

Siemanowicz v Sculco
2020 NY Slip Op 33007(U)
September 10, 2020
Supreme Court, New York County
Docket Number: 805246/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**LISA SIEMANOWICZ, As Administratrix of the Estate,
of VICTOR SIEMANOWICZ, AND LISA,
SIEMANOWICZ, Individually,**

**INDEX NO. 805246/2019
MOTION DATE
MOTION SEQ. NO. 3
MOTION CAL. NO.**

Plaintiffs,

- against-

**PETER SCULCO, M.D., HOSPITAL FOR SPECIAL
SURGERY, ARTHUR YEE, M.D., JAMES
CALLOWAY, M.D., AND PATRICK LEE, M.D.,**

Defendants.

The following papers, numbered 1 to ____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED

■
■ -
■

Cross-Motion: X Yes No

Defendant James Calloway, M.D. (“Dr. Calloway”) moves for an Order pursuant to CPLR §3211(a)(8), dismissing the Verified Complaint for Plaintiffs failure to effect proper service. Plaintiffs cross move for an Order pursuant to CPLR § 306-b, granting leave to re-serve Dr. Calloway if necessary.

Plaintiffs commenced this action by filing the summons and complaint on July 31, 2019. The action arises out of claims of alleged medical malpractice, lack of informed consent, wrongful death, and loss of service. Plaintiffs allege that Defendants failed to timely and properly treat Decedent Plaintiff Victor Siemanowicz (“Decedent”) which resulted in a stroke, brain damage, quadriplegia and death. No cross-claims are asserted.

Plaintiffs commenced this action by filing the Summons and Verified Complaint on July 31, 2019. On August 10, 2019, Dr. Calloway was served at his New York State DMV address. Defendant Hospital for Special Surgery was served on or about August 19, 2019. Defendant Hospital for Special Surgery served its answer on September 12, 2019. Dr. Calloway served his Answer on March 4, 2020. On May 4, 2020, Dr. Calloway made this motion.

On July 28, 2020, by Amended Decision and Order, Defendant Patrick Lee, M.D.’s (“Dr. Lee”) motion to dismiss was granted and the action was dismissed as to Dr. Lee based on Plaintiffs failure to obtain personal jurisdiction.

Parties' Contentions

Plaintiffs argue that Dr. Calloway's motion should be denied because it is defective on its face. Plaintiffs assert that Dr. Calloway failed to include an Attorney Affirmation with his motion to dismiss and it was not filed with New York State Courts Electronic filing as required under 22 NYCRR 202.8(c) and CPLR § 2214(c). Plaintiffs argue that Dr. Calloway was "timely served at his last known address according to the skip-trace run on him, as indicated in the Affidavit of Service signed by plaintiff's process server. (See Exhibit 2)." Plaintiffs contend that they made a good faith effort to serve Dr. Calloway. Plaintiffs argue there is no prejudice to Dr. Calloway. Plaintiffs contend that Dr. Calloway served his Answer on March 4, 2020, therefore Dr. Calloway had notice of this lawsuit. Plaintiffs assert that "if the Court determines that plaintiffs did not use good faith to serve defendant Dr. Calloway and that defendant Dr. Calloway has somehow been prejudiced, even though he answered, the proper remedy is not dismissal, but would be a traverse hearing."

Moreover, Plaintiffs assert that "[i]n the event that the Court deems that the service was not proper, plaintiffs respectfully request leave to re-serve defendant JAMES CALLOWAY, M.D., in accordance with case law and the CPLR." Plaintiffs argue that an extension of time to re-serve when the statute of limitations has run should be liberally granted where the plaintiff has been "reasonably diligent in attempting service." Plaintiffs assert that the court should permit Plaintiffs to re-serve Dr. Calloway because "as any delay is the result of [Dr. Calloway] not serving [his] Answer or motion to dismiss many months after [he] had notice of this case, there is not any impact on the judicial proceedings and the movant completely controlled any delay and has not acted in good faith." Plaintiffs contend that the malpractice occurred from July 6, 2017 to December 15, 2017, and Dr. Calloway's involvement in Decedent's treatment was on August 23, 2017. Plaintiffs argue that Dr. Calloway waited for the statute of limitations to expire to file the motion and because Dr. Calloway "did not file this motion until May 4, 2020, plaintiffs do not have time to file and serve a new action."

In opposition, Dr. Calloway argues that he "inadvertently omitted to file the Affirmation in Support" in NYSCEF, "neither the Court Clerk nor any party receiving our motion papers via the NYSCEF system alerted this office to this error to allow us to correct the obvious omission of the Affirmation containing [Dr. Calloway's] arguments". Dr. Calloway contends that 22 NYCRR 202.8(c) or CPLR 2214(c) require the Court to refuse to consider improperly submitted papers. Dr. Calloway contends that his motion to dismiss is timely made. Dr. Calloway asserts

that after filing the Answer, the State of New York suspended the filing of motions as a result of COVID-19. Dr. Calloway contends that on March 7, 2020 Governor Cuomo issued an Executive Order (Executive Order 202) declaring a State disaster emergency for the entire State of New York, and on March 20, 2020 Governor Cuomo issued an Executive Order (Executive Order 202.8) temporarily suspending and/or modifying laws of the State of New York. Dr. Calloway further contends that on March 22, 2020, the Honorable Lawrence K. Marks, Chief Administrative Judge of the Courts, issued an Administrative Order (AO/78/20), directing that “effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters ... This directive applies to both paper and electronic filings.” Dr. Calloway argues that this case was not an essential matter. Dr. Calloway asserts on April 30, 2020, Hon. Judge Marks issued a memorandum stating that new motions and responsive papers to filed motions could be filed on NYSCEF starting on Monday, May 4, 2020. Dr. Calloway contends that his motion to dismiss was timely filed on May 4, 2020.

Dr. Calloway asserts that Plaintiffs failed to comply with CPLR § 308 and obtain personal jurisdiction on Dr. Calloway, therefore the Complaint must be dismissed. Dr. Calloway argues that Plaintiffs never personally served Dr. Calloway pursuant to CPLR § 308(1), instead Plaintiffs’ counsel attempted “deliver and mail” service under CPLR § 308(2). Dr. Calloway argues that CPLR § 308(2) authorizes “deliver and mail” service to a defendants’ “actual place of business, dwelling place or usual place of abode of the person to be served.” Dr. Calloway asserts that “a party subsequently received actual notice of the suit does not cure a defect of service attempted pursuant to CPLR 308(2), since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court.” Dr. Calloway argues that he stated in Affidavit “that he previously resided at 4 Martine Avenue #518, White Plains, New York, but he moved from that address his residence in early August of 2017 to 410 Westover Road, Stamford, CT, where he still resides.” Dr. Calloway asserts that his “Affidavit states that in August 2017 he moved to the State of Connecticut, whereupon he surrendered his New York driver’s license to the Connecticut DMV to obtain a Connecticut driver’s license” pursuant to Connecticut. Conn. Gen. Stat. Ann. § 14-36(2). Dr. Calloway argues that there was no “good faith” attempt at service because Plaintiffs were on notice that Dr. Calloway surrendered his license and states that in the cross-motion. Dr. Calloway argues that “Plaintiff has not submitted an argument that the request for an extension of time to serve the Complaint should be granted based upon good cause; instead, Plaintiff argues that the Cross Motion should be granted in the interest of justice.”

In reply, Plaintiffs assert that Dr. Calloway “asks this Court to excuse its procedural defect but seeks dismissal against plaintiff for an apparent procedural issue.” Plaintiffs further assert that Dr. Calloway “also failed to address that it requested many months of extensions to Answer the Complaint and did not advise that there was a service issue until six months later when the statute of limitations passed.” Plaintiffs argue that Dr. Calloway has not proceeded in good faith and as a result Plaintiffs will be prejudiced if Dr. Calloway is dismissed. Plaintiffs assert that if the Court excuses Dr. Calloway’s procedural defect in failing to attach the Attorney Affirmation, then Plaintiffs’ procedural defect with service should also be excused. Plaintiffs argue that the process server has served tens of thousands of defendants in this manner and this is the first time that she can recall that the skip trace did not have information adequate for service. Additionally, Plaintiffs argue that Dr. Calloway “failed to refute that he had ‘fair notice’ of the lawsuit through his employer/co-defendant HOSPITAL FOR SPECIAL SURGERY.” Plaintiffs contend that Dr. Calloway does not try to claim there was any prejudice.

Legal Standards

CPLR § 308 states in relevant part:

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or
2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business ...

CPLR § 306–b states in relevant part:

Service of the summons and complaint, summons with notice, ... shall be made within one hundred twenty days after the filing of the summons and complaint, summons with notice,.... If service is not made upon a defendant

within the time period 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.

CPLR § 306–b “requires that a defendant challenging service move to dismiss on that ground.” *Henneberry v. Borstein*, 91 AD3d 493, 495 [1st Dept 2012] (internal citation omitted). “In deciding such a motion, the express language of CPLR 306–b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action.” *Id.* “CPLR 306–b authorizes an extension of time for service in two discrete situations: ‘upon good cause shown’ or ‘in the interest of justice’ (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018 [2001]).” *Id.*

“A ‘good cause’ extension requires a showing of reasonable diligence in attempting to effect service upon a defendant.” *Id.* at 496. “[G]ood cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control.” *State of New York Mtge. Agency v. Braun*, 182 AD3d 63, 66 [2d Dept 2020]. “Even if this case does not qualify for an extension under the ‘good cause’, we find that it qualifies under the ‘interest of justice’ category.” *Henneberry*, 91 AD3d at 495 (internal citation omitted). “Under this prong of CPLR 306–b, the Court of Appeals has instructed that a court ‘may consider [plaintiff’s] diligence, or lack thereof, along with any other relevant factor ..., 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’ (*Leader*, 97 N.Y.2d at 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018).” *Id.*

The First Department held in *Pennington v. Da Nico Rest.*, 123 AD3d 627, 627-28 [1st Dept 2014] that “[t]he absence of due diligence on plaintiff’s part is mitigated by the facts that [Defendant] had timely notice of the claim; [Defendant] had been timely, albeit defectively, served; plaintiff had communicated with [Defendant’s] insurer and provided the insurer with copies of relevant medical records; there was no prejudice to [Defendant]; and the statute of limitations had expired since the commencement of the action.”

Discussion

Here, although Plaintiffs have failed to show that they established good cause for the requested extension, an extension of time to serve Dr. Calloway with the

summons and complaint is warranted in the interest of justice. The action was timely commenced on July 31, 2019. The alleged malpractice occurred from July 6, 2017 to December 15, 2017, and Dr. Calloway's alleged involvement in Decedent's treatment was on August 23, 2017. The statute of limitations, however, had expired by the time Plaintiffs moved pursuant to CPLR § 306-b for leave to re-serve Dr. Calloway. Dr. Calloway had actual notice of the lawsuit. Dr. Calloway served his Answer on March 4, 2020. Plaintiffs also demonstrated the existence of a potentially meritorious cause of action, and the lack of prejudice to Dr. Calloway as a result the delay in service. *See Henneberry*, 91 AD3d at 495. Plaintiffs' attempted service, although ultimately argued to be defective, was a diligent attempt by Plaintiffs to timely serve Dr. Calloway at his last known address according to the skip-trace run on him, as indicated in the Affidavit of Service signed by Plaintiffs' process server. (Plaintiffs' Cross-Motion, Exhibit 2). Therefore, Plaintiffs are granted leave to re-serve Dr. Calloway.

Wherefore it is hereby

ORDERED that Defendant James Calloway, M.D.'s motion is denied; and it is further

ORDERED that Plaintiffs' cross motion is granted, and Plaintiffs are granted 30 days to properly serve Defendant James Calloway, M.D.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 10, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION