Legal, reflecting that Dennis Dondre ("Dondre") attempted to serve defendant at the premises on May 30, 2019 (Doc. 22). Dondre affirmed that a "Jane Doe" at the premises informed him that "she was not aware of or affiliated with [defendant] and it was not located at the property" (Doc. 22). Plaintiff's counsel also attempted to serve defendant via the Secretary of State and mailed courtesy copies of the summons and complaint to the premises (Docs. 23-24). In support of her contention that there is a meritorious claim, plaintiff submits her 50-h testimony from November 20, 2017 relating to this same incident, as well as photographs of the defective sidewalk (Docs. 25-26).

In opposition to the cross motion and in further support of its motion to dismiss, defendant disputes plaintiff's contention that service was attempted and refused by a "Jane Doe" at the premises on May 30, 2019 (Doc. 30 ¶ 3). Defendant submits the affidavit of Ranika Cohen

("Cohen"), who resides at the premises with her husband and two children (Doc. 31). Cohen asserts that she was the only person that could have been at the premises on May 30, 2019 at the time Dondre claims that service of the summons and complaint was attempted (Doc. 31). Cohen affirms that she was not served with the summons and complaint and that, contrary to Dondre's affidavit, she did not refuse service by stating that she was unaware of or unaffiliated with defendant (Doc. 31).

Defendant also argues that plaintiff's failure to comply with Business Corporation Law § 307, which governs service on unauthorized foreign corporations, warrants denial of the cross motion and dismissal of the summons and complaint (Doc. 30).

LEGAL CONCLUSIONS:

As an initial matter, this Court will first consider plaintiff's cross motion insofar as that determination could render defendant's motion moot (*see Gwinn v Dellipiane*, 2020 NY Slip Op 32721[U], 2020 NY Misc LEXIS 4721, *9 [Sup Ct, NY County 2020]; *Zulaf v St. John's Church*, 2013 NY Slip Op 33187[U], NY Misc LEXIS 5972, *2 [Sup Ct, NY County 2013]).

Although service of the summons and complaint "shall be made within one hundred twenty days after the commencement of the action," this Court may, "upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306-b; *see Yaba v City of NY*, 2020 NY Slip Op 30307[U], 2020 NY Misc LEXIS 507, *2 [Sup Ct, NY County 2020]). "A good cause extension requires a showing of reasonable diligence in attempting to effect service upon a defendant" (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] [internal quotation marks omitted]; *see Zegelstein v Faust*, 179 AD3d 541, 542 [1st Dept 2020]). However, the interest of justice standard is more flexible, allowing courts to accommodate late service that might be

attributed to mistake, confusion or oversight, so long as it does not prejudice defendant (*see Leader v Maroney*, 97 NY2d 95, 104-105 [2001]). Under the interest of justice standard, courts may consider such factors as diligence, or lack thereof; the expiration of the statute of limitations; the meritorious nature of the causes of action; the length of the delay in service; the promptness of plaintiff's request for an extension of time; and the prejudice to defendant (*see Spath v Zack*, 36 AD3d 410, 413-414 [1st Dept 2007]; *Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]).

This Court is persuaded that an extension of time to serve the summons and complaint is warranted under the "good cause" standard insofar as plaintiff has demonstrated reasonable diligence in attempting to serve defendant. At the very least, an extension of time is warranted under the interest of justice standard, especially considering, *inter alia*, the fact that plaintiff's claim would be extinguished without an extension due to the statute of limitations (*see Wimbledon Fin. Master Fund, Ltd. v Laslop*, 169 AD3d 550, 551 [1st Dept 2019]; *Hernandez v Abdul-Salaam*, 93 AD3d 522, 522 [1st Dept 2012]; *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept 2011]). Moreover, there is strong interest in deciding cases on the merits and, after reviewing plaintiff's 50-h testimony and the photographs depicting the defective sidewalk, this Court finds that the claim is potentially meritorious, weighing in favor of granting the cross motion (*see Hernandez v Abdul-Salaam*, 93 AD3d at 522; *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d at 431; *Dowell v City of New York*, 2016 NY Slip Op 31181[U], 2016 NY Misc LEXIS 2354, *7-8 [Sup Ct, NY County 2016]). Defendant has also failed to establish any prejudice from the extension because it had actual notice of this action and even interposed an answer (*see Wimbledon Fin. Master Fund, Ltd. v Laslop*, 169 AD3d at 551; *Deutsche Bank, AG v Vik*, 149 AD3d 600, 600 [1st Dept 2017]; *Rudd v City of New York*, 115 AD3d 729, 730 [2d Dept 2014]). This Court also considers the unusual fact that there was another corporation in New York with the same name as

defendant, adding to the confusion with respect to service (*see generally Pena v Dimino*, 2016 NY Slip Op 32680[U], 2016 NY Misc LEXIS 4983, *3-4 [Sup Ct, Bronx County 2016]).

Based on the foregoing, plaintiff's motion seeking dismissal of the complaint, pursuant to CPLR 3211(a)(5) and (8), is denied as moot.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Elana Zvulon's cross motion seeking an extension, pursuant to CPLR 306-b, to serve defendant 62nd Street Properties, LLC with the summons and complaint within 90 days after this order is uploaded to NYSCEF is granted; and it is further

ORDERED that the motion by defendant 62nd Street Properties, LLC, pursuant to CPLR 3211(a)(5) and (8), is denied as moot; and it is further

ORDERED that, within 30 days after this order is uploaded to NYSCEF, plaintiff Elana Zvulon shall serve a copy of this order, with notice of entry, upon defendant; and it is further

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

KATHRYN E. FREED, J.S.C.

9/10/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE