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| <b>Russo v Patel</b>                                                                                                                                                                                                           |
| 2022 NY Slip Op 32608(U)                                                                                                                                                                                                       |
| July 29, 2022                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 805211/2021                                                                                                                                                                                           |
| Judge: John J. Kelley                                                                                                                                                                                                          |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY

PART

IAS MOTION 56EFM

*Justice*

-----X

MARY ANN RUSSO, by the Administrator of her Estate, THOMAS  
P. RUSSO, and THOMAS J. RUSSO, Individually,

Plaintiffs,

- v -

NIMESH PATEL, M.D., JAI CHOI, M.D., MAHENDRA PATEL,  
M.D., TEJAS PATEL, M.D., HIRAL SHAH, M.D., JUSTINE CHEN,  
M.D., NINA PATEL, M.D., MARIA CRISTINA LAFORTEZ, R.N.,  
YEHUDIT ROMAN, P.A., KASEY WOODIN, R.N., VANESSA  
SOTO, R.N., TJH MEDICAL SERVICES, P.C., JAMAICA  
HOSPITAL NURSING HOME, formerly known as TRUMP  
PAVILION FOR NURSING & REHABILITATION, NEW YORK  
PRESBYTERIAN COLUMBIA UNIVERSITY IRVING MEDICAL  
CENTER, and THE NEW YORK AND PRESBYTERIAN  
HOSPITAL,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109, 110, 113, 114, 115, 116, 117, 118, 119, 120, 121, and 122 (Motion 003)

were read on this motion to/for

DISMISS/X-MOTION TO EXTEND TIME TO SERVE .

In this action to recover damages for medical malpractice and wrongful death, the defendant Kasey Woodin, R.N., moves pursuant to CPLR 3211(a)(8) and 306-b to dismiss the amended complaint insofar as asserted against her for the plaintiff's failure properly and timely to serve the summons and complaint upon her. The plaintiff cross-moves, pursuant to CPLR 306-b, to extend the time within which to serve Woodin. Woodin's motion is denied. The plaintiff's cross motion is granted, and the plaintiff's time within which to serve process upon Woodin is extended up to and including November 4, 2022.

The gravamen of this action is that the plaintiff's decedent, while a patient at the defendant New York and Presbyterian Hospital (NYPH), came under the care of Woodin, a registered nurse employed by NYPH, that she was injured in the course of her treatment, and

that she ultimately died as a consequence of the malpractice of all of the defendants, including Woodin.

The plaintiff commenced this action on July 9, 2021 by filing a summons and complaint on that date (see CPLR 304). Pursuant to CPLR 306-b, he had 120 days from that date to serve process upon Woodin, or until November 8, 2021, the first business day after the lapse of that 120-day period (see General Construction Law §§ 20, 25-a[1]).

In a May 10, 2022 affidavit of service, the plaintiff's first process server stated

"That on 07/20/2021, 11:53AM deponent attempted to make personal service of a true copy of the SUMMONS AND VERIFIED COMPLAINT, SUPPLEMENTAL, SUMMONS, AMENDED VERIFIED COMPLAINT, NOTICE OF ELECTRONIC FILING, CERTIFICATE OF MERIT in the above entitled action upon KASEY WOODIN, R.N. the DEFENDANT at 466 LEXINGTON AVENUE NEW YORK NY 10017 and was unable to do so.

"DEPONENT ATTEMPTED TO SERVE THE DEFENDANT AT 466 LEXINGTON AVENUE, NEW YORK, NY 10017. THE RECIPIENT NO LONGER WORKS FOR THE HOSPITAL"

In his May 10, 2022 affidavit of service, the plaintiff's second process server asserted that he attempted to serve Woodin on August 16, 2021 and August 26, 2021, at

"649 E 9TH ST APT 4C NEW YORK NY 10009 and was unable to do so. DEPONENT ATTEMPTED TO SERVE THE DEFENDANT AT 649 E 9TH ST, APT 4C, NEW YORK, NY 10009. ON ALL ATTEMPTS, DEPONENT WAS UNABLE TO VERIFY THE RECIPIENT'S RESIDENCY."

In his September 21, 2021 affidavits of service, the plaintiff's third process server averred that he attempted service upon Woodin at 156 Hope Street, Apt 4G, Brooklyn, New York 11211, an address that he believed to be Woodin's actual residence or place of abode. As the process server stated:

"Deponent made prior diligent efforts to effect personal service upon the said DEFENDANT at the above address to wit: 09/07/2021, 1:33PM 09/17/2021, 8:54 PM. Deponent was unable to confirm the DEFENDANT's place of employment or work habits.

"That personal service could not be made with due diligence upon the said DEFENDANT and therefore deponent on the 18TH day of SEPTEMBER, 2021 at 2:33PM at the above address, served a true copy of the aforementioned document(s) herein upon the said DEFENDANT KASEY WOODIN, R,N. by

affixing the same to the door of the usual place of abode of the defendant since admittance could not be obtained upon reasonable application or a person of suitable age and discretion found who would receive same, true copy thereof.

"On 09/21/2021 I deposited in the United States mail another true copy of the aforementioned documents properly enclosed and sealed in a post-paid wrapper addressed to the said DEFENDANT at the above address. That address being upon information and belief, the usual place of abode, last known residence of the DEFENDANT."

The plaintiff filed the September 21, 2021 affidavits of service on November 17, 2021.

In support of her motion, Woodin submitted an attorney's affirmation, the summons and complaint, the supplemental summons and amended complaint, the relevant affidavits of service, and a November 24, 2021 email to the plaintiff's counsel from the attorney for NYPH, who asserted that

"the service attempted on Kasey Woodin, RN at the Hope Street address is invalid as she has not resided there for over 4 years. As she was an employee of NYPH at the time of the incident complained of, we would appear on her behalf if properly served. As the 120 days from filing have now passed, and given her limited involvement in the claim, we request your consideration of a d/c as to her rather than institution of the legal process necessary to permit service at this point."

CPLR 308(4) provides that, where the service of a summons by personal delivery to the defendant (CPLR 308[1]), or delivery to a person of suitable age and discretion at the defendant's dwelling place, usual place of abode, or actual place of business (CPLR 308[2]) "cannot be made with due diligence," service upon an individual defendant may be effectuated

"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 either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing."

The plaintiff failed properly to serve process upon Woodin within the applicable statutory 120-day period in accordance with CPLR 308(4). Since Woodin only submitted the affirmation of her attorney to deny that she resided at the Hope Street address in September 2021, and not her own affidavit, she has not established that she did not reside there at that time (see *Bank of Am., N.A. v Batson*, 176 AD3d 771, 772 [2d Dept 2019]; *HSBC Mtge. Corp. (USA) v Hollender*, 159 AD3d 883, 884 [2d Dept 2018]). Nonetheless, even if the Hope Street address were indeed Woodin's dwelling place or usual place of abode in 2021, as indicated in the New York State Department of Motor Vehicle records retrieved by the plaintiff's attorney, the plaintiff has not shown the necessary "due diligence" in effecting service by personal delivery (CPLR 308[1]) or substituted service (CPLR 308[2]), as a mere two attempts at service in accordance with those provisions, one of which was during working hours, are insufficient to establish due diligence within the meaning of CPLR 308(4) (see *State Higher Educ. Servs. Corp. v Cacia*, 235 AD2d 986, 987 [3d Dept 1997]; *McGreevy v Simon*, 220 AD2d 713, 713-714 [2d Dept 1995]; see also *Hennessey v DiCarlo*, 21 AD3d 505, 506 [2d Dept 2005]).

Although CPLR 306-b provides that "[i]f 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," it alternatively authorizes the court, "upon good cause shown or in the interest of justice," to "extend the time for service." The plaintiff, by her cross motion, seeks to extend the time for service in the interest of justice.

As the Court of Appeals explained in *Leader v Maroney* (97 NY2d 95, 105-106 [2001]),

"the legislative history is unequivocal that the inspiration for the new CPLR 306-b provision was its Federal counterpart. The revision was intended to offer New York courts the same type of flexibility enjoyed by Federal courts under rule 4(m) of the Federal Rules of Civil Procedure. Rule 4(m) similarly provides two alternative grounds for a plaintiff seeking an extension of time to serve process. The rule explicitly mandates that 'if the plaintiff shows good cause for the failure, the court shall extend the time for service' (Fed Rules Civ Pro, rule 4[m]). The rule also authorizes a second, unspecified discretionary basis for extension 'even if there is no good cause shown' (1993 Advisory Comm Note, Fed Rules Civ Pro, rule 4[m]; see, *Boley v Kaymark*, 123 F3d 756, 758 [3d Cir], *cert denied* 522 US 1109).

“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. We also agree with the Appellate Division majorities that Federal case law analysis of rule 4(m) of the Federal Rules of Civil Procedure provides a useful template in discussing some of the relevant factors for an interest of justice determination (*see, e.g., AIG Managed Mkt. Neutral Fund v Askin Capital Mgt.*, 197 FRD 104, 109 [SD NY]; *see also, State of New York v Sella*, 185 Misc 2d 549, 554 [Albany County Sup Ct] [compiling Federal factors]).

“The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative--the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served.”

(some citations and internal quotation marks omitted). Inasmuch as the plaintiff cannot show that he employed due diligence in attempting to serve Woodin in a proper manner, he cannot show good cause for the requested extension of time. Nonetheless, although this action does not qualify for an extension under the “good cause” exception (*see Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]), the court concludes that it qualifies under the “interest of justice” category (*see Henneberry v Borstein*, 91 AD3d 493, 495-496 [1st Dept 2012]).

Here, it is undisputed that the plaintiff's process servers made several attempts within the statutory 120-day period to serve Woodin. It also cannot be said that the plaintiff waited too long to seek the extension of time so as to prejudice Woodin or her former employer, NYPH, as NYPH was on notice of the plaintiff's attempts to serve Woodin at the Hope Street address shortly after the 120-day period of CPLR 306-b expired, and informed the plaintiff's attorney that Woodin no longer resided there (*cf. Nationstar Mtge., LLC v McCallum*, 191 AD3d 480, 480-481 [1st Dept 2021] [plaintiff waited nearly five years after defendant put plaintiff on notice that service was purportedly improper, nine years after the action was commenced, and five months after the court determined that a traverse hearing was warranted to move for an extension of

time)). Moreover, the plaintiff stated a cause of action to hold NYPH vicariously liable for Woodin's alleged malpractice, and NYPH's counsel informed the plaintiff that she would appear on Woodin's behalf had she been properly served with process. Hence, neither Woodin nor NYPH will be prejudiced by extending the plaintiff's time to effect proper service upon Woodin.

There is no merit to Woodin's contention that the plaintiff submitted additional affidavits of service for the first time in the reply papers referable to his cross motion. Rather, those affidavits of service were submitted one day after the initial cross motion papers were filed, and uploaded to NYSCEF as docket entries 107 and 108.

Accordingly, it is

ORDERED that the motion of the defendant Kasey Woodin, R.N., to dismiss the amended complaint insofar as asserted against her is denied; and it is further,

ORDERED that the plaintiff's cross motion for leave to extend the time within which to effect service of process upon the defendant Kasey Woodin, R.N., is granted, and the plaintiff shall have until November 4, 2022 to serve process upon her.

This constitutes the Decision and Order of the court



JOHN J. KELLEY, J.S.C.

|                       |                                     |                                                    |                                     |
|-----------------------|-------------------------------------|----------------------------------------------------|-------------------------------------|
| <u>7/29/2022</u>      |                                     |                                                    |                                     |
| <b>DATE</b>           |                                     |                                                    |                                     |
| MOTION:               | <input type="checkbox"/>            | CASE DISPOSED                                      | <input checked="" type="checkbox"/> |
|                       | <input type="checkbox"/>            | GRANTED <input checked="" type="checkbox"/> DENIED | <input type="checkbox"/>            |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER                                       | <input type="checkbox"/>            |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN                         | <input type="checkbox"/>            |
| CROSS MOTION:         | <input type="checkbox"/>            | CASE DISPOSED                                      | <input checked="" type="checkbox"/> |
|                       | <input checked="" type="checkbox"/> | GRANTED <input type="checkbox"/> DENIED            | <input type="checkbox"/>            |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER                                       | <input type="checkbox"/>            |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN                         | <input type="checkbox"/>            |
|                       |                                     | NON-FINAL DISPOSITION                              | <input checked="" type="checkbox"/> |
|                       |                                     | GRANTED IN PART                                    | <input type="checkbox"/> OTHER      |
|                       |                                     | SUBMIT ORDER                                       | <input type="checkbox"/>            |
|                       |                                     | FIDUCIARY APPOINTMENT                              | <input type="checkbox"/> REFERENCE  |
|                       |                                     | NON-FINAL DISPOSITION                              | <input checked="" type="checkbox"/> |
|                       |                                     | GRANTED IN PART                                    | <input type="checkbox"/> OTHER      |
|                       |                                     | SUBMIT ORDER                                       | <input type="checkbox"/>            |
|                       |                                     | FIDUCIARY APPOINTMENT                              | <input type="checkbox"/> REFERENCE  |