

**Rivera v Mendez**

2021 NY Slip Op 32470(U)

September 14, 2021

Supreme Court, New York County

Docket Number: Index No. 805351/2020

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

GILBERTO RIVERA,

INDEX NO. 805351/2020

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 1

MOTION CAL. NO.

- against -

Amended Interim

Decision and Order

TEO MENDEZ, M.D., NICK WESSLING, M.D., VICKEN PAMOUKIAN, M.D., DVORAH HOLTZMAN, M.D., WOO S. TAK, M.D., and LENOX HILL HOSPITAL,

Defendants.

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

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

PAPERS NUMBERED

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits

Cross-Motion:   x Yes    No

This action was commenced by the filing of a Summons and Complaint on November 4, 2020. This is an action alleging medical malpractice arising from the medical treatment that Plaintiff Gilberto Rivera (“Plaintiff”) received from on or about February 27, 2018 and continuing through and including May 18, 2020.

Presently before the court is Defendant Teo Mendez, M.D.’s (“Dr. Mendez”) motion to dismiss the action as against him. Dr. Mendez moves pursuant to CPLR § 3211(a)(8) for an Order dismissing Plaintiff’s complaint due to lack of personal jurisdiction. Plaintiff cross moves pursuant to CPLR §2004 and §306-b, extending Plaintiff’s time to serve the Summons and Verified Complaint upon Dr. Mendez.

Legal Standard

CPLR § 3211(a)(8) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant.”

The preferred methods of personal service on an individual are by delivering the summons to the defendant (see CPLR 308[1] ), or by delivering the summons to a person of suitable age and discretion and mailing another copy of the summons to

the defendant's last known residence or actual place of business. See CPLR 308 [2]). Where service of process cannot be made with "due diligence" by personal delivery, pursuant to CPLR § 308(1), or by the deliver and mail alternative, under CPLR § 308(2), CPLR § 308(4) permits service of process, "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by ... mailing the summons to such person at his or her last known residence ... or actual place of business." CPLR § 308[4].

It is well established that the affidavit of a process server constitutes *prima facie* evidence of proper service. See *Hinds v. 2461 Realty Corp.*, 169 A.D.2d 629 [1st Dept 1991]. The mere denial of receipt of service "is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service." *Matter of de Sanchez*, 57 A.D.3d 452, 454 [1st Dept 2008]. A sworn affidavit alleging the particulars concerning why service is improper is required. See, e.g., *Hinds v. 2461 Realty Corp.*, 169 A.D.2d 629 [1st Dept 1991]. Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. *NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D. 3d 459 [1st Dept. 2004].

This Court may exercise its discretion to extend the 120-day period in CPLR § 306-b to enable Plaintiff to properly serve Dr. Mendez. CPLR § 306-b provides that "[i]f service is not made upon a defendant within the [120-day period] provided in this section, the court, upon motion, shall dismiss the action without prejudice... or upon good cause shown or in the interest of justice, extend the time for service."

A "good cause" extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. *Henneberry v. Borstein*, 91 A.D.3d 493, 496 [1st Dept 2012]. Good cause has been found where "the plaintiff's failure to timely serve process is a result of circumstances beyond its control." *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 32 [1st Dept 2009]. The "good cause" extension, however, does not include conduct that is considered to be "law office failure." *Henneberry*, 91 A.D.3d at 496.

An extension "in the interest of justice" is broader and more flexible than a "good cause" extension and can include law office failures as long as there is no prejudice to the defendant. *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105 [2001] ("CPLR 306-b provides for an *additional and broader standard, i.e.*, the 'interest of justice,' to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant"). 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." *Henneberry*, 91 A.D.3d at 496, citing *Leader*, 97 N.Y.2d at 105-106. *See also Brash v. Richards*, 2021 NY Slip Op 03436 [2d Dept 2021].

### Parties' Contentions

This action was commenced by the filing of a Summons and Verified Complaint on November 4, 2020. Plaintiff served the Summons and Verified Complaint upon Dr. Mendez by service of process by affixing the Summons and Verified Complaint to the door of the "usual place of abode" of Dr. Mendez at 112 Saint Marks Pl Apt# 1, Brooklyn, NY 11217, on February 8, 2021.

Dr. Mendez asserts that "plaintiff did not exercise sufficient due diligence as to Dr. Mendez's whereabouts and place of employment." Dr. Mendez argues that "Dr. Mendez's place of employment is ascertainable through an internet search." Additionally, Dr. Mendez argues that the "information contained in the process server's affidavit is clearly inaccurate." Dr. Mendez contends that "[i]n the comments section of Dr. Mendez's affidavit of service it states, 'WHITE DOOR, GREY WALLS.'" Dr. Mendez asserts that "a publicly available, 'Google Street View,' of Dr. Mendez's apartment located at 112 Saint Marks Place, Apt # 1, Brooklyn, NY, clearly depicts a brown door with brown siding."

In his cross motion, Plaintiff argues that "good cause" exists to warrant the extension because he made reasonably diligent efforts to effectuate service upon Dr. Mendez within the time provide by CPLR § 306-b. Plaintiff asserts that "[a]fter multiple attempts, nail and mail was the only way to effectuate service as due diligence was taken in attempting to locate" Dr. Mendez. Plaintiff further argues that "the interest of justice" would be served by granting his request for an extension of time to serve Dr. Mendez. Plaintiff asserts that "there is time left on the statute to serve Defendant Teo Mendez, M.D., but rather than waste judicial resources with the filing of another Summons & Complaint under a new index and then be forced to consolidate the two actions, the Plaintiff is respectfully requesting under the interest of justice that the court allow an extension to serve Defendant Teo Mendez, M.D., if the court finds that service was improper."

In opposition, Dr. Mendez argues that "plaintiff does not even argue that proper service was effectuated pursuant to C.P.L.R. § 308(4)." Dr. Mendez asserts that "plaintiff must not be granted an extension of time to serve the Summons and Complaint on Dr. Mendez because he is unable to demonstrate 'Good Cause,' or that an extension of time would be in the 'Interest of Justice.'" Dr. Mendez argues that

“plaintiff has provided no competent evidence in support of his argument that reasonable diligence was exercised in plaintiff’s attempt to effectuate personal service on Dr. Mendez.” Dr. Mendez asserts that the “interest of justice” does not warrant an extension of time because Plaintiffs failed to exercise reasonable diligence in attempting to effectuate service. Dr. Mendez argues that “plaintiff’s allegations of malpractice are incorrectly listed in the summons and complaint as February 27, 2018 to May 18, 2020.” Dr. Mendez contends that “plaintiff was discharged from Lenox Hill Hospital, on May 18, 2018, not May 18, 2020.” Dr. Mendez asserts that “plaintiff’s re-filing of the complaint at this point is time barred by the 2 ½ year statute of limitations.”

### Discussion

Here, Dr. Mendez asserts that he was not served at his last known address. Dr. Mendez asserts that “[i]n the comments section of Dr. Mendez’s affidavit of service it states, ‘WHITE DOOR, GREY WALLS.’” Dr. Mendez further asserts that “a publicly available, ‘Google Street View,’ of Dr. Mendez’s apartment located at 112 Saint Marks Place, Apt # 1, Brooklyn, NY, clearly depicts a brown door with brown siding. Dr. Mendez’s statement that he did not reside at the location where service was made is sufficient to dispute the veracity or content of Plaintiff’s affidavit of service and to warrant a traverse hearing as to whether proper service was made upon Dr. Mendez.

Turning to Plaintiff’s cross motion extending Plaintiff’s time to serve the Summons and Verified Complaint, Plaintiff timely commenced the action and exercised reasonable diligence and made a good-faith attempt to serve Dr. Mendez within the 120-day period. Dr. Mendez received notice of the lawsuit within the 120 days period and before the statute of limitations expired, as evidenced by Dr. Mendez’s Answer filed on March 8, 2021. Dr. Mendez has not shown any prejudice resulting from a delay in formal service. Therefore, even if this case does not qualify for an extension under the “good cause” exception, this Court finds that an extension granting Plaintiff additional time to effect proper service is warranted in the interest of justice. *See Lippett v. Educ. All.*, 14 A.D.3d 430, 431 [1st Dept 2005] [granting extension in the interest of justice where action was timely commenced, plaintiff made good-faith attempt to serve defendant, defendant received actual notice of the claim within the 120-day period and before expiration of statute of limitations and showed no prejudice from the delay].

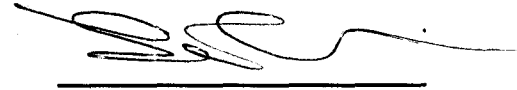
Wherefore, it is hereby

ORDERED that Defendant Teo Mendez, M.D.'s motion to dismiss the Complaint is granted to the extent that a traverse hearing is ordered for September 14, 2021 at 10:00am via Teams; and it is further

ORDERED that Plaintiff's cross motion to extend the time to serve Defendant Teo Mendez, M.D. is granted and Plaintiff is provided with a 60 day extension to properly effect service upon Defendant Teo Mendez, M.D.

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

**Dated: September 14, 2021**



**EILEEN A. RAKOWER, J.S.C.**

Check one:    **FINAL DISPOSITION**             **NON-FINAL DISPOSITION**