

<b>Yaba v City of New York</b>
2020 NY Slip Op 33665(U)
November 4, 2020
Supreme Court, New York County
Docket Number: 157357/2019
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. 157357/2019

MINERVA YABA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, DEPARTMENT OF HOMELESS SERVICES, SUS SERVICES FOR THE UNDERSERVED, UNIQUE WILLIAMS, JOHN DOE, JANE DOE, and THOMAS MARSH,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16 were read on this motion to/for ALTERNATE SERVICE.

In this tort action, plaintiff Minerva Yaba moves for an order, pursuant to CPLR 306 (b), requesting an extension in time in which to serve defendant Thomas Marsh a/k/a Tanya Price (Marsh). All defendants except Marsh have been served and have answered.

The underlying facts relevant to this motion were stated in the decision and order of this Court entered February 5, 2020 (“the Prior Decision”), which granted plaintiff a 60-day extension of time to serve Marsh, thereby resolving motion sequence 001.

In the Prior Decision, this Court found that plaintiff’s motion papers were devoid of any indication that plaintiff made a reasonable effort to serve Marsh prior to November 2019, the month in which the 120-day period in which to serve Marsh expired. The alleged effort plaintiff made to locate Marsh consisted of emailing a subpoena seeking Marsh’s address to the attorney for SUS Services for the Under Served and the Department of Homeless Services (DHS) on November 19, 2019, just four days before the 120-day period was to expire. This Court found that

“plaintiff’s 11th hour attempt to locate Marsh” did not “constitute a good faith effort to serve him” and that “plaintiff has failed to establish good cause for an extension of time to serve the summons and complaint.”

However, in weighing the factors pertaining to the interests of justice standard (*see e.g. Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 (2001); *Frank v Garcia*, 84 AD3d 654, 654-655 [1st Dept 2011]), and cognizant of the fact that public policy favors the resolution of claims on their merits (*see e.g. Hernandez v Abdul-Salaam*, 93 AD3d 522, 522 [1st Dept 2012]), this Court, in its discretion, in the Prior Decision, determined that plaintiff should be given a reasonable amount of additional time to serve Marsh. Given that this matter has already been delayed by plaintiff’s failure to serve Marsh, this Court granted an extension of 60 days, rather than the three month extension that plaintiff requested.

In support of the instant motion, plaintiff states as follows: on February 5, 2020, this Court granted her request for an extension of time to serve Marsh for 60 days. Pursuant to several Executive Orders, however, the operations of this Court were partially suspended until June 6, 2020 (affirmation of Zachary Gaynor, Esq., dated June 26, 2020, ¶¶ 5-7).

On March 16, 2020, plaintiff sent the City of New York an amended Demand for Bill of Particulars as well as other discovery requests. Additionally, counsel for plaintiff requested that the City of New York provide an immediate response regarding Marsh’s forwarding address based upon the records and the information that it possessed. The City of New York informed plaintiff’s counsel that the current whereabouts for Marsh are unknown and that his last-known address was at the “Skyway shelter” (Skyway) (*id.* ¶ 8).

On June 3, 2020, counsel for plaintiff contacted “Skyway Men’s Shelter in Queens” to find out what information it had regarding Marsh, and was told that it would not be able to provide him

with the information because it had contracted with the City of New York. During this telephone call, counsel was informed that he would need to subpoena DHS (*id.* ¶ 9).

Based on the foregoing, plaintiff asks the court (1) to grant her request for an extension of time to serve Marsh and (2) for leave to serve the summons and verified complaint through alternative service on Marsh; i.e. through publication (*id.* ¶¶ 10, 20). Counsel for plaintiff notes that opposing counsel (i.e. counsel for the answering defendants) informed him that they would not be opposing this motion.

Considering that (1) plaintiff was previously granted an additional 60 days from February 5, 2020 in which to serve Marsh; and (2) the Executive Order temporarily suspending a substantial part of the Court's operations commenced approximately 30 days later, this Court grants plaintiff an additional 45 days from the date of entry of this order in which to serve Marsh.

The request for leave to serve by publication is denied. Plaintiff has not demonstrated that service by publication is reasonably calculated to apprise Marsh of the pendency of the action (*see Contimortgage Corp. v Isler*, 48 AD3d 732, 735 [2d Dept 2008] [“Assuming arguendo that service pursuant to CPLR 308 (5) was proper, the court could have directed service by publication *and* an alternative method such as mailing to his attorney in the District Court action”] [emphasis added]). “Service by publication ... [is] a last resort since it is really more symbolic than anything else” (*Iroff v Iroff*, 125 AD2d 197, 200 [1st Dept 1986] [internal quotation marks and citation omitted]; *see also David v Total Identity Corp.*, 50 AD3d 1484, 1485 [4th Dept 2008] [“plaintiff's motion must be denied ... because plaintiff requested service by publication but gave no indication of where such publication would occur or how it was reasonably calculated to give notice” to defendant]).

Here, the alleged incident occurred more than two years ago, on July 28, 2018, defendant was allegedly living in a homeless shelter and, as stated above, plaintiff's motion papers (motion 001) were devoid of any indication that plaintiff made a reasonable effort to serve Marsh prior to November 2019, the month in which the 120-day period in which to serve him expired.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion (sequence 002) is granted to extent that plaintiff Minerva Yaba is permitted an additional 45 days from the date of entry of this order in which to serve defendant Thomas Marsh; and it is further

ORDERED that the request to serve Marsh through publication is denied; and it is further

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

11/4/2020  
DATE



KATHRYN E. FREED, 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	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE