

Rodriguez v Mani

2023 NY Slip Op 30823(U)

March 15, 2023

Supreme Court, New York County

Docket Number: Index No. 805060/2022

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

RITA RODRIGUEZ and AMANDA COLON, as
Administrators of the ESTATE OF PEDRO COLON,
Deceased,

Plaintiffs,

- v -

MATHEW MANI, M.D., and TERENCE CARDINAL COOKE
HEALTH CARE CENTER,

Defendants.

-----X

INDEX NO. 805060/2022

MOTION DATE 11/29/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISS/X-MOT EXTEND TIME TO SERVE.

In this action to recover damages for medical malpractice, negligence, liability pursuant to Public Health Law § 2801-d, and wrongful death, the defendant Matthew Mani, M.D., moves pursuant to CPLR 306-b and 3211(a)(8) to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction, premised upon the plaintiff's alleged failure properly and timely to serve process upon him. Mani also served an answer to the complaint. The plaintiffs oppose the motion, and cross-move pursuant to CPLR 306-b to extend the time within which to serve process upon Mani, pursuant to CPLR 308(5) for leave to effectuate expedient service upon him, and to compel him to provide his current addresses. Mani opposes the cross motion. Mani's motion to dismiss the complaint as against him is denied. The plaintiffs' cross-motion is granted, Mani is directed to provide the plaintiffs with his residence and office addresses on or before March 24, 2023, the plaintiffs' time within which to serve Mani is extended until April 14, 2023, and the plaintiffs may serve him by overnight delivery service in accordance herewith, unless Mani, in writing, authorizes his attorney to accept process on his behalf, upon which the

plaintiffs may serve Mani by separately uploading another copy of the summons and complaint to the New York State Court Electronic Filing (NYSCEF) system.

The plaintiffs commenced this action on February 17, 2022. They thus had 120 days, or until June 17, 2022, within which to serve process upon Mani (see CPLR 306-b). According to an affidavit of service executed by process server Richard Ayala, the plaintiffs, on February 23, 2022, provided Ayala with a copy of the summons and complaint intended for Mani. Ayala asserted that, also on February 23, 2022, he attempted to serve Mani at 220 13th Street, Brooklyn, New York 11215, but that he could not effectuate service there because he was advised that Mani was no longer at that location. Later that same date, Ayala traveled to the defendant Terence Cardinal Cooke Health Care Center (TCC HCC) at 1249 5th Avenue, New York, New York 10029, where the plaintiffs believed that Mani was employed. Ayala personally delivered a copy of the summons and complaint there to a person named Wayne Knight, and thereafter mailed an additional copy to Mani at TCC HCC. Ayala, relying on a LEXIS search, also traveled to 100 Kensico Street, Staten Island, New York 10306 on March 2, 2022, and personally delivered a copy of the summons and complaint to Jinu Mani, who identified herself as Mani's wife. Ayala asserted that he thereafter mailed an additional copy to Mani at that address.

In support of his motion, Mani submits his own affidavit, in which he avers that, at the time Ayala attempted service upon him at TCC HCC, he was no longer affiliated with it and did not work there. He further asserted that, when Ayala delivered the papers to his wife at the Staten Island address, it was not his actual place of residence. Mani also avers that he gave neither Knight nor his own wife authority to accept service on his behalf.

The plaintiffs have the burden of demonstrating proper service of process by a preponderance of the evidence (see *Steuhl v CRD Metalworks, LLC*, 159 AD3d 1182, 1184 [3d Dept 2018]). CPLR 308(2) authorizes a plaintiff to serve the summons and complaint upon a natural person

“by delivering the summons within the state to a person of suitable age and discretion at the *actual place of business, dwelling place or usual place of abode* of the person to be served and *by either mailing the summons to the person to be served 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 delivery 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 delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law”

(emphasis added). “Personal jurisdiction is not acquired absent compliance with both the delivery and mailing requirements of the statute” (*Everbank v Kelly*, 203 AD3d 138, 143 [2d Dept 2022]). In opposition to Mani’s motion, the plaintiffs submitted Ayala’s affidavit, in which he described the attempts that made to serve Mani, along with printouts of relevant web sites, including the Medicare, United States National Provider Identifier, Medical News Today, Healthgrades, and WebMD sites, along with other physician search web sites, that listed addresses for Mani, all of which showed that he maintained a medical practice at the Brooklyn location and that he designated his mailing address, and perhaps an office, at the Staten Island location. Some of those web sites, however, listed additional office addresses for Mani on Staten Island at locations at which the plaintiffs did not attempt to serve him.

When a plaintiff seeks to effectuate service pursuant to CPLR 308(2), it is irrelevant to the court’s inquiry whether the defendant did or did not expressly authorize a person at his actual place of business, dwelling place, or usual place of abode to accept service on his or her behalf. They need only be persons of suitable age and discretion. Consequently, if TCC HCC were in fact Mani’s actual place of business, Knight would qualify as a person of suitable age and discretion thereat, and if the Staten Island address were in fact Mani’s dwelling place or usual place of abode, his wife would qualify as a person of suitable age and discretion, since

both recipients were “of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant” (*Roldan v Thorpe*, 117 AD2d 790, 791 [2d Dept 1986], quoting *City of New York v Chemical Bank*, 122 Misc 2d 104, 108-109 [Sup Ct, N.Y. County 1983]; see *Costine v St. Vincent's Hosp. & Med. Ctr.*, 173 AD2d 422, 423 [1st Dept 1991]). The question for the court, however, is whether either of those addresses constituted an actual place of business, dwelling place, or usual place of abode at the time that copies of the summons and complaint were delivered to the recipients.

An address qualifies as a person’s actual place of business within the meaning of CPLR 308(2) only if the person is “physically present with regularity” at the address and is “shown to regularly transact business at that location” (*1136 Realty, LLC v 213 Union St. Realty Corp.*, 130 AD3d 590, 591 [2d Dept 2015] [internal quotation marks omitted]; see *Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831, 833 [2d Dept 2013]; *Sage Realty Corp. v Wallack Firm, P.C.*, 75 Misc 3d 186, 189 [Sup Ct, N.Y. County 2022]). CPLR 308(6) defines “actual place of business” as “any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.” A person’s “dwelling place,” as that term is used in the statute, need not be his or her domicile, sole residence, or permanent place of residence. Rather, it may be a location, such as a vacation house, where the defendant sporadically resides (see *Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1175 [2d Dept 2015]; *Krechmer v Boulakh*, 277 A.D.2d 288, 289 [2d Dept 2000]; see also *Zhiying Wang v Bin Wu*, 208 AD3d 1211, 1212-1213 [2d Dept 2022]). Hence, although a defendant’s “usual place of abode” may indeed be the same as an “actual place of residence,” the delivery of process need not be made only at an “actual place of residence.” Nonetheless, to the extent that a plaintiff seeks to dispatch the follow-up mailing to a residence rather than a business address, he or she must dispatch it to the defendant’s last known residence, for which there must be proof of some degree of permanency (see *Washington Mut. Bank v Murphy*, 127 AD3d at 1175).

The plaintiffs failed to rebut Mani's showing that TCC HCC was not his actual place of business in February 2022, when service was attempted there, or that the Staten Island address was not his dwelling place or usual place of abode in March 2022, when service was attempted there. Hence, the court concludes that service of process was not properly effectuated upon Mani. The court, however, declines to dismiss the complaint against him on that ground.

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 [are] 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]). 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. In light of the court's determination to extend the plaintiffs' time to serve Mani, it denies his motion to dismiss the complaint insofar as asserted against him.

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 plaintiffs made only three attempts to serve Mani within the statutory 120-day period at only three different locations, and made no additional attempts at any of the other Staten Island locations identified on various physician-search web sites. 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 cause of action asserted against Mani, the applicable limitations period is two years and six months from the last date of treatment, which the plaintiffs here allege was October 30, 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 plaintiffs’ application, the limitations period applicable to the claim would expire only a few weeks after the entry of this order. Moreover, the allegations in the complaint are not facially non-meritorious, the plaintiffs did not evince a significant delay in attempting service upon Mani, the request for the extension of time was

made within a reasonable time after Mani challenged the propriety of service, and Mani has not shown that he would suffer any prejudice if the time to serve her with process were extended.

Accordingly, it is

ORDERED that the motion of the defendant Matthew Mani, M.D., to dismiss the complaint insofar as asserted against him is denied; and it is further,

ORDERED that the plaintiffs' cross motion is granted, and

- (a) on or before March 24, 2023, the defendant Matthew Mani, M.D., shall provide the plaintiffs' attorney with his residence and office addresses at which he may be served with process or, alternatively, shall authorize his attorneys in this action, in writing, to accept process on his behalf, upon which the plaintiffs may effectuate service by uploading a new copy of the summons and complaint to the New York State Court Electronic Filing system,
- (b) the plaintiffs' time to serve process upon the defendant Matthew Mani, M.D., is extended up to and including April 14, 2023, and
- (c) the plaintiffs are permitted to serve process upon Matthew Mani, M.D., by overnight delivery service to either or any of the residence or office addresses identified by Matthew Mani, M.D., in accordance with this order, provided that the plaintiffs obtain, from that delivery service, proof of delivery to such address or addresses.

This constitutes the Decision and Order of the court.



JOHN J. ... J.S.C.

3/15/2023
DATE

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