SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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JARLY J. ESPINAL,

Plaintiff,

- v -

RAYMOND RIVERA, TROY LIQUOR, INC., doing business as TROY LIQUOR BAR, and EMRG MEDIA, LLC, doing business as EMRG MEDIA,

Defendants.

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INDEX NO. 154752/2020

MOTION DATE 09/01/2022

MOTION SEQ. NO. 003

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number 24, 25, 26, 27, and 28 (Motion 003)

were read on this motion to/for EXTEND TIME TO SERVE/DEFAULT JUDGMENT .

In this action to recover damages for false imprisonment, battery, and assault, the plaintiff moves pursuant to CPLR 306-b and 2004 to extend his time to serve process upon the defendant Troy Liquor, Inc., doing business as Troy Liquor Bar (TLI). In this regard, he seeks nunc pro tunc judicial approval of the October 26, 2021 service of process that he effectuated upon TLI pursuant to Business Corporation Law § 306 and, thus, requests the court to measure TLI's time for answering the complaint or appearing in the action from that date. Upon granting that branch of the motion, the plaintiff seeks leave pursuant to CPLR 3215 to enter a default judgment against TLI. Although TLI does not oppose the motion, the motion is denied.

The plaintiff, Jarly J. Espinal, commenced this action on June 26, 2020. In his unverified complaint, he alleged that he was a patron at a bar owned and operated by TLI, which had permitted the defendant EMRG Media, LLC, doing business as EMRG Media (EMRG), to host an event at the bar. The plaintiff alleged that EMRG, in turn, hired the defendant Raymond Rivera as one of its individual hosts. In his complaint, the plaintiff asserted that, as he

attempted to leave the bar, Rivera, who was inebriated at the time by virtue of alcohol provided to him by TLI, grabbed him by the wrist, refused to permit him to leave the premises, and began to throw a punch that was blocked by the plaintiff, who, in self-defense, struck Rivera. The plaintiff further asserted that, although he was himself arrested and charged with five separate offenses, one of the charges against him was dismissed on motion, and the other four charges were superseded by one charge of assault in the third degree, of which he was acquitted.

By order dated October 18, 2021, this court denied the plaintiff's first motion for leave to enter a default judgment against TLI, as well as against Rivera and EMRG, upon concluding that he failed properly to serve process upon any of them, and that he failed to submit proof of the facts underlying his claim, as he based his motion solely on an unverified complaint and an attorney's affirmation. On October 26, 2021, the plaintiff, without first obtaining leave of court pursuant to CPLR 306-b to extend his time to serve process upon TLI or EMRG, served those defendants pursuant to Business Corporation Law § 306(b)(1) by delivering two copies thereof to the Secretary of State with respect to each of them, and paying the appropriate fee.

On January 26, 2022, the plaintiff stipulated to discontinue the action against EMRG, with prejudice.

The plaintiff had 120 days from his commencement of the action on June 26, 2020 to serve TLI (*see* CPLR 306-b). Applying the COVID-19 pandemic toll that lapsed on November 3, 2020, and was applicable to all service and filing deadlines in pending actions (*see* L 2020, ch 23 [eff Mar, 3, 2020]; Executive Law § 29-a; see e.g. Executive Orders 202.8, 202.67), the plaintiff had until March 3, 2021 properly to effectuate service upon the defendants. As set forth in the October 18, 2021 order, his attempted service upon TLI on July 24, 2020 and July 30, 2020 was ineffective to obtain personal jurisdiction over that defendant. Prior to making the instant motion, he neither sought nor obtained an order extending his time to effectuate service upon TLI before attempting to serve it through the Secretary of State. Hence, unless the court directs otherwise, the October 26, 2021 service of process upon TLI was a nullity (*see US Bank*

N.A. v Fink, 206 AD3d 858, 860 [2d Dept 2022]; *Commissiong v Mark Greenberg Real Estate Co., LLC*, 203 AD3d 657, 657 [1st Dept 2022]; *Waggaman v Vernon*, 123 AD3d 1110, 1111 [2d Dept 2014]).

As the Appellate Division, First Department, explained it,

> "[a]lthough 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," and 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 TLI 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. Thus, although the court may consider the plaintiff's motion, it concludes that it nonetheless must deny it.

The plaintiff contends that he did not properly serve TLI because he mistakenly attempted to serve that corporation by a method only applicable to service upon individuals. 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).
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> "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 Sell*a, 185 Misc 2d 549, 554 [Albany County Sup Ct] [compiling Federal factors]).
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> "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 only attempts that the plaintiff made to serve TLI within the statutory 120-day period, as extended by the COVID-19 pandemic toll, were not in accordance with the CPLR. Hence, the plaintiff has not demonstrated due diligence in correctly serving TLI. Moreover, consideration of the factors articulated by the Court of Appeals in *Leader* necessitates the conclusion that the request for an extension of time under the "interest of justice" category also is not warranted. Although the expiration of the one year limitations period applicable to claims to recover for false imprisonment, assault, and battery militates in favor of the plaintiff's request, the plaintiff did not promptly request the extension of time subsequent to this court's October 18, 2021 order, but instead waited nine months to make the instant motion, and then only after he had re-served the

papers without court authorization. In addition, as discussed below, he has not established the merits of his claim against TLI. In any event, were the court to deem the October 26, 2021 service of process upon TLI to be proper, that defendant would be unduly prejudiced, since it would place it in default as of a date prior to the entry of the order deciding the instant motion (*see Khan v Hernandez*, 122 AD3d 802, 803 [2d Dept 2014] [a court may not retroactively approve late filing of proof of serve, and thereupon deem the filing to have been effectuated nunc pro tunc, as it would prejudice defendant by holding him in default as of a date prior to the order; late filing is approved, however, on condition that defendant be given an additional 30 days after entry of the appellate order to answer or appear]; *NYCTL 2014-A Trust v Stillman*, 2019 NY Slip Op 33713[U], *7-8, 2019 NY Misc LEXIS 6786, *7-8 [Sup Ct, Kings County, Nov. 18, 2019]).

As explained in this court's October 18, 2021 order, where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the defendant's default, and proof of the facts constituting the claim (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc*. 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]). In addition,

> "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment"

(CPLR 3215[g][4][i]).

In support of his current motion, the plaintiff submits an affirmation of service of the summons and complaint upon TLI, authenticated by his attorney, his unverified complaint, and

his own affidavit, describing both the underlying altercation and admissions made by Rivera during the plaintiff's criminal proceeding to the effect that Rivera was drinking alcohol prior to the altercation. He also submits his attorney's affirmation of the facts, and provides the court with records from his own criminal case file.

Since the court is not extending the plaintiff's time within which to serve TLI, that defendant has not properly been served and, thus, is not in default, and the motion must be denied on those grounds alone. Even if the court were to extend the time for service upon TLI, and provide it with an additional 30 days after entry of this order to answer or appear in this action (*see Khan v Hernandez*, 122 AD3d at 803), there is no indication in the docket entries of this matter that, contemporaneously with or prior to making the instant motion on July 25, 2022 (*see* CPLR 2211), the plaintiff served the additional notice required by CPLR 3215(g)(4)(i). Hence, the motion would have to be denied on that ground as well (*see Burlington Ins. Co. v Aisyrk Co.*, Inc., 153 AD3d 777, 778 [2d Dept 2017]; *Bank of New York v Willis*, 150 AD3d 652, 654 [2d Dept 2017]; *Sterk-Kirch v Uptown Communications & Elec., Inc.*, 124 AD3d 413, 413-414 [1st Dept 2015]; *Bunch v Dollar Budget, Inc*., 12 AD3d 391, 391-392 [2d Dept 2004]; *Schilling v Maren Enters*., 302 AD2d 375, 376 [2d Dept 2003]).

In any event, the plaintiff again failed to satisfy his obligation to submit proof of the facts underlying his claim against TLI. He conceded that Rivera was not employed by TLI, but by EMRG. It is also apparent that TLI is not a proper party to this action. "[C]ourts may take judicial notice of a record in the same court of either the pending matter or of some other action" (*Caffrey v North Arrow Abstract & Settlement Servs., Inc*., 160 AD3d 121, 126 [2d Dept 2018]; *see Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985]). In connection with Motion Sequence 004, the corporate counsel for 675 Hudson Vault, LLC (675 Hudson), attested that, on August 10, 2022, he received a packet of papers from the plaintiff's attorney that contained a copy of the complaint naming TLI as a party defendant herein. Counsel conceded that, on the date of the subject altercation, 675 Hudson, and not TLI, owned and managed the bar at which

the altercation occurred, and that it, and not TLI, was doing business as Troy Liquor Bar at that time. In connection with Motion Sequence 005, the plaintiff seeks leave to serve an amended complaint by dropping TLI as a party defendant, and naming 675 Hudson as the only defendant. Since the court may also take judicial notice of "material derived from official government websites" (*Kingsbrook Jewish Medical Center v Allstate Ins Co*., 61 AD3d 13, 20 [2d Dept 2009]; *see also LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011]; *Cohen v American Biltrite, Inc*., 2018 NY Slip Op 51950[U], 62 Misc 3d 1204[A] [Sup Ct, N.Y. County, Sep. 7, 2018]), it takes judicial notice of the fact that TLI is a domestic corporation registered with the Department of State, with its principal place of business in Kings County, and that the New York State Liquor Authority has issued it a license to operate a retail liquor store in the Bushwick section of Brooklyn. These facts thus confirm that TLI is not the correct defendant in this action, as it had no connection whatsoever with Troy Liquor Bar.

Finally, the legal theories apparently underlying the claims that the plaintiff wishes to assert against the owner and operator of Troy Liquor Bar fail to state a cause of action.

Generally, an employer is only vicariously responsible for an assault and battery committed by its employee where the employee was acting in the scope of his or her employment (*see Rivera v State of New York*, 34 NY3d 383, 389 [2019]). Even if the court were to consider Rivera, who was employed by EMRG, to have been a special employee of the owner of Troy Liquor Bar, the issue of whether he was acting in the scope of his special employment with the owner requires the court to consider

> "'the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated' (i.e., whether it was foreseeable)"

(*Rivera v State of New York*, 34 NY3d at 390, quoting *Riviello v Waldron*, 47 NY2d 297, 303 [1979]; *see Judith M. v Sisters of Charity Hosp.,* 93 NY2d 932, 933 [1999]). "[W]hether an

employee is acting within the scope of employment requires consideration of whether the employee was authorized to use force to effectuate the goals and duties of the employment" (*Rivera v State of New York*, 34 NY3d at 390). Where "gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the [employee's] duties," the occurrence will be deemed to constitute a "malicious attack completely divorced from the employer's interests" (*id.* at 391) that would obviate any claim that the employer is vicariously liable for the tortious acts of its employee.

As described by the plaintiff in his own affidavit, Rivera, who was working as a "host," and not a bouncer or security guard, would not let him exit the bar, and either held up an arm or wrist to block the plaintiff's progress, or grabbed the plaintiff's wrist, at which point another patron told him that Rivera was drunk. The plaintiff further averred that Rivera cocked back his closed fist in what the plaintiff described as preparation for striking the plaintiff in the face, at which point the plaintiff, purportedly acting in self-defense, punched Rivera instead. This type of behavior on Rivera's part clearly was not undertaken in the interest of an employer and was not a natural incident of employment but, rather, involved a personal dispute between the plaintiff and someone he claimed to be drunk, for which the employer may not be held vicariously liable (*see Rodriguez v Judge,* 132 AD3d 966, 967-968 [2d Dept 2015]; *Ali v State of New York*, 115 AD3d 629, 631 [2014]; *Marino v City of New York*, 95 AD3d 840, 841 [2d Dept 2012]; *Campos v City of New York*, 32 AD3d 287, 291-292 [1st Dept 2006]).

To the extent that the plaintiff implicitly contends that the owner or operator of Troy Liquor Bar should be held liable to him pursuant to the Dram Shop Act (General Obligations Law § 11-101), he was obligated to allege facts that established that the owner had served alcohol to Rivera while Rivera was visibly intoxicated, and that there was "some reasonable or practical connection" between the provision of alcohol to Rivera and the plaintiff's injuries (*Carver v P.J. Carney's*, 103 AD3d 447, 448 [1st Dept 2013]; *see Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137 [2d Dept 2019]; *Dugan v Olson*, 74 AD3d 1131, 1132 [2d Dept 2010]).

Here, although the plaintiff alleged that another patron informed him that Rivera was drunk as the altercation began, and that Rivera testified at the plaintiff's criminal proceeding that he had been drinking that night, the plaintiff presented no proof that the proprietor of the bar provided Rivera with alcohol *while he already was* "visibly intoxicated."

In light of the foregoing, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

10/17/2022
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**