

<b>Huber v Palm Constr., Inc</b>
2022 NY Slip Op 30851(U)
March 15, 2022
Supreme Court, New York County
Docket Number: Index No. 156076/2020
Judge: Sabrina Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA KRAUS PART 57TR**

*Justice*

-----X

ANTHONY HUBER,

Plaintiff,

- v -

PALM CONSTRUCTION, INC, MICHAEL TENAGLIA, ,THE  
SAFETY GROUP, LTD, PASQUALE CATALANO, MICHAEL  
LISS, AMY LISS

Defendant.

-----X

INDEX NO. 156076/2020

MOTION DATE 12/20/2021,  
12/20/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 72, 73, 74

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 108, 109, 110

were read on this motion to/for DISMISSAL.

**BACKGROUND**

Plaintiff commenced this action seeking damages under the Labor Law for injuries he sustained in August 2017 while employed in a construction project at 6 East 94th Street, New York, New York (Subject Premises). Plaintiff alleges he was caused to fall from a ladder and sustain serious physical injuries when a steel lentil he was working on with co-workers came loose, swung down and struck the ladder he was standing on. Plaintiff alleges violations of the labor law sections 240(a), 241(6) and 200, as well as common law negligence claims.

Plaintiff alleges that PALM CONSTRUCTION, INC, (Palm) and MICHAEL TENAGLIA (Tenaglia) are believed to be the General Contractors for the project.

MICHAEL LISS and AMY LISS are the owners of the Subject Premises.

Plaintiff alleges PASQUALE CATALANO (Catalano) was the Construction Superintendent for the project and that he was employed by SAFETY GROUP, LTD (SGL) at the time.

### **THE PENDING MOTIONS**

On March 22, 2021, Foundations Group Inc., and Foundation Group I, Inc. moved for dismissal (Motion Seq No. 1). That motion was denied as moot by the court (Kelly, J) as the parties had entered a stipulation of discontinuance as to those defendants.

On April 14, 2021, plaintiff cross-moved for an order extending his time to serve process on Catalano.

On April 16, 2021, Palm and Tenaglia moved for an order dismissing the action (Motion Seq No 2), and plaintiff cross-moved for an order for a default judgment as to Palm and Tenaglia or alternatively for an order extending his time to serve process on these defendants.

On June 2, 2021, Catalano moved for an order dismissing the action as against him based on lack of personal jurisdiction (Motion Seq No 3), and plaintiff again cross-moved for an order extending his time to serve Catalano.

Motions Seq Nos 2 & 3 and plaintiff's cross-motions are consolidated herein for determination and granted to the extent set forth below.

### **DISCUSSION**

#### ***Catalano's Motion to Dismiss Is Denied and Plaintiff's Cross-Motion for An Extension of Time to Serve Is Granted***

Plaintiff served Catalano by delivery to his former employer SGL on October 16, 2020. Catalano put in an affidavit that states that he was no longer employed with SGL after September 2018. Catalano further states he did not learn of this lawsuit until April 2021, when Tenaglia phoned to alert him that he had been named as a defendant herein.

By Plaintiff's own admission, the Summons and Complaint herein were filed on the last day of the limitations period for Plaintiff's claims, brought under New York State Labor Law §§ 240, 241 and 244, and the New York State Industrial Code.

Plaintiff's counsel alleges that prior to the commencement of this action, he "repeatedly" reviewed the electronic filings maintained by the Department of Buildings website for this construction project, and discovered SGL served as a construction superintendent for the general contractors, defendants Tenaglia and Palm, and that Catalano appeared to work for both companies at this project.

Catalano submitted sworn work permit applications to the Department of Buildings asserting that from December 2016 through September 2018 he was serving as a construction superintendent for the Foundations Group and SGL. Plaintiff also states that Catalano was registered with DOB as a Superintendent of Construction for SGL from July 2008 through January 2021.

Plaintiff's counsel states he attempted to located Catalano's home address through two DMV searches and that said searches did not provide him with the information he was looking for. The first search was in July 2020.

When SGL filed their answer on January 28, 2021, they did not appear for Catalano. Plaintiff's counsel states that in late January 2021, he received a last known home address for Catalano from counsel for the Foundations Group.

Plaintiff moves for an extension of time to serve Catalano pursuant to CPLR §306-b which provides in pertinent part:

Service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding . . . If service is not made upon a defendant

within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

N.Y. C.P.L.R. 306-b (McKinney). The 120 period to serve Catalano expired on December 2, 2021.

In construing CPLR 306-b, the Court of Appeals in *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001), held that there are two distinct standards for relief under CPLR 306-b, "good cause" and "the interests of justice." Both have distinctive elements.

To establish "good cause" for extending the time to serve under CPLR 306-b, a plaintiff must show that it exercised "reasonable diligence" in attempting to effect service. *Id.* Good cause will not be shown where a plaintiff fails to conduct any investigation as to whether a defendant is still employed by the entity at whose office service is attempted. *Silvering v. Sunrise Family Med., P.C.*, 161 A.D.3d 1021, 1022-23 (2d Dep't 2018). Nor do excuses that essentially amount to law office failure amount to good cause. *Zegelstein v. Faust*, 179 A.D.3d 541, 542 (1st Dep't 2020). The court agrees with defendants that plaintiff has not shown good cause because its efforts to serve Catalano within the 120 days can not be considered due diligence where no effort was made to ascertain that Catalano was actually employed at the business served at the time of service.

However, when analyzed under the broader and more flexible interest of justice standard the court finds there is a basis to grant plaintiff's motion for an extension of time to serve.

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. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, 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.

*Leader v. Maroney, Ponzini & Spencer*, at 105–06.

If dismissal were granted plaintiff would be precluded from commencing a third action as the statute of limitations has expired. Additionally, construing the allegations in the complaint in the light most favorable to plaintiff (*Henneberry v Borstein* 91 AD3d 493), the complaint does set forth a meritorious cause of action for damages for personal injury under the Labor Law. Furthermore, defendant fails to identify any prejudice to be suffered if an extension were granted. Finally, and perhaps most importantly, granting plaintiff the opportunity to pursue this action is not only consistent with the interest of justice exception set forth in CPLR 306-b, but also with the strong interest of the courts in deciding cases on the merits where possible (*Id* at 497 citing *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 [2007]).

Based on the foregoing, defendant’s motion to dismiss for lack of personal jurisdiction is denied, and plaintiff’s cross-motion for an extension of time to serve process is granted to the extent of extending plaintiff’s time to serve Catalano from 60 of the date of this order.

***Tenaglia And Palm’s Motion to Dismiss Is Denied and Plaintiff’s Cross-Motion for A Default Judgment as To Said Defendants Is Also Denied***

**The Motion To Dismiss Pursuant To CPLR §3211(A)(4) Is Denied**

Tenaglia and Palm move to dismiss the action pursuant to CPLR §3211(a)(4) which provides that a party may move for dismissal if “there is another action pending between the same parties for the same cause of action in a court of any state or the United States” the statute further provides “ the court need not dismiss upon this ground but may make such order as justice requires.”

This is the second action plaintiff has filed regarding this alleged accident. On December 26, 2019, plaintiff filed an action in New York County Supreme Court under index #162485/2019. The initial summons and complaint only named Palm Construction as a

defendant and this defendant was never served. This action sat dormant until 8/4/2020 when plaintiff filed an amended complaint adding Michael Tenaglia and the other defendants listed in this action (under index # 156076/2020) as defendants in the 2019 case. Just like the original complaint, the amended complaint was never served.

Prior to addressing the motions in the pending action, this Court addressed the motion of defendants to dismiss the first action and dismissed that action without prejudice. Thus, there is no longer a prior action pending. Plaintiff did not oppose said dismissal if it was without prejudice and made clear that his intention was to proceed in this action. Based on the foregoing defendants' motion to dismiss pursuant to CPLR §3211(a)(4) is denied.

The Motion to Dismiss Based on The Expiration Of The Statute Of Limitations Is Denied

CPLR §3211(a)(5) provides for dismissal when a cause of action can not be maintained because the statute of limitations has expired. The parties agree that the statute of limitation for plaintiff's claim is three years [CPLR §214(5)]. Plaintiff filed the summons and complaint in this action on August 4, 2020.

Defendants point out that in the first action plaintiff alleged the accident took place on August 4, 2017 and in this action, plaintiff alleges the accident took place on August 5, 2017. Defendant argues that if the accident took place on August 4<sup>th</sup> plaintiff was required to file his action by August 3, 2020. Plaintiff argues either way this action is timely filed. The court agrees with plaintiff. As held by the Appellate Division, First Department "(i)n calculating the limitations period, the day of the accident is excluded, the one-year period is counted as 365 days ... (see *DeCicco v City of Syracuse*, 68 AD3d 1771 [2009]; see also General Construction Law §§ 20, 58)." *Turner v. City of New York*, 94 A.D.3d 635, 636 (2012). Thus, in either case the action was timely filed on August 4, 2020.

Service of Process on Tenaglia Was Proper And  
The Moving Papers Are Insufficient to Challenge Service

Tenaglia acknowledges that service was made on the address he listed with DMV but argues said service is not good because it was never his actual place of residence or usual abode. Tenaglia states he intentionally listed an address with DMV that he never resided in and had no intention of residing because that is where his assistant lived, and he wanted paperwork to go there. Moreover, the initial motion to dismiss contained no affidavit from Tenaglia disputing service.

Plaintiff details the diligent efforts he made to ascertain the address used for service is a proper one.

Vehicle and Traffic Law §505(5) states in pertinent part “It shall be the duty of every licensee to notify the commissioner in writing of any change of residence of such licensee within ten days after such change occurs and to make a notation of such change of residence on such license in the place provided by commissioner.”

It is established law that a party to an action who fails to notify the Commissioner of Motor Vehicles of any changes of residence within the ten-day period provided by VTL §505(5), “... is estopped from challenging the propriety of service made at the former address.” *Stillman v. City of New York* 39 A.D.3d 301 (1st Dept. 2007); *Williams v. Yassky* 199 A.D.2d 18 (1st Dept. 2007); *Mighty v. Deshommes* 178 A.D.3d 912 (2nd Dept. 2019).

The failure of a motorist licensed to drive in the State of New York who fails to timely notify the Department of Motor Vehicles (New York) of his change of address cannot vitiate a service otherwise proper, made at the registered address. Plaintiff had the right to rely on the address that is registered with the DMV when attempting service of process upon an individual.

*Deas v. Brunke* 199 A.D.2d 43 (1st Dept. 1993); *Toure v. Harrison* 6 A.D.3d 270 (1st Dept. 2004); *Benjamin v. Avis* 208 A.D.2d 449 (1st Dept. 1994).

The estoppel is more appropriately applied to Tenaglia in this case because, unlike a typical case where a person moves and simply neglects to update their DMV information, here, the information filed by Tenaglia with DMV was deliberately false from the get-go.

Based on foregoing the motion to dismiss as to Tenaglia based on lack of jurisdiction is denied.

Plaintiff's Cross-Motion for A Default Judgment as To Palm and Tenaglia Is Denied

It is unclear to this court what the basis of the motion for a default is as to Palm and Tenaglia who have appeared by counsel and moved for relief pursuant to CPLR §3211. There is no suggestion in the cross-motion that the 3211 motion was untimely. Based on the foregoing the motion for a default judgment is denied.

**CONCLUSION**

WHEREFORE it is hereby:

ORDERED that the motion of Palm Construction, Inc. and Michael Tenaglia for dismissal pursuant to CPLR §3211 is denied and said defendants shall serve and file an answer within 20 days from the date of service of this order with notice of entry; and it is further

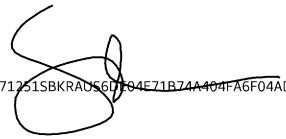
ORDERED that the motion of Pasquale Catalano for dismissal is denied and the cross-motion of plaintiff extending its time to serve for Pasquale Catalano is granted to the extent of extending plaintiff's time to serve for 60 days from the date of this decision; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

  
202203151712515BKRAUS60784E71B74A404FA6F04ADE24100628

3/15/2022  
DATE

\_\_\_\_\_  
**SABRINA KRAUS, J.S.C.**

CHECK ONE:  APPLICATION:  CHECK IF APPROPRIATE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER  <input type="checkbox"/> REFERENCE
---	--	---------------------------------	---	--