

Ahn v NYU Langone Hosps.

2022 NY Slip Op 33417(U)

October 3, 2022

Supreme Court, New York County

Docket Number: Index No. 805048/2022

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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ALBERT AHN,

Plaintiff,

- v -

NYU LANGONE HOSPITALS, HAITHAM SIAQ, M.D., MARIA NAGEL, R.N., VISHAL THANIK, M.D., CHRISTINA CHEN, R.N., MICHELLE DOSCHER, R.N., GRETA PIPER, M.D., STEVE HAN, M.D., BARRY CZEISLER, M.D., and MARK GILLESPIE, P.A.,

Defendants.

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INDEX NO. 805048/2022
MOTION DATE 08/10/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44 were read on this motion to/for EXTEND - TIME

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 306-b for leave to extend his time to serve a copy of the summons and complaint upon Clarissa Chen, R.N., incorrectly sued herein as Christina Chen, R.N. No party opposes the motion. The motion is granted, the plaintiff shall have until February 3, 2023 to serve Chen, and, on the court's own motion, the caption is amended to reflect Chen's correct first name.

The plaintiff commenced this action on February 9, 2022. He thus had 120 days from that date, or until June 9, 2022, to serve Chen (see CPLR 306-b).

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." "In deciding such a motion, the express language of CPLR 306-b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action. . . . In these circumstances, the court's options were limited to either dismissing the action outright, or extending the time for plaintiff to properly effect service"

(*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]; see *Sottile v Islandia Home for Adults*, 278 AD2d 482, 484 [2d Dept 2000] [“The statute gives a court the option of extending the time to serve *instead of* dismissing the action”] [emphasis in original]). CPLR 306-b provides that a court may only dismiss a complaint for failure to effect timely service of process “upon motion,” not on its own initiative (see *Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345, 345 [2d Dept 2006]; see also *Vanyo v Buffalo Police Benevolent Assn.*, 159 AD3d 1448, 1452 [4th Dept 2018]). Since Chen has not made such a motion, dismissal here is not an option. Moreover, a court is precluded from entertaining a request to extend the time for service pursuant to CPLR 306-b only where the action has been dismissed by virtue of the entry of a judgment of dismissal (see *State of N.Y. Mortgage Agency v Braun*, 182 AD3d 63, 70 [2d Dept 2020]), which has not occurred here.

The plaintiff contends that he was unable to serve Chen because he had misidentified her first name and, hence, his attorneys and their process servers were unable to locate her within the applicable 120-day period.

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).

This action does not qualify for an extension of time under the “good cause” exception, as the plaintiff made no attempts to serve Chen within the statutory 120-day period.

Nonetheless, upon consideration of the factors articulated by the Court of Appeals in *Leader*, it qualifies under the “interest of justice” category (*see Henneberry v Borstein*, 91 AD3d at 495-496). With respect to the medical malpractice causes of action asserted against Chen, the applicable limitations period is two years and six months from the last date of treatment, which the plaintiff here alleges was June 9, 2020 (*see* CPLR 214-a). Consideration of this factor militates in favor of an extension of time to serve process because, were this court to decline the plaintiff’s application, the limitations period applicable to the claim would expire only a few months after the entry of this order. Moreover, the allegations in the complaint are not facially non-meritorious, and the request for the extension of time was made within a reasonable time after the plaintiff learned Chen’s correct first name.

The court, on its own motion, directs that the summons and complaint be amended to reflect Chen’s correct first name, inasmuch as the limitations period applicable to claims against Chen has yet to lapse, and she will not be prejudiced by the amendment at this early stage of the action.

“CPLR 305 (c) authorizes the court, in its discretion, to ‘allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.’ This provision, and its predecessors, has been consistently interpreted as allowing a misnomer in the description of a party defendant to be cured by amendment”

(*Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d Dept 1990]; see *Jordan-Covert v Petroleum Kings, LLC*, 199 AD3d 666, 668 [2d Dept 2021]; *Martin v Witkowski*, 158 AD3d 131, 139 [4th Dept 2017]; *Houghtalen v Norstar Bank*, 191 AD2d 371, 371 [1st Dept 1993]).

Accordingly, it is

ORDERED that the plaintiff’s motion is granted, and he shall have until February 3, 2023 to serve Clarissa Chen, R.N., incorrectly sued herein as Christina Chen, R.N., with the amended summons and complaint; and it is further,

ORDERED that, on the court’s own motion, the summons, complaint, and caption are amended to read as follows:

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ALBERT AHN,

Plaintiff,

v

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NYU LANGONE HOSPITALS, HAITHAM SIAQ, M.D., MARIA NAGEL, R.N., VISHAL THANIK, M.D., CLARISSA CHEN, R.N., MICHELLE DOSCHER, R.N., GRETA PIPER, M.D., STEVE HAN, M.D., BARRY CZEISLER, M.D., and MARK GILLESPIE, P.A.,

Defendants.

-----X;

and it is further,

ORDERED that, on the court’s own motion, within 15 days of the entry of this order, the plaintiff shall serve a copy of this order upon the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall separately file and upload the notice required by CPLR 8019(c) and a completed Form EF-22, and the Trial Support Office shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

10/3/2022

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE