SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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ABDULLAH IBRAHEEM and SAHER IFTIKHAR IBRAHEEM,

Plaintiffs,

- v -

JONATHAN H. OREN, M.D., PARK LENOX ORTHOPAEDICS, P.C., FRANK MOTA, M.D., DAVID PAUL, M.D., DENNIS H. KRAUS, M.D., INA TAVBERIDZE, R.N., LENOX HILL HOSPITAL, NORTHWELL HEALTH, INC., "JOHN/JANE DOE, M.D." (First and Last Names Being Fictitious), "JANE/JOHN DOE, R.N." (First and Last Names Being Fictitious), and "ABC CORP." (Corporate Name Being Fictitious),

Defendants.

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INDEX NO. 805066/2023

MOTION DATE 06/30/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for EXTEND - TIME.

In this action to recover damages for personal injuries, the plaintiffs move pursuant to CPLR 306-b for leave to extend, for a period of 120 days, their time to serve process upon the defendants Jonathan Oren, M.D., Frank Mota, M.D., David Paul, M.D., Dennis J. Kraus, M.C., and Ina Tavberidze, R.N. (collectively the individual defendants). No party opposes the motion. During the pendency of the motion, Mota answered the complaint, but asserted, as his twelfth affirmative defense, that he was not properly served with process. The motion is granted, and the plaintiff's time within which to serve a copy of the summons and complaint upon the individual defendants, including Mota, is extended until February 5, 2024.

The plaintiffs commenced this action on February 19, 2023 by filing a summons with notice (*see* CPLR 304[a]). Pursuant to CPLR 306-b, they had 120 days from that date to serve process upon the individual defendants in accordance with CPLR 308, or until June 19, 2023,

but they were unable to effectuate process upon Oren, Paul, Kraus, and Tavberidze by that date, and apparently were unable properly to serve Mota by that date.

The plaintiffs' attorney retained Guaranteed Subpoena Service, Inc. (GSS), to serve process upon the individual defendants.

In connection with attempted service of process upon Oren and Paul, GSS reported to the plaintiff's attorney that it first attempted to serve them at Lenox Hill Hospital, 130 East 77th Street, 11th Floor, New York, New York 10075, but that its process server was told by a security guard named Grace that hospital personnel could not accept process on behalf of physicians. GSS next attempted serve Oren and Paul at the office of legal affairs of the defendant Northwell Health, Inc. (Northwell), in New Hyde Park, New York. A Northwell employee told the GSS process service that legal affairs office was not authorized to accept service on behalf of either Oren or Paul because that was not the actual place of business of either of those two physicians; rather, the employee told the process server that Oren and Paul could only be served at the locations where they actually maintained their medical offices. There is no other documentation in this action showing that other attempts were made to serve Oren or Paul.

With respect to Mota, as with Oren, a GSS process server initially attempted to deliver process to him at Lenox Hill Hospital, and received the same explanation from a security guard there, after which the process server personally delivered the summons with notice to the aforementioned Northwell legal affairs employee in New Hyde Park, who again told the process server that the legal affairs office was not authorized to accept service on Mota's behalf because it was not his actual place of business. There is no other documentation in this action showing that other attempts were made to serve Mota. Mota nonetheless answered the complaint, asserting improper service of process as an affirmative defense.

As to Tavberidze, the GSS process server also initially attempted to serve process upon her at Lenox Hill Hospital, and was similarly informed that hospital security officers would not accept service of process on behalf of nurses. GSS then sent a process server to the university

audit office of Weill Cornell Medical College at 575 Lexington Avenue, New York, New York 10022, and was told by security officers there that, like the Northwell legal affairs office, they could not accept process on behalf of health-care staff. There is no other documentation in this action showing that other attempts were made to serve Tavberidze.

GSS also attempted to serve process upon Kraus at Centura Health in Englewood, Colorado, but its process server was informed that Kraus was not at that location, and was further informed during a telephone conversation that Centura's legal department was not authorized to accept process on behalf of its physicians. As with the other individual defendants, there is no other documentation in this action showing that other attempts were made to serve Kraus.

On September 13, 2023, the plaintiffs filed and served their complaint.

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." Inasmuch as the 120-day period for proper service has now lapsed, the plaintiffs seek leave to extend their time properly to serve the summons and complaint upon the individual defendants.

> 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 were 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 none of the individual defendants has 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.

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).
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> "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 Sell*a, 185 Misc 2d 549, 554 [Albany County Sup Ct] [compiling Federal factors]).
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> "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).

The plaintiffs only made two attempts within the statutory 120-day period to serve Oren, Mota, Paul, and Tavberidze, and only one attempt to serve Kraus. Inasmuch as the plaintiffs thus cannot show that they employed due diligence in attempting to serve the individual defendants in the manner required by statute (*see generally State Higher Educ. Servs. Corp. v Cacia*, 235 AD2d 986, 987 [3d Dept 1997]; *McGreevy v Simon*, 220 AD2d 713, 713-714 [2d Dept 1995]; *see also Hennessey v DiCarlo*, 21 AD3d 505, 506 [2d Dept 2005]), they cannot show good cause for the requested extension of time. Nonetheless, although this action does not qualify for an extension under the "good cause" exception (*see Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]), the court, upon consideration of the factors articulated by the Court of Appeals in *Leader*, concludes that it qualifies under the "interest of justice" category (*see Henneberry v Borstein*, 91 AD3d 493, 495-496 [1st Dept 2012]).

With respect to the medical malpractice causes of action asserted against the individual defendants, the applicable limitations period is two years and six months from the final date of the treatment that allegedly constituted malpractice, which the plaintiffs here alleged was August 30, 2020 (*see* CPLR 214-a). In light of the toll for the service and filing of legal papers that was in effect between March 20, 2020 and November 3, 2020 due to the COVID-19 pandemic (*see Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021]), the limitations period here did not begin to run until November 4, 2020. Hence, the limitations period expired on May 4, 2023. 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 already would have expired. The certificate of merit that the plaintiffs uploaded to the New York State Court Electronic Filing system is sufficient to support the potentially meritorious nature of their claims. Moreover, the plaintiffs did not evince a significant delay in attempting service upon the individual defendants, the request for the extension of time was made within a reasonable time after they were unable to locate the individual defendants' actual place of business, actual dwelling place, or usual place of abode, and no party has shown that the

individual defendants would suffer any prejudice if the time to serve them with process were extended.

The court notes that where, as here, a doorman or security guard in a building or a gated residential complex denies a process server direct access to a resident's or occupant's dwelling or office, the doorman or guard is deemed to be a person of suitable age and discretion within the meaning of CPLR 308(2), and the delivery prong of that statute may be satisfied by leaving the summons and complaint with or near the doorman or guard (*see Bossuk v Steinberg*, 58 NY2d 916, 918 [1983]; *F. I. Du Pont, Glore Forgan & Co. v. Chen*, 41 NY2d 794, 796-797 [1977]; *Zabari v Zabari*, 154 AD3d 613, 614 [1st Dept 2017] [leaving summons and complaint in general vicinity of doorman satisfied delivery prong of CPLR 308(2)]; *Charnin v Cogan*, 250 AD2d 513, 518 [1st Dept 1998] [service is valid when delivery was made to doorman, and mailing made to defendant at place of residence, even where the doorman's employer had a policy discouraging doorman's acceptance of process]; *Duffy v St. Vincent's Hosp*., 198 AD2d 31, 31 [1st Dept 1993]). Hence, to the extent that a medical facility such as Lenox Hill Hospital was, in fact, an individual defendant's actual place of business, service pursuant to CPLR 308(2) may be effectuated by simply leaving a copy of the summons and complaint with or near one of the guards or security officers, and timely mailing a second copy to the particular individual defendant at that address.

Accordingly, it is

ORDERED that the plaintiffs' motion is granted, without opposition, and the plaintiffs' time to serve the summons and complaint upon the defendants Jonathan Oren, M.D., Frank Mota, M.D., David Paul, M.D., Dennis J. Kraus, M.C., and Ina Tavberidze, R.N., is extended up to and including February 5, 2024.

This constitutes the Decision and Order of the court.

10/6/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE