

John Doe v Yeshiva of Brooklyn

2023 NY Slip Op 31528(U)

April 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 512993/2020

Judge: Laurence L. Love

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
KINGS COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

-----X

JOHN DOE,

Plaintiff,

- v -

THE YESHIVA OF BROOKLYN also known as the
Talmudical School of Brooklyn, RABBI YEHUDA
NUSSBAUM and RABBI SHLOMO MANDEL,

Defendants.

-----X

INDEX NO. 512993/2020

MOTION DATE 11/17/2021

MOTION SEQ. NO. 002, 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24-34
were read on this motion to/for VACATE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35-58
were read on this motion to/for EXTEND TIME.

Upon the foregoing documents, Defendants The Yeshiva of Brooklyn also known as the Talmudical School of Brooklyn (the “Yeshiva”) and Rabbi Shlomo Mandel move for an order vacating the default judgement entered by this Court on July 20, 2021 pursuant to either CPLR 317 or CPLR 5015(a)(3) and (4), and an order dismissing this action with prejudice pursuant to CPLR 3211(a)(8) or CPLR 306-b (Motion Seq. 002).

Plaintiff cross-moves for an order extending time to complete service upon the Yeshiva and Rabbi Shlomo Mandel pursuant to CPLR 306-b (Motion Seq. 003).

BACKGROUND

This is an action commenced pursuant to the Child Victims Act (“CVA”) in which Plaintiff alleges that as a minor attending school at the Yeshiva, he was subject to repeated

sexual abuse by Defendant Rabbi Yehuda Nussbaum, and that the Yeshiva and its principal, Rabbi Shlomo Mandel, knew of the abuse but allowed it to continue.

Plaintiff filed the Complaint on July 21, 2020. Plaintiff filed affidavits of service dated September 1, 2020 in which Plaintiff's process server, Stuart Schwartz, averred that he personally served the complaint on all three Defendants on August 18, 2020 by leaving the Summons and Complaint with a person of suitable age and discretion at the entry of the premises at 1470 Ocean Parkway, Brooklyn, NY 11230. Mr. Schwartz also mailed copies of the Summons and Complaint to the same address.

Plaintiff sent letters by mail to Defendants on March 17, 2021, notifying them that if they did not interpose an answer within ten days, a motion for default judgment would be filed. On June 21, 2021, Plaintiff moved for a default judgment against Defendants (Motion Seq. 001), which was granted on July 16, 2021 without opposition.

Shortly thereafter, on August 19, 2021, the Yeshiva and Rabbi Mandel appeared and filed the motion now before the Court, seeking vacatur of the default judgments and dismissal of this action.

In support, Defendants have filed an affidavit from the Yeshiva's administrator stating that based upon his review of a video camera, with no audio, Plaintiff's process server, Mr. Schwartz, did not leave the Summons and Complaint with an employee but rather left them on the front door after standing outside for a minute and not interacting with anyone. Defendants have also submitted video footage reflecting that Mr. Schwartz only stood outside the front door for a brief time.

Defendants conclude that the July 2021 default judgments should be vacated. As the statute of limitations for bringing CVA actions has now expired, Defendants further argue the action should be dismissed.

In opposition, Mr. Schwartz has submitted an affidavit wherein he represents that when he arrived at the premises, an employee named “Ishie” spoke to him through a glass door and directed him to leave the papers in front of the door. Plaintiff has submitted photos of the front door with glass panels. Plaintiff maintains that service was proper, but should the Court find otherwise, Plaintiff has cross-moved for an extension of time to complete service (Motion Seq. 003).

DISCUSSION

“A process server’s affidavit of service constitutes prima facie evidence of proper service” (see *Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719 [2nd Dept 2014]). However, “[a] sworn denial containing a detailed and specific contradiction of the allegations in the process server’s affidavit will defeat the presumption of proper service. If the presumption is rebutted ... the burden is on the plaintiff to prove jurisdiction by a preponderance of the evidence” (see *Machovec v Svoboda*, 120 A.D.3d [2nd Dept 2014]).

Pursuant to CPLR 306-b, “[s]ervice of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause 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.”

“To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service” (*Bumpus v New York City Transit Authority*, 66 AD3d 26, 31-32 [2d Dept 2009]). “[G]ood cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control” (*Bumpus*, 66 AD3d at 32).

As discussed in *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105–06 (2001), the “good cause” and “interest of justice” branches of CPLR 306-b contemplate separate grounds for an extension of time to serve process. “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.”

As discussed *supra*, here Defendants have argued that Plaintiff’s personal service in August 2020 was not proper given that Plaintiff’s process server, Mr. Schwartz, left the papers on the door without speaking to anyone. Mr. Schwartz has represented that an employee spoke to him through a door and directed him to leave the papers. “[I]f a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server’s progress is arrested” (*F. I. Du Pont, Glore Forgan & Co. v Chen*, 396 NYS2d 343, 346 [1977]). Plaintiff notes it would not have been unusual for Mr. Schwartz to be directed to leave the papers

without entering given that the service took place in August 2020, at the height of the COVID-19 pandemic.

Regardless, Defendants have raised an issue with Plaintiff's August 2020 service that suggests a possibility service may not have been fully compliant. However, Defendants have not alleged that the Summons and Complaint or the ensuing motion papers in this litigation were not received, but only that the initial personal service was technically improper. The court is also aware that said service occurred during a time that COVID circumstances were present in New York. Therefore, the Court finds the most prudent path at this juncture is to vacate its prior default orders against Defendants and grant Plaintiff an extension to complete personal service.

Plaintiff has demonstrated that the interest of justice warrants an extension of time to remedy any deficiencies in his earlier, timely attempt at service. Defendants argue that an extension of time would not serve the interest of justice because the statute of limitations for commencement of CVA actions has now expired and allowing the action to proceed would unfairly prejudice them. However, dismissal of this action on such grounds would more severely prejudice Plaintiff, given that Plaintiff would not be able to bring a new action. (*See Woods v M.B.D. Cmty. Hous. Corp.*, 90 AD3d 430, 431 [1st Dept. 2011] [granting an extension pursuant to CPLR 306-b in the interest of justice when "plaintiff's claim would be extinguished without an extension since the statute of limitations has expired"]).

Dismissal of this action on such grounds would also be completely contrary to the well-documented legislative goals of the CVA. The Legislature intended to "open the doors of justice to thousands of survivors of child sexual abuse in New York State" because "New York is one of the worst states in the nation for survivors of child sexual abuse" (NY Committee Report, Senate Bill S2440 § 3 [January 26, 2019]). The merits of Plaintiff's allegations have yet to be

adjudicated, but Defendants have not demonstrated they are false. If proven true, they certainly constitute the type of harm that the CVA was enacted to remedy. Additionally, given that this case is in its infancy stage and Defendants have been aware of the action for years, Defendants cannot claim they have suffered prejudice or surprise.

Accordingly, the Court vacates its July 2021 default judgement but grants Plaintiff's cross-motion to extend time to complete service such that this action may now proceed. The Court directs that Plaintiff personally serve his Complaint and all other papers on Defendants within 30 days.

CONCLUSION

Accordingly, it is

ORDERED that the motion of Defendants The Yeshiva of Brooklyn and Rabbi Shlomo Mandel for an order vacating the default judgement entered by this Court on July 20, 2021 pursuant to either CPLR 317 or CPLR 5015(a)(3) and (4), and an order dismissing this action with prejudice pursuant to CPLR 3211(a)(8) or CPLR 306-b (Motion Seq. 002) is partially granted to the extent that the July 20, 2021 default judgment is vacated; and the motion is otherwise denied; and it is further

ORDERED that this Court's prior decision and order entered July 20, 2021 (NYSCEF doc No. 20) is hereby vacated in its entirety;

ORDERED that Plaintiff's cross-motion pursuant to CPLR 306-b for an extension of time to complete service upon Defendants (Motion Seq. 003) is granted; and it is further

ORDERED that Plaintiff shall effect service on Defendants as detailed herein within 30 days; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days after issue is joined.

This constitutes the decision and order of the Court.



04/26/2023
DATE

LAURENCE L. LOVE, J.S.C.

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