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| <b>Cruz v McLoughlin</b>                                                                                                                                                                                                       |
| 2022 NY Slip Op 35065(U)                                                                                                                                                                                                       |
| September 16, 2022                                                                                                                                                                                                             |
| Supreme Court, Bronx County                                                                                                                                                                                                    |
| Docket Number: Index No. 27329/2020E                                                                                                                                                                                           |
| Judge: Veronica G. Hummel                                                                                                                                                                                                      |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 31

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EDICKSON CRUZ

Index №. 27329/2020E

-against-

Hon. VERONICA G. HUMMEL

K.M. MCLOUGHLIN JR., RICHARD T.  
KIRWIN, JESUS A. RUBIO, MOHAMED J.  
ALTAWHEEL, ELIZABETH AGNES  
RODRIGUEZ, ED A. RODRIGUEZ and JULIO  
A. HERNANDEZ

Acting Justice Supreme Court

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The following papers were read on this motion (Seq. No. 1) to **DISMISS** noticed on August 6, 2021, and submitted on January 17, 2022.

|                                             |                     |
|---------------------------------------------|---------------------|
| Notice of Motion - Affirmation and Exhibits | NYSCEF Doc. # 16-18 |
| Affirmation in Opposition and Exhibits      | NYSCEF Doc. # 35-38 |
| Reply Affirmation                           | NYSCEF Doc. # 39    |

Upon the foregoing papers, it is hereby ordered that the motion [mot. seq. 1] by Richard Kirwin and Kevin McLoughlin (collectively, “the Moving Defendants”) for an Order, pursuant to CPLR 3211(a)(8), dismissing the complaint for failure to establish personal jurisdiction over the Moving Defendants for untimely service pursuant to CPLR 306-b, is decided in accordance herewith.

This action arises from a multi-vehicle accident that occurred on August 6, 2017. The parties agree that the summons and complaint was timely filed 2 years, 11 months, and 8 days later, on July 14, 2020, prior to the expiration of the three-year statute of limitations in an action to recover damages for a personal injury (CPLR 214[5]). The parties also agree that based on prior Executive Orders during the height of the COVID-19 pandemic, plaintiff had until March 4, 2021, to complete service. However, it is undisputed that service was effectuated late upon the Moving Defendants on or about April 27, 2021, 54 days beyond the agreed upon deadline to serve the Moving Defendants. The Moving Defendants then served an answer on May 20, 2021, which included an affirmative defense alleging this Court lacks jurisdiction over them.

CPLR 306-b provides that “[s]ervice of the summons and complaint, summons with notice... 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.” In other words, “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 two discrete situations: ‘upon good cause shown’ or ‘in the interest of justice’” (*Henneberry v Borstein*, 91 A.D.3d 493, 495 [1st Dept 2012]). The good cause shown and in the interest of justice standards “constitute separate grounds for extensions, to be defined by separate criteria” (*id.* [citation omitted]). Nevertheless, when a defendant makes their 306-b motion after the statute of limitations has expired, the court cannot dismiss the action without prejudice and must instead “dismiss[] the action outright, or extend[] the time for plaintiff to properly effect service” (*id.*; *see also id.*, citing *Matter of Rodamis v Cretan’s Assn. Omonoia, Inc.*, 22 A.D.3d 859 [2d Dept 2005]).

Here, since the statute of limitations has expired, this Court must either dismiss the action outright or extend the time for plaintiff to properly effect service. The Moving Defendants argue that plaintiff failed to timely serve them within the time allowed by CPLR 306-b, and therefore, plaintiff’s claim against the Moving Defendants must be dismissed. The Moving Defendants also claim that plaintiff’s first attempt to complete service occurred on April 20, 2021, one month after the parties’ agreed-upon last day to properly serve the Moving Defendants. Based upon this information, the Moving Defendants urge this Court to dismiss plaintiff’s complaint asserted against the Moving Defendants. The Moving Defendants also assert that not barring this action would prejudice the Moving Defendants because the subject motor vehicle accident was not caused at all by the Moving Defendants.

In opposition to the motion, plaintiff makes no argument that service was properly effectuated within the relevant time constraints. Nor does plaintiff make any argument on the grounds of good cause shown. Rather, plaintiff requests that this Court exercise its discretion to grant an extension of time to the statutory deadline to effectuate service based upon the interest of justice. Since the Moving Defendants fully addressed the issue of whether plaintiff should be afforded relief pursuant to CPLR 306-b in its moving papers, “the absence of a formal motion by plaintiff is not an impediment” to deciding this issue (*Slate v Schiavone Constr. Co.*, 10 A.D.3d 1 [1st Dept 2004], *revd on other grounds* 4 N.Y.3d 816 [2005]).

The interest of justice standard is recognized as “‘more flexible’ than the good cause standard” (*Leader v. Maroney*, 97 N.Y.2d 95, 104 [2001]). In other words, the interest of justice standard may “‘accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant’” (*id.* at 105, quoting Bill Jacket, L 1997, ch 476, at 14). “[T]he 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” (*id.* at 105-106). Furthermore, “[n]o 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” (*id.* at 106), including this State’s “strong interest in deciding cases on the merits where possible” (*Henneberry*, 91 A.D.3d at 497, citing *L-3 Communications Corp. v SafeNet, Inc.*, 45 A.D.3d 1 [1st Dept 2007]).

On this motion, the Court will grant an extension of time to effectuate service against the Moving Defendants. Although plaintiff did not submit any affidavit in opposition, the Moving Defendants submitted Kirwin’s affidavit wherein Kirwin stated that when this multi-vehicle accident occurred, Kirwin was operating a vehicle owned by McLoughlin. The affidavit stated the vehicle Kirwin was operating struck the rear of another vehicle in this accident. As a result, the Court does not agree, nor does it decide, that the subject motor vehicle accident was not caused at all by the Moving Defendants (*see Fernandez v McCarthy*, 183 A.D.3d 539 [1st Dept 2020] [holding a “potentially meritorious” claim is a factor in granting an extension of time pursuant to CPLR 306-b]; *compare Schwartz v Chan*, 162 A.D.3d 408, 409 [1st Dept 2018] [holding a claim that lacks merit is a factor in denying an extension of time pursuant to CPLR 306-b]). This means the Moving Defendants only allegation of prejudice – having to participate in frivolous litigation – is no real showing of prejudice at all. This factor weighs in favor of granting plaintiff an extension to serve the Moving Defendants.

Moreover, plaintiff acted with diligence by timely filing this action within the three-year statute of limitations and timely served all other co-defendants in this motor vehicle action, to wit, Jesus A. Rubio, Mohamed J. Altaweel, Elizabeth Agnes Rodriguez, Ed A. Rodriguez, and Julio A. Hernandez, between July 31, 2020, to September 15, 2020 (*see Zegelstein v Faust*, 179 A.D.3d 541, 542 [1st Dept 2020] [plaintiffs’ “extreme lack of diligence” is a factor in denying an extension of time pursuant to CPLR 306-b])). Thus, this factor weighs in favor of granting plaintiff an extension to serve the Moving Defendants.

The length of the alleged delay in proper service on the Moving Defendants is not long, *i.e.*, from March 4, 2021 (the parties’ agreed upon last day to properly serve the Moving Defendants) to April 27, 2021 (when the Moving Defendants were properly served) equates to a 54 day delay (*see Frank v Garcia*, 84 A.D.3d 654 [1st Dept 2011] [granting extension to serve pursuant to CPLR 306-b in the interest of justice where plaintiff could not find defendant and “filed motion [for extension] almost one year after the date of her process server’s affidavit” based upon expiration of statute of limitations, meritorious nature of the action, and lack of any potential prejudice to defendant]; *Goldstein v Columbia Presbyterian Med. Ctr.*, 1 A.D.3d 188 [1st Dept 2003] [granting extension to serve pursuant to CPLR 306-b in the interest of justice in wrongful death action where the statute of limitations expired over eight months prior to defendant being properly served])). This factor, therefore, also weighs in favor of granting plaintiff an extension to serve the Moving Defendants.

With regard to actual notice, the Court points out that Kiriwn's affidavit has an unclear date next to Kirwin's signature. Thus, the Court does not know when Kirwin signed the affidavit. Nevertheless, Kirwin was the operator of one of the vehicles involved in the subject multi-vehicle accident, and therefore, Kirwin had actual notice of this action (*see generally Spath v Zack*, 36 A.D.3d 410 [1st Dept 2007] [finding that defendant Miller, one of the operators of a vehicle involved in a multi vehicle accident, "had notice of the action" for the purpose of granting extension to serve pursuant to CPLR 306-b]). This factor weighs in favor of granting plaintiff an extension to serve the Moving Defendants.

Finally, plaintiff alleges that the Moving Defendants failed to update their address with the Department of Motor Vehicles, and thus, could not be found. However, the Court finds that plaintiff submitted a document from Tristate Judicial Services, dated August 3, 2020, containing the same address the Moving Defendant were ultimately served at on April 27, 2021. Therefore, plaintiff's assertion of not having knowledge of the Moving Defendants' proper address to be served at is contradicted by plaintiff's own submissions which show plaintiff did have the Moving Defendants' address on August 3, 2020. Therefore, this factor does not weigh in favor of granting plaintiff an extension to serve the Moving Defendants.

Where "some factors weigh in favor of granting an interest of justice extension and some do not, [the Appellate Division] should not disturb Supreme Court's discretion-laden determination" (*Nunez-Ariza v Nell*, 161 A.D.3d 614, 614-615 [1st Dept 2018], quoting *Sutter v Reyes*, 60 A.D.3d 448 [1st Dept 2009]). Considering all the above factors and analysis, the Court grants an extension of time to effectuate service against the Moving Defendants. "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 [this State's] strong interest in deciding cases on the merits where possible" (*Henneberry*, 91 A.D.3d at 497, citing *L-3 Communications Corp.*, 45 A.D.3d 1).

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by either party was not addressed by the Court, it is hereby denied.

Accordingly, is it hereby,

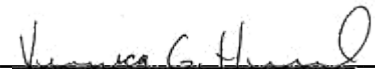
**ORDERED** that the Moving Defendants' motion [Mot. Seq. 1] is **denied**; and it is further

**ORDERED** that plaintiff is granted leave to re-serve the Moving Defendants and e-file proof of service within 60 days from the date of filing hereof in NYSCEF; and it is further

**ORDERED** that in the event plaintiff fails to re-serve the Moving Defendants and e-file proof of service within 60 days from the date of filing hereof in NYSCEF, the Moving Defendants may immediately seek appropriate relief.

This constitutes the decision and order of the court.

**Dated: September 16, 2022**

Hon.   
**VERONICA G. HUMMEL, A.J.S.C.**

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|------------------------------|-----------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------|
| 1. CHECK ONE.....            | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY                      | <input checked="" type="checkbox"/> CASE STILL ACTIVE                                                              |
| 2. MOTION IS.....            | <input type="checkbox"/> GRANTED                                            | <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> SUBMIT ORDER | <input type="checkbox"/> SCHEDULE APPEARANCE                                                                       |
|                              | <input type="checkbox"/> FIDUCIARY APPOINTMENT                              | <input type="checkbox"/> REFEREE APPOINTMENT                                                                       |