

Pirs Capital, LLC v Apex Solutions, Inc.

2023 NY Slip Op 31742(U)

May 23, 2023

Supreme Court, New York County

Docket Number: Index No. 653693/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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PIRS CAPITAL, LLC,

Plaintiff,

- v -

APEX SOLUTIONS, INC., TED HICKS, aka TED A. HICKS,
SCOTT BENSON aka SCOTT A. BENSON,

Defendant.

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INDEX NO. 653693/2022

MOTION DATE 05/17/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISSAL.

Defendants’ motion to dismiss for lack of service is denied and the cross-motion by plaintiff for an extension of time to serve defendants is granted, and defendants are deemed to be timely served *nunc pro tunc*.

Background

In this case about a receivables contract, defendants move to dismiss for lack of proper service. They claim that none of the defendants were properly served. Mr. Hicks claims that a copy of the commencing papers was apparently left on the windshield of his car and that does not constitute proper service. He also insists that service on the corporate defendant was improper because the address where Apex was served (a location in Las Vegas, Nevada) was only a virtual office and the equivalent of a post office box as opposed to its place of business.

Mr. Benson makes similar comments about Apex, including that it had no desks or chairs at the Las Vegas location where service was allegedly effectuated.

Plaintiff contends that after receipt of defendants' motion to dismiss, it instructed its process server to locate and serve defendants again. It claims that it completed service on April 21, 2023 (22 days after the motion was filed) and that all three defendants were properly served. Defendant Apex was served via Mr. Benson, Apex's registered agent, defendant Benson was personally served at his residence in California and defendant Hicks was served via a person of suitable age and discretion (his wife).

Defendants claim that the most recent attempts to effectuate service were done after the 120-day deadline to complete service. They contend that the interest of justice standard does not compel the Court to extend plaintiff's time to effectuate service and that there is no good cause for the delay.

Discussion

The Court denies defendants' motion and grants plaintiff's cross-motion. The Court finds that plaintiff timely effectuated service *nunc pro tunc* via the April 2023 service of process (NYSCEF Doc. No. 18 [affidavits of service]).

CPLR 306-b "explicitly mandates that "if the plaintiff shows good cause for the failure, the court shall extend the time for service" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105, 736 NYS2d 291 [2001]). Alternatively, a plaintiff may seek an extension of time to serve under the "interest of justice standard" (*id.*). "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" (*id.* at 105-06).

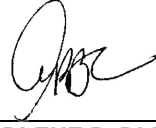
Plaintiff satisfied its burden under either standard. It first endeavored to serve the corporate defendant at an address that, according to defendant Benson, "Apex Solutions employed while it used plaintiff's services" (NYSCEF Doc. No. 8, ¶ 3). That demonstrates due diligence to serve defendant Apex; that this Las Vegas location was only a virtual office is not a basis to find that plaintiff is not entitled to an extension of time to serve defendants. Plaintiff did what any other plaintiff would do-attempt to serve a corporate defendant at the location where it believed the defendant was located.

Moreover, plaintiff had the proper reaction to the instant motion. It immediately contacted its process server who effectuated service on all three defendants in April 2023, just a few weeks after defendants made the instant motion. Then it cross-moved for the appropriate relief regarding service. This is not a situation where plaintiff needlessly delayed this case (the action was only filed in October 2022) and it promptly took action to remedy any service problems. The Court observes that defendants did not attach any affidavits in opposition to plaintiff's cross-motion that dispute the April 2023 attempts at service.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied and plaintiff's cross-motion is granted to the extent that defendants are deemed timely served *nunc pro tunc* and defendants shall answer or otherwise respond pursuant to the CPLR.

Conference: August 2, 2023 at 11:30 a.m. By July 26, 2023, the parties are directed to upload 1) a discovery stipulation signed by all remaining parties, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by July 26, 2023 will result in an adjournment of the conference.

5/23/2023		
DATE		ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE