At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of February, 2020

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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CECIL EDWARDS AND RUBY EDWARDS,

Plaintiff,

- against -

THE BROOKLYN HOSPITAL CENTER AND NELSON MENEZES, M.D.,

Defendants.

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DECISION AND ORDER

Index No. 522212/18

The following papers numbered 1-7 read herein:	Papers Numbered
Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5
Opposing Affidavits (Affirmations)	5, 6-7
Reply Affidavits (Affirmations)	6-7
Other Papers	

Upon the foregoing papers in this action for medical malpractice and related claims, defendant Nelson Menezes, M.D. ("Dr. Menezes"), moves, pursuant to CPLR 3211 (a) (8), for an order dismissing the complaint against him on the ground that he was not properly served, pursuant to CPLR 308 (2), and the court lacks personal jurisdiction over him. Plaintiffs, Cecil Edwards and Ruby Edwards (plaintiffs), cross-move, for an order denying Dr. Menezes' motion, or, alternatively, ordering a traverse hearing to

determine whether service was properly made, or, further alternatively, extending plaintiffs' time to serve Dr. Menezes, pursuant to CPLR 306-b, in the interest of justice.

Background and Procedural History

Plaintiffs bring this action against defendants, The Brooklyn Hospital Center ("BHC") and Dr. Menezes for, collectively, medical malpractice, lack of informed consent and loss of services arising from treatment culminating in surgery and amputation of Mr. Edwards' right leg by Dr. Menezes at BHC on May 3, 2006.

Plaintiffs commenced this action on November 2, 2018 by filing a summons with notice (the 2018 action). BHC was served on February 25, 2019, within 120 days after filing, by personal delivery of the summons with notice to Nia Gordon (Ms. Gordon), the medical records clerk at BHC, located at 121 DeKalb Avenue in Brooklyn. Plaintiffs' process server also attempted to serve Dr. Menezes at BHC by leaving a copy of the summons with notice for him with Ms. Gordon, who allegedly told the process server, after checking her computer records, that she was authorized to accept service. The process server also mailed the summons with notice to Dr. Menezes at BHC at 121 DeKalb Avenue in Brooklyn.

Dr. Menzes' demand for a complaint on March 25, 2019 prompted plaintiffs' filing of the complaint on April 10, 2019. Dr. Menezes' answer was filed on April 18, 2019 and BHC's answer was filed on May 14, 2019. On June 3, 2019, Dr. Menezes'

motion to dismiss was filed containing his May 31, 2019 affidavit stating that he was not served at his actual place of business.

In addition, plaintiffs initiated a companion action, *Edwards, et ano. v. Nelson Menezes, M.D.* (Sup Ct, Kings County, index No. 514709/19]), by filing a summons and complaint on July 3, 2019 (the 2019 action). The allegations and causes of action therein are substantially the same as those made in this case. Both complaints state treatment was rendered "beginning in or about 2012, and continuing through 2015, and April and May 2016, and more specifically on May 3, 2016 through May 25, 2016 and thereafter" (2018 Action complaint and 2019 Action complaint at 4-5, ¶¶ 16-17. However, the 2019 action only names Dr. Menezes as a defendant and refers to his treatment of plaintiff as "continuing until about January 5, 2017 and February 2, 2017" (2019 Action complaint at 4-5, ¶¶ 16-17). It also alleges that Dr. Menezes was Chief of Vascular Surgery at BHC, and as such, directed the BHC employees' actions regarding Mr. Edwards' treatment (2019 Action complaint at 3-4, ¶¶ 12 and 14).

Dr. Menezes, after the June 3, 2019 filing of his dismissal motion, was served at his office, Suite 5A at 240 Willoughby Street in Brooklyn, on July 29, 2019, with the summons with notice as well as the complaint and attorney's affirmations in this case by delivery of a copy of those papers to his office manager, Gary Moore, a person of suitable age and discretion. Plaintiffs filed their cross motion herein the next day, July 30, 2019.

Discussion

A defendant may assert lack of personal jurisdiction based on defective service in either its answer or in a motion to dismiss, and the defense is not waived by filing an answer asserting that defense before moving to dismiss on the same grounds (*see Castillo v JFK Medport, Inc.*, 116 AD3d 899, 900 [2d Dept 2014]; *Colbert v International Sec. Bureau*, 79 AD2d 448, 462-463 [2d Dept 1981], *lv denied* 53 NY2d 608 [1981]). Plaintiff bears the ultimate burden of establishing personal jurisdiction (*Shore Pharm. Providers, Inc., v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 [2d Dept 2009]; *see also Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 986 [2d Dept 2007]). In opposing a motion to dismiss pursuant to CPLR 3211 (a) (8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but must only set forth "a sufficient start, and show[ ] their position not to be frivolous" (*Shore Pharm. Providers*, 65 AD3d at 624, quoting *Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]).

Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of proper service and allows a presumption of service. However, a defendant's sworn denial of proper service rebuts the affidavit of service, and "plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence" (*Finnegan v Trimarco*, 173 AD3d 691, 692 [2d Dept 2019]; *Purzak v Long Is. Hous. Servs., Inc.*, 149 AD3d 989, 991 [2d Dept 2017]; *Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831,

832-833 [2d Dept 2013]). If a defendant "fails to sufficiently rebut the presumption of proper service established by a process server's affidavit, no hearing is warranted" (*HSBC Bank USA, N.A. v Oqlah*, 163 AD3d 928, 930 [2d Dept 2018]).

CPLR 308 (2), by its terms, permits service by delivery of the summons to a person of suitable age and discretion at the actual place of business of the person to be served and by mailing the summons to the person to be served at his or her actual place of business. CPLR 308 (3) permits service "by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318 . . . ." A person's "actual place of business" is "where the person is physically present with regularity" and where the person "regularly transact[s] business" (*1136 Realty LLC v 213 Union St. Realty Corp.*, 130 AD3d 590, 591[2d Dept 2015] quoting *Rosario*, 105 AD3d at 833; *Selmani v City of New York*, 100 AD3d 861, 861 [2d Dept 2012]).

Defendant argues that he was not properly served under CPLR 308 (2) because service on the medical records clerk was made at the hospital, which is not his "actual place of business" (*see Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980 [2d Dept 2011], *lv denied* 19 NY3d 810 [2012]). Dr. Menezes avers that he does not maintain an office at the hospital, but that his medical offices are located at 240 Willoughby Street and 186 Joralemon Street in Brooklyn.

In response, plaintiffs argue that the hospital was actually Dr. Menezes' place of business because he was BHC's Chief of Vascular Surgery and regularly performed

surgery, including plaintiff's surgery, there. Plaintiffs also argue that, in any event, service was proper because BHC's medical records clerk advised the process server that she was authorized to accept service for Dr. Menezes. Plaintiffs further argue that, even if service is deemed defective, an extension of time to serve should be granted because service was timely attempted within 120 days after filing, because Dr. Menezes was not prejudiced as he learned about the lawsuit and his counsel promptly demanded a complaint, and because plaintiffs' claims are not frivolous.

In reply, Dr. Menezes argues that plaintiffs' allegation that the medical records clerk was authorized to accept service on his behalf - thus making service proper under CPLR 308 (3) and 318 - is contrived. He contends in this regard that if the records clerk was authorized to accept service, there would have been no need for plaintiffs to also mail a copy of the summons with notice to him at his place of business.

Defendant argues that the Second Department's aforementioned *Samuel* decision controls. There, as here, plaintiff's process server went to the BHC building at 121 DeKalb Avenue in Brooklyn to serve the doctor named in the medical malpractice action (*see Samuel*, 88 AD3d at 980). Initially, the summons and complaint was delivered to the supervisor of BHC's Health Information Management Department (*id.*). A month later, service was made on an individual who worked at BHC's Risk Management Department (*id.*). The doctor was not an employee of BHC, but had privileges there, and, like Dr. Menezes, maintained an office in a building located on the BHC campus at 240

Willoughby Street in Brooklyn (*id.*). The court noted that the BHC building at 240 Willoughby Street is separate from the BHC building at 121 DeKalb Avenue, but the buildings are connected via a series of tunnels and corridors (*id.*). After a hearing on the validity of service, the lower court determined that service on the doctor had been properly made (*id.*). The Second Department reversed, holding that "CPLR 308(2) requires strict compliance" and that the plaintiff failed to meet his burden of establishing by preponderance of the evidence, that service had been properly made at the doctor's actual place of business (*id.*).

Both the lower court's and the Second Department's determination in *Samuel* occurred after an evidentiary hearing had been held. The Second Department's decision does not detail the facts found at the lower court's hearing, and plaintiffs may be correct that the facts in the present case concerning Dr. Menezes' relationship to BHC may be distinguished from those adduced at the lower court hearing in *Samuel.* Moreover, Dr. Menezes denies that BHC was his place of business and further denies the process server's allegation that BHC's medical records clerk was authorized to accept service on his behalf. The parties' submissions therefore raise factual questions as to whether Dr. Menezes was properly served at his actual place of business and regarding the veracity of the process server's affidavit (*see Samuel*, 88 AD3d at 980; *Hobbins v North Star Orthopedics, PLLC*, 148 AD3d 784, 786 [2d Dept 2017]; *Wilbyfont v New York Presbyt. Hosp.*, 131 AD3d 605, 606 [2d Dept 2015]).

Had plaintiffs' service on Dr. Menezes at the hospital on February 25, 2019 been the only attempt at service, a hearing would have been required to determine, by a preponderance of the evidence, whether Dr. Menezes was properly served (*see Wilbyfont*, 131 AD3d at 606; *Rosario*, 105 AD3d at 833). However, it is uncontested that, after Dr. Menezes submitted an affidavit supporting his motion to dismiss which listed his actual place of business, plaintiffs served the summons with notice along with the complaint on him at what concededly is his office at 240 Willoughby Street in Brooklyn, and also mailed copies of those documents to him at that same address.

Indeed, CPLR 306-b allows the court "in the interest of justice [to] extend the time for service" which that provision otherwise requires herein "be made within one hundred twenty days after the commencement of the action . . . ." "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 Mahoney, Porzini & Spencer*, 97 NY2d 95, 105 [2001]). While a plaintiff "need not establish reasonably diligent efforts at service" to receive an interest of justice extension, "the court may consider diligence, or lack thereof" in making its determination (*id.*). Other relevant factors include "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" (*id.* at 105-106; *see also Rosenzweig v 600 N. St., LLC*, 35 AD3d 705, 705 [2d Dept 2006]). "No one factor is determinative--the calculus of the court's

discretion is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served" (*Leader*, 97 NY2d at 106).

Here, plaintiffs timely attempted service on Dr. Menezes within 120 days after filing the summons with notice by serving him at BHC, which was reasonably believed to be his place of business given the allegation that he performed surgery on plaintiff there. Moreover, plaintiff filed his cross motion to extend the time for service on July 30, 2019, one day after Dr. Menezes was re-served at his office address on July 29, 2019. That re-service, in turn, occurred less than two months after plaintiffs had received Dr. Menezes' affidavit identifying his business address as part of his motion to dismiss, filed June 3, 2019. In addition, while plaintiffs have not filed a certificate of merit in the case, they have explained that they were unable because they have not received all of the BHC records, and, in any event, the allegations in the complaint suggest a meritorious cause of action. Also, Dr. Menezes has not demonstrated that he was prejudiced by the service (i.e. he received the summons with notice, and his counsel demanded a complaint within four weeks of the attempted service at BHC (*see Scarabaggio v Olympia & York Estates Co. affd sub nom. Leader*, 97 NY2d at 107) [defendant not prejudiced by extension to serve even though 1 month beyond 120-day period, 2 months after statute of limitations had expired and where defendant therein, as here, had actual notice of the action]). Under these circumstances, an extension of time to serve Dr. Menezes nunc pro tunc is appropriate (*see Selmani v City of New York*, 100 AD3d 861, 862 [2d Dept 2012] [court

properly exercised its discretion in granting cross motion for leave to extend time to serve defendant where action "timely commenced, the statute of limitations had expired when the plaintiffs cross-moved for relief, the timely service of process was subsequently found to have been defective, and the [defendant] had actual notice of the action within 120 days of commencement . . ."]; *Estate of Fernandez v Wychoff Hgts. Med. Ctr.*, 162 AD3d 743, 744 [2d Dept 2018] [same]; *Thompson v City of New York*, 89 AD3d 1011, 1012 [2d Dept 2011] [same]). These circumstances warrant exercising discretion and granting an extension of time, nunc pro tunc, to serve Dr. Menezes, and deem the summons with notice and the complaint timely and validly served on him as of July 29, 2019 (*see Wells Fargo, NA v Burshstein*, 172 AD3d 1437, 1438, 1440 [2d Dept 2019] [affirming decision of Knipel, J. both recognizing proper service at newly discovered correct address and granting extension to serve nunc pro tunc]; *Fernandez v Morales Bros. Realty, Inc.*, 110 AD3d 676, 677 [2d Dept 2013] [reversing lower court ruling and granting extension to serve nunc pro tunc in the interest of justice "where the statute of limitations expired between the time that the action was commenced and the time that the copy of the summons and complaint was served . . . ."]).

Here, too, the action was timely commenced, and plaintiffs have timely cross-moved to extend the time to serve Dr. Menezes, who had actual notice of the action within 120 days after commencement. Accordingly, it is hereby,

ORDERED that Dr. Menezes' motion, for an order, pursuant to CPLR 3211 (a) (8), dismissing the complaint herein against him for lack of personal jurisdiction based on improper service is denied; and it is further

ORDERED that the branch of plaintiffs' cross motion for a traverse hearing is denied; and it is further

ORDERED that the branch of plaintiffs' cross motion to extend their time to serve Dr. Menezes is granted nunc pro tunc to the extent that service on July 29, 2019 of the summons with notice and complaint made on Dr. Menezes is deemed timely and valid service.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. ELLEN M. COLER

KINGS COUNTY CLERK
FILED
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