

**Turner v Doe**

2020 NY Slip Op 35534(U)

July 30, 2020

Supreme Court, Bronx County

Docket Number: Index No. 32268/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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JAHYRA TURNER,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 32268/2018E

“JOHN DOE,” name being fictitious and unknown,  
AMERICAN UNITED TRANSPORTATION INC.,  
“JOHN DOE,” name being fictitious and unknown &  
LUCERO PRODUCE INC.,

Defendants.  
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John R. Higgitt, J.

Upon the December 18, 2019 notice of motion of defendant Lucero Transport, Inc. i/s/a Lucero Produce Inc. (“defendant Lucero”) and the affirmation, affidavit, and exhibits submitted in support thereof; defendant American United Transportation Inc.’s (American United) January 17, 2020 affirmation in partial opposition; plaintiff’s February 26, 2020 notice of cross motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendant Lucero’s May 20, 2020 affirmation in opposition to plaintiff’s cross motion; plaintiff’s May 28, 2020 affirmation in reply; defendant Lucero’s June 3, 2020 correspondence to the court; and due deliberation; defendant Lucero’s motion for dismissal of the complaint as against it and the cross claims against it is granted, and plaintiff’s cross motion for an extension of time to serve defendant Lucero is denied.

Plaintiff commenced this action on October 26, 2018 to recover damages for injuries that plaintiff allegedly sustained as a result of an August 7, 2016 motor vehicle accident. Plaintiff had until February 25, 2019 to effect service (*see* CPLR 306-b).

Defendant Lucero seeks dismissal of the complaint as against it and the cross claims against it on the ground that the court lacks personal jurisdiction over it because plaintiff failed to timely and properly serve it under CPLR 306-b, which states that service of the summons and complaint must be made within 120 days after the filing of the summons and complaint.

In support of its motion, defendant Lucero submits the pleadings, the affidavit of Olivia Lucero-Garcia (owner of defendant Lucero), and a Department of Motor Vehicles registration record. Lucero-Garcia averred that she is the owner of defendant Lucero and that at no point has it been served with the summons and complaint. Lucero-Garcia also averred that the vehicle owned by defendant Lucero was not involved in the subject accident.

In opposition to defendant Lucero's motion and in support of her cross motion, plaintiff submits the pleadings, her affidavit, the transcript of her no-fault examination under oath, and a document suggesting that service was not effected on defendant Lucero. Plaintiff averred that at the time of the accident she was a passenger in defendant American United's vehicle, which was involved in an accident with defendant Lucero's vehicle. According to plaintiff, defendant Lucero's truck backed into defendant American United's vehicle, causing plaintiff's injuries.

Plaintiff acknowledged that service was not properly effected on defendant Lucero, but asserts that the court should deny defendant Lucero's motion and grant plaintiff an extension to serve under CPLR 306-b. Plaintiff asserts that law office failure is to blame for her failure to serve defendant Lucero.

After reviewing the motion and cross motion record, and considering the various relevant factors associated with the interest-of-justice extension under CPLR 306-b (*see Leader v Maroney*, 97 NY2d 95, 104-106 [2001]), the court concludes that such an extension is not warranted.<sup>1</sup> Plaintiff exercised minimal diligence in serving defendant Lucero within the 120-day period to effect proper service; a lengthy gap exists between the deadline for proper service (February 25, 2019) and the date on which plaintiff sought leave for an extension of time (February 27, 2020); and plaintiff's request for an extension was not prompt, coming only in response to defendant Lucero's motion to dismiss (*see Johnson v Concourse Village, Inc.*, 69 AD3d 410 [1st Dept 2010]). Moreover, while defendant

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<sup>1</sup> No extension for good cause is warranted because plaintiff did not demonstrate that she exercised reasonable diligence in attempting to effect service (*see Leader v Maroney, supra*).

Lucero has not articulated how specifically it was prejudiced by plaintiff's failure to serve it within 120-days of the commencement of the action and plaintiff's long delay in seeking an extension of time to serve, there is no indication that defendant Lucero had notice of plaintiff's action within the 120-day period or prior to the expiration of the statute of limitation on plaintiff's claims (*cf. Sutter v Reyes*, 60 AD3d 448 [1st Dept 2009]). Thus, while certain factors weigh in favor granting plaintiff an interest-of-justice extension (i.e., the expiration of the statute of limitations, and a showing of a potentially meritorious claim), the majority of factors do not (i.e., lack of diligence, delay in service, lack of promptness of request for extension, potential prejudice to defendant Lucero). On balance, the interest of justice does not call for an extension.

Accordingly, it is

ORDERED, that defendant Lucero's motion to dismiss the complaint as against it and the cross claims against it is granted, and the complaint as against it is dismissed; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Lucero dismissing the complaint as against it and the cross claims against it; and it is further

ORDERED, that plaintiff's cross motion for an extension of time to serve defendant Lucero is denied.

The parties are reminded that a compliance conference has been scheduled before the undersigned on October 2, 2020 at 9:30 a.m. in courtroom 407.

This constitutes the decision and order of the court.

Dated: July 30, 2020



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John R. Higgitt, J.S.C.