

Stiglitz v Amber Ct. of Westbuty, LLC

2021 NY Slip Op 33584(U)

January 25, 2021

Supreme Court, Nassau County

Docket Number: Index No. 610952/19

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SUSAN STIGLITZ, as Administrator of the Estate of
HESTER J. KAUFMAN, Deceased, SUSAN STIGLITZ,
Individually, CHARLES MOSKOWITZ and LEIGH
STIGLITZ,

Plaintiffs,

-against-

AMBER COURT OF WESTBUTY, LLC, MMR CARE
CORP. d/b/a DALEVIEW CARE CENTER and
ISHA PATHAK, M.D.,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 610952/19
Motion Seq. Nos.: 03, 04
Motion Dates: 10/13/2020
11/19/2020

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 03), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 04), Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion (Seq. No. 04) and in Reply to Motion (Seq. No. 03) and Exhibits	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Isha Pathak, M.D. ("Dr. Pathak") moves (Seq. No. 03), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiffs' Amended Complaint as against her on the grounds that plaintiffs failed to acquire personal jurisdiction over her; and moves, pursuant to CPLR § 306-b, for an order dismissing the Amended Complaint with prejudice due to plaintiffs' failure to timely complete service of the Supplemental Summons and Amended Complaint on her.

Plaintiffs oppose the motion (Seq. No. 03) and cross-move (Seq. No. 04), pursuant to CPLR §§ 2005 and 306(b), for an order excusing their failure to serve the Supplemental Summons and Amended Complaint upon defendant Dr. Pathak on or before June 1, 2020, on the grounds that Executive Orders numbered 202 through 202.72 provided that all deadlines were stayed until November 3, 2020, and because plaintiffs' delay in serving defendant Dr. Pathak was the result of excusable default and delay caused by COVID 19-related illnesses and hardships suffered by plaintiffs' counsel; and move, pursuant to CPLR §§ 2005 and 306(b), for an order excusing their failure to personally serve a copy of the May 1, 2020 Order of the Honorable Denise L. Sher upon defendant Dr. Pathak together with the Supplemental Summons and Amended Complaint, on the grounds that such failure was the result of excusable default and delay caused by COVID 19-related illnesses and hardships suffered by plaintiffs' counsel, and on the grounds that once defendant Dr. Pathak's attorney registered his email address, he received email service of same prior to November 3, 2020, rendering defendant Dr. Pathak's motion (Seq. No. 03) moot; and, after granting plaintiffs' cross-motion (Seq. No. 04), move for an order conforming the provisions of the Court's May 1, 2020 Order with Governor Cuomo's Executive Orders 202 through 202.72, or, in the alternative, issuing an order deeming plaintiffs' Supplemental Summons, Amended Complaint and a copy of the Court's May 1, 2020 Order as having been timely and properly served on defendant Dr. Pathak thereby rendering her motion to dismiss (Seq. No. 03) moot. Defendant Dr. Pathak opposes the cross-motion (Seq. No. 04).

In support of defendant Dr. Pathak's motion (Seq. No. 03), her counsel submits, in pertinent part, that, "[t]his action sounding in medical malpractice was commenced by plaintiff's filing of a summons and complaint on August 9, 2019.... On February 6, 2020, plaintiff filed a cross-motion seeking leave, pursuant to CPLR § 3025(c), to allow the plaintiff to amend her

complaint and serve a supplemental summons and complaint. This motion practice resulted (*sic*) an order dated May 1, 2020 and entered into the Nassau County Clerk's Office on May 7, 2020.... Pursuant to Justice Sher's order, plaintiff was ordered to serve all the parties including the moving defendant, **ISHA PATHAK, M.D.**, with the supplemental summons and amended complaint by June 1, 2020. Justice Sher's order also directed that a copy of her May 1, 2020, decision and order be served with the supplemental summons and amended complaint.... According to plaintiff's affidavit of service on July 6, 2020, Dr. Pathak was served with a copy of the supplemental summons, amended complaint, and NYSCEF confirmation at 499 Cold Spring Road, Syosset, New York 11791.... Issue was joined by defendant, **ISHA PATHAK, M.D.**, (*sic*) service of her answer on August 13, 2020. In her answer, Dr. Pathak raised several affirmative defenses including the lack of personal jurisdiction.... It is respectfully submitted that the plaintiff has failed to properly serve Dr. Pathak and as such, this honorable court does not have personal jurisdiction over her.... In short, plaintiff has failed to properly serve Dr. Pathak and has not obtained jurisdiction over her because according to the plaintiff's own affidavit of service, Dr. Pathak was not served with process by June 1, 2020, as directed by this honorable court in its order of May 1, 2020.... Instead plaintiff's affidavit of service states that service was made upon Dr. Pathak on July 6, 2020, well after the expiration of the deadline set by the court. In addition to being untimely, plaintiff's affidavit of service is deficient because it does not indicate that a copy of Justice Sher's order of May 1, 2020 was served on Dr. Pathak as directed by the court in its order.... In her attached affidavit, Dr. Pathak has averred that she was not served with a copy of this honorable court's order of May 1, 2020 and that she never received a follow-up mailing.... Likewise, the action against Dr. Pathak should be dismissed pursuant to CPLR § 306-b, which requires that a summons be served within 120 days of filing

with the county clerk. In the case at bar, Justice Sher's order permitting the filing of the supplemental summons and amended complaint was entered with the Nassau County Clerk on May 7, 2020. Over 120 days has past and Dr. Pathak has still not been properly served with process. As such, pursuant to CPLR § 306-b, the court should also dismiss this action against Dr. Pathak." *See* Defendant Dr. Pathak's Affirmation in Support of Motion (Seq. No. 03) Exhibits A-F.

In opposition to the motion (Seq. No. 03) and in support of the cross-motion (Seq. No. 04), counsel for plaintiffs asserts, in pertinent part, that, "[i]t is well-settled that a process server's affidavit establishes a prima facie case as to the method of service and, thus, gives rise to a presumption of proper service', [citations omitted]. It is possible for a defendant to overcome the presumption of good and proper service raised by a process server's affidavit of service. However, 'bare and unsubstantiated denials' of receipt of service, such as the one stated by Defendant PATHAK in Paragraph 3 of her September 15, 2020 Affidavit ('**I never received a copy of the supplemental summons, amended complaint, and NYSCEF's notification by mail...**') ..., without more, are patently insufficient as a matter of law to rebut the presumption of good and proper service attached to the affidavit of service by Plaintiffs' process server.... [citation omitted]. Furthermore, although Defendant PATHAK did not ask for a Traverse Hearing in her Motion to Dismiss, her Affidavit is also insufficient to raise the genuine issues of fact required to warrant a factual hearing. [citations omitted].... [I]n light of the fact that Defendant PATHAK never denied receiving service of the Supplemental Summons and Amended Complaint at her actual home, upon her lawful husband, Naveen Pathak, Defendant PATHAK's Motion to Dismiss for defective service of process for failing to serve a second copy of the aforesaid pleadings upon PATHAK via U.S. Mail, must be denied." *See* Plaintiffs'

Affirmation in Support of Cross-Motion (Seq. No. 04) and in Opposition to Motion (Seq. No. 03) Exhibits A and C.

Counsel for plaintiffs further contends, in pertinent part, that, “[b]ecause of the Covid-related challenges with which this Affirmant and her family have been struggling since April of 2020, including two (2) month-long Covid-related illnesses suffered by your Affirmant, herself, and a Covid-induced recurrence of metastatic cancer with which your Affirmant’s spouse is still suffering and for which he is still receiving treatment, Plaintiffs’ counsel erroneously failed to attach a copy of this Court’s May 1, 2020 Decision and Order to the service copies of Plaintiffs’ Supplemental Summons and Amended Complaint served upon Defendant PATHAK on July 8, 2020. In light of this excusable law office failure Plaintiffs seek relief from those provisions of the Court’s May 1, 2020 Decision and Order as required Plaintiffs to serve a copy of the said Decision and Order upon Defendant PATHAK on or before June 1, 2020, pursuant to CPLR §2005. Contrary to the suggestion in PATHAK’s moving papers, Plaintiffs’ failure to serve a copy of the May 1, 2020 Decision and Order upon her before June 1, 2020 did not create a jurisdictional defect in said service of process and, indeed, PATHAK did not cite to any case law in support of her argument to that effect.... [P]laintiffs respectfully submit that their good and proper service of the Supplemental Summons and Amended Complaint upon Defendant PATHAK at home, via personal service upon her husband, did not give rise to a jurisdictional defect simply because they failed to include a copy of the Court’s May 1, 2020 Decision and Order in the pleadings served upon Defendant PATHAK. The obligation to serve a copy of the May 1, 2020 Decision and Order on PATHAK prior to June 1, 2020, emanated from the Order, itself; it was not a statutory requirement stated by any of the statutes PATHAK claimed as the bases for her within Motion. Accordingly, this Court may grant Plaintiffs relief

from that provision of the Decision and Order requiring Plaintiffs to serve PATHAK with a copy of the Order pursuant to CPLR §2205, by ‘exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.’ ... In this era of Zoom conferences and E-filed documents, Plaintiffs respectfully ask the Court to take judicial notice of the fact that, once Plaintiffs completed service of the Supplemental Summons and Amended Complaint upon PATHAK on July 8, 2020, her malpractice carrier retained legal counsel for her and such counsel registered his email address on the NYSCEF site and received e-mailed service of the May 1, 2020 Decision and Order at that time – four (4) months prior to the date when Governor Cuomo lifted the toll on legal deadlines on November 3, 2020. Thus, PATHAK cannot claim prejudice if the Court relieves Plaintiffs of its own Court-ordered obligation to serve the May 1, 2020 Order upon PATHAK by June 1, 2020. In light of the foregoing, and pursuant to CPLR §2205, Plaintiffs respectfully ask the Court to excuse their failure to serve a copy of the May 1, 2020 Decision and Order upon Defendant PATHAK on or before June 1, 2020, and to deny PATHAK’s Motion to Dismiss in its entirety.”

Counsel for plaintiffs further asserts, in pertinent part, that, “[a]s is well known to defense counsel, and, of course, to this Court, Governor Andrew Cuomo issued a series of Executive Orders numbered 202 through 202.72, which tolled all statutes of limitations and all other legal deadlines – including legal deadlines for service of E-filed pleadings upon a prospective defendant – in response to the Covid-19 Pandemic. Executive Order #202 tolled the aforesaid deadlines beginning in March 7, 2020, and Executive Order §202.72 did not lift the aforesaid toll until one week ago as of the date of this Affirmation, November 3, 2020. Nowhere in Defendant PATHAK’s Affidavit ... does she dispute actual receipt of personal service of the Supplemental Summons and Amended Complaint upon her at her home, via service upon her husband, on July

6, 2020 – almost four (4) full months before the Governor lifted the state of statutes of limitations and other legal deadlines on November 3, 2020. The only issue PATHAK raises in her Motion with respect to the validity of Plaintiffs' service of process upon her is her merely conclusory allegation, devoid of any substantiating facts, claiming she never received the *second* copy of the pleadings, which were mailed to her on July 8, 2020 by Plaintiffs' process server.... Defendant's simple denial of receipt of the second copy of pleadings mailed to her via U.S. Mail is insufficient to raise an issue of fact that Plaintiffs successfully established personal jurisdiction over Defendant PATHAK for purposes of defending the within lawsuit.... Thus, in light of the fact that all legal deadlines, including the deadline for Plaintiffs' service of their E-filed pleadings upon Defendant PATHAK, were stayed from March 7, 2020 through November 3, 2020, PATHAK's Motion to Dismiss for late service of process upon her pursuant to CPLR §306-b, must be denied in its entirety," *See* Plaintiffs' Affirmation in Support of Cross-Motion (Seq. No. 04) and in Opposition to Motion (Seq. No. 03) Exhibit C.

In opposition to plaintiffs' cross-motion (Seq. No. 04) and in further support of defendant Dr. Pathak's motion (Seq. No. 03), her counsel submits, in pertinent part, that, "[t]he plaintiffs' conduct in this case evinces a complete inability to comply with any of the timetables set by the Court, or those agreed upon amongst the parties even at the plaintiffs' behest and this has ultimately caused the Moving Defendant prejudice in its (*sic*) ability to timely defend this matter. First and foremost, the plaintiffs' recent opposition papers, were due by November 4, 2020, according to the plaintiffs' own Stipulation to Adjourn the Motion dated October 9, 2020. Plaintiff (*sic*) instead filed their opposition on November 11, 2020, representing a seven (7) day delay.... In light of this late filing and lack of justification provided in the opposition papers, the (*sic*) Affirmant respectfully submits that the plaintiff's (*sic*) opposition papers should not be

considered by this Court. If in the alternative, the Court agrees to consider the plaintiffs' opposition, the Moving Defendant provides the following justifications for why the motion to dismiss should be granted. Plaintiffs concede that they did not serve the Moving Defendant by June 1, 2020 as directed by this Court in its May 1, 2020 Order.... This concession alone mandates the granting of defendant's motion to dismiss. Instead, plaintiffs seek to shift the blame to the Moving Defendant by stating that the Moving Defendant's 'bare and unsubstantiated denial' of receipt of service in the Moving Defendant's Affidavit dated September 15, 2020 were insufficient to rebut the presumption of good and proper service.... Regardless of fault, it does not change the undisputed fact that the Moving Defendant was not timely served and that when she was eventually served, service was deficient because a copy of Judge Sher's Order of May 1, 2020 was not provided, and no follow-up mailing was completed, pursuant to that Order. While a process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR § 308, where, as here, there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted.... The Affidavit of the Moving Defendant dated September 15, 2020 contains a detailed and specific contradiction of the allegation in the process server's affidavit." See Defendant Dr. Pathak's Affirmation in Opposition to Cross-Motion (Seq. No. 04) and in Reply to Motion (Seq. No. 03) Exhibits A-C.

Counsel for defendant Dr. Pathak further asserts, in pertinent part, that, "[w]hile the undersigned is sympathetic to plaintiffs' counsel's hardship, this does not alter the fact that the plaintiffs failed to comply with the Court's May 1, 2020 Decision and Order which required the plaintiffs to serve the Moving Defendant with a copy of said Court Order. The argument that failure to effect proper service should be excused because in this 'era of Zoom conferences and E-filed documents', the Moving Defendant's counsel registered his email address and received

email service is inconsequential. This does not release the plaintiffs from their obligation to strictly comply with statutorily mandated procedures. [citation omitted].... The fact that Moving Defendant's counsel could access email service is irrelevant to the question of this Court's jurisdiction over the Moving Defendant. Plaintiffs try to salvage their failure to serve the Moving Defendant by arguing that Governor Andrew Cuomo's Executive Orders 202 to 202.72 tolled all legal deadlines including service of E-filed pleadings upon a prospective defendant in response to the COVID-19 Pandemic. While it is acknowledged that at least initially, on March 22, 2020, the New York Chief Administrative Judge issued an order prohibiting all electronic and paper filings, the New York courts began re-opening after this and by May 25, 2020 all restrictions on electronic filings had been lifted. This included Nassau County in which this case was filed.... Electronic filing was therefore re-instituted before the plaintiffs were required to effect service on the Moving Defendant by June 1, 2020. Plaintiffs cannot on the one hand rely on the 'era of E-filed documents' to excuse the failure to attach a copy of the Court's Order to the Pleadings served on the Moving Defendant and on the other hand, ignore the use of e-filing during the pandemic, instead relying on Governor Cuomo's Executive to justify a failure to effectuate timely service. Moreover, it is respectfully submitted that the purpose of Governor Cuomo's Executive Orders was not to excuse deficient service in existing cases. The argument that the plaintiffs were not expected to timely serve the Moving Defendant with the copy of Justice Sher's May 1, 2020 Order, supplemental summons and amended complaint as required by the Court due to Governor Cuomo's Executive Orders is irrelevant and cannot defeat the instant motion. Personal jurisdiction is essential. Here, clearly the Court does not have personal jurisdiction over the Moving Defendant due to the plaintiffs' failure to effectuate proper service."

See Defendant Dr. Pathak's Affirmation in Opposition to Cross-Motion (Seq. No. 04) and in Reply to Motion (Seq. No. 03) Exhibit D.

The Court will first address plaintiffs' cross-motion (Seq. No. 04). The Court acknowledges that Governor Cuomo's Executive Orders issued during the course of the Covid-19 pandemic tolled the time limits for service in legal actions. Accordingly, while the time frame for plaintiffs to serve the Supplemental Summons and Amended Complaint upon defendant Dr. Pathak was set forth in the May 1, 2020 Decision and Order of this Court, the Executive Order could be viewed to have tolled said deadline.

With respect to the issue as to whether defendant Dr. Pathak was additionally served by mail with the Supplemental Summons and Amended Complaint, mere denials of receipt are insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service. See *De La Barrera v. Handler*, 290 A.D.2d 476, 736 N.Y.S.2d 249 (2d Dept. 2002); *Udell v. Alcamo Supply & Contracting Corporation*, 275 A.D.2d 453, 713 N.Y.S.2d 77 (2d Dept. 2000); *Morales v. Yaghoobian*, 13 A.D.3d 424, 786 N.Y.S.2d 562 (2d Dept. 2004). The process server's affidavit established, *prima facie*, that defendant Dr. Pathak was properly served pursuant to personal service rules. Additionally, the affirmation of service that additional copies of the Supplemental Summons and Amended Complaint had been mailed to defendant Dr. Pathak raises a presumption that a proper mailing occurred and defendant Dr. Pathak's mere denial of receipt was not sufficient, by itself, to rebut the presumption. See *Udell v. Alcamo Supply & Contracting Corporation, supra.*; *Cavalry Portfolio Services, LLC v. Reisman*, 55 A.D.3d 524, 865 N.Y.S.2d 286 (2d Dept. 2008).

Furthermore, while the Court did in fact order that a copy of its May 1, 2020 Decision and Order be served with the Supplemental Summons and Amended Complaint, plaintiffs' failure to do so does not constitute the Court lacking jurisdiction over the person of defendant Dr. Pathak.

Therefore, based upon the above, and in the Court's discretion, plaintiffs' cross-motion (Seq. No. 04), pursuant to CPLR §§ 2005 and 306(b), for an order excusing their failure to serve the Supplemental Summons and Amended Complaint upon defendant Dr. Pathak on or before June 1, 2020, on the grounds that Executive Orders numbered 202 through 202.72 provided that all deadlines were stayed until November 3, 2020, and because plaintiffs' delay in serving defendant Dr. Pathak was the result of excusable default and delay caused by COVID 19-related illnesses and hardships suffered by plaintiffs' counsel; and, pursuant to CPLR §§ 2005 and 306(b), for an order excusing their failure to personally serve a copy of the May 1, 2020 Order of the Honorable Denise L. Sher upon defendant Dr. Pathak together with the Supplemental Summons and Amended Complaint, on the grounds that such failure was the result of excusable default and delay caused by COVID 19-related illnesses and hardships suffered by plaintiffs' counsel, is hereby **GRANTED**. And it is further

ORDERED that plaintiffs' Supplemental Summons, Amended Complaint, and a copy of the Court's May 1, 2020 Order, are hereby deemed as having been timely and properly served on defendant Dr. Pathak.

Consequently, defendant Dr. Pathak's motion (Seq. No. 03), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiffs' Amended Complaint as against her on the grounds that plaintiffs failed to acquire personal jurisdiction over her; and, pursuant to CPLR § 306-b, for an order dismissing the Amended Complaint with prejudice due to plaintiffs' failure

to timely complete service of the Supplemental Summons and Amended Complaint on her, is hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 30, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on April 13, 2021.

This constitutes the Decision and Order of this Court.

ENTER: 
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 25, 2021

ENTERED
Jan 27 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE