

**Mori v Riomar Corp.**

2023 NY Slip Op 34391(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 154687/2020

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

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INDEX NO. 154687/2020

HENRY MORI,

MOTION SEQ. NO. 004

Plaintiff,

- v -

RIOMAR CORP., MARTHA SILVA FRANSA, KANA RESTAURANT, D/B/A KANA, D/B/A KANA TAPAS BAR AND RESTAURANT, ARMANDO OROFINA, ALEJANDRO VEGA, ANDRES VEGA, and JOHN DOE

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 110, 111, 112, 113, 114, 115, 116, 117, 118, 121, 123, 178, 179, 180, 181

were read on this motion to/for DISMISS

In this intentional tort and negligence action, defendants Armando Orofina and Andres Vega (collectively, movants) move, pursuant to CPLR 3211(a)(8), for an order dismissing the complaint as against them for failure to properly serve them in accordance with CPLR 308(2). Plaintiff opposes the motion and cross-moves, pursuant to CPLR 306-b, for an order granting him an extension of time to complete service, which movants oppose.

Factual and Procedural Background

Plaintiff commenced this action in June 2020 after he was allegedly injured when assaulted by employees of defendant Kana Restaurant, which was then allegedly owned by, among others, movants (Doc No. 1 at 3-7). Shortly thereafter, plaintiff allegedly served movants (Doc Nos. 6, 9). Following joinder of issue (Doc No. 11), plaintiff again allegedly served movants (Doc Nos. 26-27). Movants subsequently moved (Seq. 001) to dismiss the complaint as against them for failure to properly complete service (Doc Nos. 13-14), which plaintiff opposed (Doc Nos. 34-35).

By order entered April 28, 2021, this Court granted movants' motion and dismissed the complaint as against them (Doc No. 57). Plaintiff then moved (Seq. 003) for leave to reargue, contending, among other things, that his time to serve movants was extended because of the COVID-19 pandemic (Doc Nos. 62-63). Movants opposed the motion for leave to reargue (Doc No. 68). By order entered January 20, 2022, this Court granted plaintiff leave to reargue and, upon reargument, denied movants' initial motion to dismiss (Doc No. 84). Plaintiff was ordered to complete service on movants within 30 days of service of the order with notice of entry (Doc No. 84 at 3). Plaintiff then allegedly served movants for a third time (Doc Nos. 91-92).

Movants then moved again (Seq. 004) to dismiss the complaint as against them, arguing that plaintiff failed to properly serve them in accordance with the January 2022 order (Doc Nos. 93-94). Plaintiff opposed the motion and cross-moved for an order granting him a second extension of time to serve movants should his service be deemed incomplete (Doc No. 110), which movants opposed (Doc No. 115). By order entered September 19, 2022, movants' motion to dismiss and plaintiff's cross-motion for additional time to serve were held in abeyance "pending the outcome of a traverse hearing regarding the propriety of service on movants" (Doc No. 121). The matter was then referred to Special Referee Jeremy R. Feinberg to conduct the traverse hearing and "to hear and determine the issue of service of process with respect to [movants]."

*Special Referee's Decision (Doc No. 182)*

In April 2023, over the course of two days, Special Referee Feinberg held the traverse hearing and heard testimony from movants and Linda Forman, an owner of the process service agency used by plaintiff to purportedly serve movants. Although he found all three witnesses credible, he ultimately concluded that plaintiff failed to satisfy his burden of demonstrating proper service of the summons and complaint for three reasons. First, plaintiff failed to call as witnesses

the specific individuals tasked with serving movants. The absence of that testimony, “standing alone,” was sufficient to find plaintiff did not meet his burden. Second, Special Referee Feinberg indicated that the weight of Forman’s testimony was “diminish[ed]” by the absence of other evidentiary support showing the summons and complaint were properly served.<sup>1</sup> Third, and finally, Special Referee Feinberg emphasized the weight provided by the combination of movants’ testimony and their physical evidence corroborating their statements that they never received the summons and complaint.

Thus, he concluded that plaintiff “failed to meet his burden of demonstrating proper service of the summons and complaint on [movants] by a preponderance of the evidence.”

### Legal Analysis and Conclusions

#### Movants’ Motion to Dismiss

It is well established that, pursuant to CPLR 3211(a)(8), a court may dismiss a complaint against a defendant for lack of personal jurisdiction due to improper service (*see e.g. Makhnevich v Board of Mgrs. of 2900 Ocean Condominium*, 217 AD3d 630, 631 [1st Dept 2023] [affirming dismissal of complaint under CPLR 3211(a)(8) because court lacked jurisdiction as a result of improper service], *appeal dismissed* 40 NY3d 1015 [2023]).

Here, Special Referee Feinberg determined that plaintiff failed to satisfy his burden of demonstrating proper service upon movants. Therefore, plaintiff’s complaint must be dismissed as against movants, because this Court lacks personal jurisdiction over them (*see Stanton v Velis*, 172 AD2d 415, 415 [1st Dept 1991] [affirming dismissal of complaint against defendant pursuant to CPLR 3211(a)(8) because motion court concluded after traverse hearing that plaintiff failed to properly serve defendant]; *cf. Pressley v Shneyer*, 56 AD3d 263, 263 [1st Dept 2008] [affirming

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<sup>1</sup> Special Referee Feinberg, however, explicitly declined to apply an adverse inference to this testimony.

denial of motion to dismiss because plaintiff satisfied burden of establishing personal jurisdiction over defendant by service pursuant to CPLR 308(2) at traverse hearing]).

However, since plaintiff cross-moved for an extension of time to serve movants, that issue must also be addressed before plaintiff's complaint can be dismissed.

*Plaintiff's Cross-Motion for Additional Time to Serve*

Plaintiff contends that he should be given an additional 120 days to serve movants with the summons and complaint because he has shown good cause based on his diligence in attempting to serve movants within the 30-day timeframe required by this Court's January 2022 order. He also contends that granting additional time is in the interest of justice because the competing interests between the parties here weigh in his favor. In opposition, movants argue that plaintiff has not shown good cause because his three failed attempts at service were not beyond his control. They also argue that additional time to serve is not warranted in the interest of justice because plaintiff has no meritorious cause of action and lacked diligence in attempting to serve them.

"[U]nder CPLR 306-b, a court may extend the time for service upon good cause shown or in the interest of justice" (*HSBC Bank USA, N.A. v Russo*, 205 AD3d 647, 648 [1st Dept 2022] [internal quotation marks and citation omitted]; see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 [2001]), and the decision to extend the time for service under either standard is left to the court's discretion (see *Nunez-Ariza v Nell*, 161 AD3d 614, 614-615 [1st Dept 2018] [explaining that decision to extend time is "discretion-laden determination" (internal quotation marks and citation omitted)]).

Good cause and in the interest of justice, however, are "two discrete situations . . . defined by separate criteria" (*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]). To demonstrate good cause, a plaintiff must show that they were reasonably diligent in attempting to serve a

defendant (*see id.* at 496), whereas “[t]he 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” (*Gjurashaj v ABM Indus. Groups, LLC*, 213 AD3d 479, 480 [1st Dept 2023] [internal quotation marks and citation omitted]). In balancing those interests, a 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 [a] defendant,” with no single factor being determinative (*Leader*, 97 NY2d at 105-106).

Here, plaintiff has not shown good cause for an extension. Based on the traverse hearing, Special Referee Feinberg determined that plaintiff’s service issues were essentially administrative errors. Thus, plaintiff’s excuse for not timely serving movants “amount[s] at best to law office failure, which is insufficient” to demonstrate good cause (*Zegelstein v Faust*, 179 AD3d 541, 542 [1st Dept 2020] [affirming denial of additional time to serve because “(p)laintiffs’ lack of diligence preclude[d] a finding of good cause”], *lv denied* 36 NY3d 905 [2021]).

Balancing the competing interests here results in a conclusion that it is not in the interest of justice to allow plaintiff additional time to serve. Plaintiff has now failed three times to properly serve movants, and such failures demonstrate that he lacked diligence in attempting to serve them. After commencing this action, he failed to properly serve movants twice, which lead to movants’ initial motion to dismiss. He was then given a third opportunity to serve them after the January 2022 order. Yet, despite that additional extension, he was still unable to properly serve movants within the 30-day window provided to him by this Court in that order. Such a lack of diligence is sufficient to deny an extension of time to serve in the interest of justice (*see Holland v Thiam*, 201

AD3d 546, 547 [1st Dept 2022] [“Given plaintiff’s lack of diligence, the court properly found that the interests of justice did not warrant an extension” (citations omitted)], *lv dismissed* 37 NY3d 1228 [2022]).

The statute of limitations factor weighs against granting an extension. In his complaint, plaintiff asserted causes of action against movants for negligent hiring, training, and supervision, which have a statute of limitations of three years from the date of the accident (*see* CPLR 214 [5]; *Green v Emmanuel African M.E. Church*, 278 AD2d 132, 132 [1st Dept 2000]). Since plaintiff alleged that his accident occurred on May 5, 2019, the statute of limitations for such claims expired on May 5, 2022. Plaintiff, however, did not cross-move for a second extension of time to serve until May 18, 2022, two weeks after his statute of limitations had expired. Were the statute of limitations unexpired, this factor would weigh in favor of granting an extension of time to serve (*see Gjurashaj*, 213 AD3d at 480 [affirming grant of additional time to serve, in part, because statute of limitations had not expired]).

As a result of plaintiff’s errors, movants have also been prejudiced. They have retained counsel, been deposed, and taken part in a multi-day traverse hearing. Their counsel has attended numerous discovery conferences in the more than three years this action has continued, and they have been forced to file multiple motions, which included two motions to dismiss and one motion to vacate a premature note of issue. Movants have been subjected to a substantial amount of litigation while plaintiff, who has been represented by counsel throughout, has struggled to complete a simple, fundamental aspect of commencing a civil action.

“Although extensions of time should be liberally granted on good cause shown or in the interest of justice” (*Jimenez v City of New York*, 13 AD3d 107, 107 [1st Dept 2004]), plaintiff has shown an inability to take advantage of the second chances given to him thus far in the litigation.

Movants should not be required to endure another attempt by plaintiff to serve them with the summons and complaint, when they have waited years for plaintiff to do so. Between the lack of diligence, the expiration of the statute of limitations, and the prejudice suffered by movants, the balance of interests weighs against granting an extension of time to serve (*see Nunez-Ariza*, 161 AD3d at 614-615 [affirming denial of additional time to serve because the balance of factors favored against granting extension of time to serve]).

Accordingly, it is hereby:

ORDERED that the motion by defendants Armando Orofina and Andres Vega to dismiss the complaint as against them is granted; and it is further

ORDERED that plaintiff's cross-motion for an extension of time to serve the summons and complaint is denied; and it is further

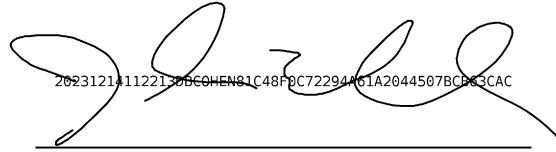
ORDERED that plaintiff's fifth, sixth, and seventh causes of action are dismissed as against defendants Armando Orofina and Andres Vega; and it is further

ORDERED that plaintiff's remaining claims are severed, and the remainder of the action shall continue against the remaining defendants; and it is further

ORDERED that counsel for defendants Armando Orofina and Andres Vega shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties shall appear for a status conference on February 13, 2024, at 10:00 a.m., in person at 71 Thomas Street, Room 305, unless a stipulation containing a schedule for all remaining discovery is submitted by February 12, 2024, in accordance with the Part rules.



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12/14/2023

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE