

**Rotella v Castillo**

2022 NY Slip Op 34346(U)

December 19, 2022

Supreme Court, New York County

Docket Number: Index No. 805172/2022

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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NICHOLAS ROTELLA,

Plaintiff,

- v -

RAPHAEL CASTILLO, M.D., MARY TIEN LABOWSKY,  
M.D., GARETH MARK CZAMARA LEMA, M.D., CARL  
STANLEY WILKINS, M.D., NEW YORK EYE AND EAR  
INFIRMARY IPA, INC., THE NEW YORK EYE AND EAR  
INFIRMARY, and NEW YORK EYE AND EAR INFIRMARY  
OF MOUNT SINAI,

Defendants.

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INDEX NO. 805172/2022

MOTION DATE 10/06/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29

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 enlarge the time within which to serve the summons and complaint upon the defendant Mary Tien Labowsky, M.D. No party opposes the motion. The motion is granted, and the plaintiff's time to serve process upon Labowsky is enlarged until March 31, 2023. Inasmuch as Labowsky has appeared in the action by serving an answer, she is directed, on or before December 31, 2022, to provide the plaintiff with both a business and residence address at which she may be served or, alternatively, to authorize the plaintiff to serve her by delivery of process to the law firm representing her in this action.

The plaintiff commenced this action on May 20, 2022. He thus had until the first business date after 120 days had lapsed (see General Construction Law § 25-a), or until September 19, 2022, to serve Labowsky with the summons and complaint (see CPLR 306-b). He was not able to do so.

As the Appellate Division, First Department, has explained,

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 [a]re 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 Labowsky has not made such a motion, dismissal here is not an option. Moreover, a court is only precluded from entertaining a request to extend the time for service pursuant to CPLR 306-b 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 timely to serve Labowsky because, although he had made several attempts at numerous locations to serve her, his process servers were unable to locate her within the applicable 120-day period.

Specifically, the plaintiff asserted that, on or about July 6, 2022, he first attempted service upon Labowsky at the New York Eye and Ear Infirmary of Mount Sinai, 310 East 14th Street, New York, New York 10003, but that the papers were rejected at because Labowsky no longer worked there. He averred that, upon learning that Labowsky was not served at that facility, his attorney attempted to identify where Labowsky’s practice or residence was located, with a search revealing that she may have maintained a medical practice at 243 Charles Street, Boston, Massachusetts. Counsel obtained a process server to serve Labowsky at this Boston

address, and service was attempted there on or about July 27, 2022, but the process server was advised by security personnel at that address that, although Labowsky once was a resident at Massachusetts Eye and Ear Infirmary, she had since moved and no longer worked there. The plaintiff's attorney thereafter was able to identify a possible residence address for Labowsky at 131 Seaport Boulevard, Apartment 916, Boston, Massachusetts 02210, but when service was attempted at that address on or about August 24, 2022, the process server was advised by the concierge at that building that she did not find that name listed in residential register, and that no names were listed for Apartment 916.

A further search by the plaintiff's attorney revealed that Labowsky might be residing in Honolulu, Hawaii, and enrolled as a student in an organized health care education and training program, which listed as her practice location as 1356 Lusitania Street, 7th Floor, Honolulu, Hawaii 96813-2409. Counsel's office engaged a local process server in Honolulu to attempt service at that address, but when the process server attempted service there on or about September 6, 2022, he was told by the manager there that she was unaware that Labowsky lived or worked there. A later attempt was made to serve Labowsky at the Hawaii residence program, 1356 Lusitania Street #507, Honolulu, Hawaii, 96813, but a representative of the program's administrative department informed the process server that Labowsky was no longer in the program. The plaintiff's process server once again tried serving Labowsky at the New York Eye and Ear Infirmary, as her Linked In profile suggested that she was still working there, but, on or about September 12, 2022, the process server again was informed that Labowsky no longer worked there.

On or about September 13, 2022, the plaintiff's attorney's office was able to locate a Twitter tweet made by @CUEyeCenter, which had announced that Labowsky was about to join its staff. Based upon this message, counsel was able to identify a possible business address for Labowsky at the Sue Anschutz-Rodgers Eye Center 1675 Aurora Court, Aurora, Colorado 80045 and a potential residence addressed at 3222 East 1st Avenue, Denver, Colorado 80206.

On or about September 13, 2022, the plaintiff attempted service upon Labowsky at both the Aurora and Denver addresses, but the Colorado process server was informed by staff personnel at the medical facility that they couldn't locate Labowsky, while personnel at the residence address would not let the process server I the building because it was a "secured access" facility. When the process server requested access from the University of Colorado police, they refused to entertain the request.

Despite the fact that the plaintiff conceded that he has yet properly to serve process upon Labowsky, she nonetheless has served and filed an answer to the complaint, asserting that "[t]he court lacks jurisdiction over the person of defendant, MARY LABOWSKY, M.D . . . , by virtue of plaintiff's violation of CPLR 308. Plaintiff failed to properly serve Dr. LABOWSKY."

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) (*see Wells Fargo Bank, N.A. v Kaul*, 180 AD3d 956, 958 [2d Dept 2020], quoting *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31 [2d Dept ["(t)o establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service"]]).

This action qualifies for an extension of time under the "good cause" exception, as the plaintiff exercised due diligence in attempting to locate Labowsky and made numerous attempts to serve Labowsky within the statutory 120-day period at seven different locations in four different states (*see Divalerio v Mount Sinai Hosp.*, 2005 NY Slip Op 30536[U], \*3-4, 2005 NY Misc LEXIS 8562, \*3-4 [Sup Ct, N.Y. County, Aug. 2, 2005]).

Moreover, upon consideration of the factors articulated by the Court of Appeals in *Leader*, this matter also 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 Labowsky, the applicable limitations period is two years and six months from the last date of treatment, which the plaintiff here alleges was January 6, 2021 (*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 exhausted his attempts at locating Labowsky.

Inasmuch as Labowsky served an answer notwithstanding her contention that she was not properly served, on the court's own motion, she is directed to provide the plaintiff, on or before December 31, 2022, with both a residence and business address at which she may properly be served or, in the alternative, to authorize her attorney in this action to accept service on her behalf.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, without opposition, and he may serve process upon the defendant Mary Tien Labowsky, M.D., on or before March 31, 2023; and it is further,

ORDERED that, on the court's own motion, on or before December 31, 2022, Mary Tien Labowsky, M.D., shall provide the plaintiff with both a residence and a business address at which she may be served with the summons and complaint or, alternatively, shall authorize her attorneys in this action to accept process on her behalf by accepting personal delivery thereof.

This constitutes the Decision and Order of the court.

12/19/2022

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: