

Delucie v Largotta
2020 NY Slip Op 34144(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 655118/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. DEBRA A. JAMES

PART

IAS MOTION 59EFM

Justice

-----X

JOHN DELUCIE,

INDEX NO. 655118/2019MOTION DATE 03/10/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

SEAN LARGOTTA,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9
were read on this motion to/for EXTEND - TIME

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff John DeLucie for an
extension of time to serve the summons and complaint and for
alternative service is granted, and it is further

ORDERED that plaintiff John DeLucie shall serve the summons
and complaint upon Jeffrey Strauss, counsel for defendant Sean
Lagrotta, within forty-five (45) days of service of a copy of
this order with notice of entry, and it is further

ORDERED that Jeffrey Strauss, defendant's counsel, is
directed to accept service on behalf of Sean Lagrotta; and it is
further

ORDERED that within forty-five (45) days after such service, defendant shall answer or otherwise move with respect to the complaint, and it is further

ORDERED that counsel are directed to submit to 59nyef@nycourts.gov and NYSCEF a proposed preliminary conference order or competing proposed preliminary conference order on March 15, 2021.

DECISION

In motion sequence 001, plaintiff John DeLucie (DeLucie) moves, pursuant to: (1) CPLR 306-b, for an order extending the time to serve the summons and complaint (Complaint), and (2) CPLR 308 (5), for an order directing service of the summons and Complaint by alternative means.

In this action, Delucie seeks damages arising from a failed venture to own and manage certain restaurants in New York City, New York. DeLucie, Lagrotta, and non-party Mark Thomas Amadei were partners in the ownership of several restaurants, which were managed by Lagrotta. In his complaint, DeLucie alleges that Lagrotta's severe mismanagement of the restaurants resulted in closure of the restaurants and subjected the owners to lawsuits by restaurant employees and the New York State Department of Taxation and Finance.

It is undisputed that DeLucie failed to serve his summons and Complaint within the proscribed 120-day time frame (NYSCEF Doc. No. [NYSCEF] 3, 17)

Douglas M. Schneider (Schneider), counsel for DeLucie, submits an attorney affirmation detailing the efforts to serve Lagrotta using traditional methods (id. at ¶¶ 11-14). Schneider affirms that the first attempt of service at Lagrotta's last known address was unsuccessful because the address failed to identify a floor or apartment number (id. at ¶ 13). Next, Schneider made multiple attempts to serve Lagrotta at his place of employment, the Gansevoort Hotel, but the process server was informed that Lagrotta was either unavailable or in London, despite confirming his presence the same day prior to attempting service (id. at ¶ 14).

Lagrotta fails to identify any prejudice that would result from the granting of the extension sought by DeLucie. The record demonstrates that DeLucie has made diligent attempts to effectuate service, but Lagrotta's apparent absence from the jurisdiction and his employer's unwillingness to cooperate have rendered service pursuant to CPLR 308 (1) and (2) impracticable (id. at ¶ 15, NYSCEF 6, 7). DeLucie contends service pursuant to CPLR 308 (4) is also impracticable as Lagrotta's "place of employment is a world-renowned hotel and there is no way to

affix the summons and [C]omplaint to a door at the facility"

(NYSCEF 3, ¶ 16).

In opposition, counsel for Lagrotta, Jeffrey T. Strauss (Strauss) affirms in his affirmation that he was not authorized to accept service on Lagrotta's behalf and opposes the portion of the motion at bar seeking to serve the summons and Complaint on him on behalf of his client, Lagrotta (NYSCEF 9, ¶¶ 3-4).

"A showing of impracticability under 308 (5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to Subdivisions (1), (2) or (4) of CPLR 308" (Franklin v. Winard, 189 AD2d 717, 717, [1st Dept 1993] [internal citation omitted]). "Under CPLR 308 (5), a court is vested with the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308 (1), (2), and (4) are 'impracticable'" (Born To Build, LLC v Saleh, 139 AD3d 654, 655 [2d Dept 2016] [internal citations omitted]). The court may extend the deadline to serve the summons and Complaint if good cause is demonstrated or if it would serve the interest of justice (id.).

Strauss correctly argues that he cannot accept service on behalf of his client unless authorized to do so and that he is not automatically deemed an agent of Lagrotta for the purposes of service of process (id.). However, DeLucie has established

that service otherwise upon Lagrotta would be impracticable, having attempted to serve at Lagrotta at his last known address and place of employment, coupled with the fact that Lagrotta's address in London is unknown, effectively preventing an attempt of international service (Kelly v Lewis, 220 AD2d 485, 486 [1st Dept 1995] [court concluded service was impracticable after plaintiff made multiple attempts on different days to serve defendant at last known address]). Furthermore, Strauss fails to assert any prejudice that would arise from his acceptance of service on behalf of Lagrotta or that such service is inadequate to apprise Lagrotta of the instant action or (Born v Saleh, 139 AD3d at 655).

Consequently, this court, in its discretion, shall grant DeLucie an extension of time to serve the summons and Complaint on Lagrotta pursuant to CPLR 306-b and direct Strauss to accept service on behalf of Lagrotta pursuant to CPLR 308 (5).

DEC 10 2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

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OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE