

**Montanez v City of New York**

2024 NY Slip Op 30506(U)

February 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 501066/2022

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of NY,  
held in and for the County of Kings, at the Courthouse, at 360  
Adams Street, Brooklyn, New York, on the 2nd day of February  
2024.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
ANGEL MONTANEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK; THE NEW YORK CITY  
HEALTH AND HOSPITAL CORPORATION; KINGS  
COUNTY HOSPITAL; KAPADIA, PT; JEFFREY  
SCHWARTZ, MD; JASON BAJAJ, MD; JAMES DORAN,  
MD; NISHANT SUNEJA, MD; DONALD DOUKAS, MD;  
NICHOLAS STEKAS, MD; MICHAEL ROSE, MD;  
VIDUSHAN NADARAJAH, MD; QAIS NAZIRI, MD; and  
John Doe and Jane Doe 1 through 6 being other unknown and  
unnamed defendants,

Defendants.

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 52 – 57, 62 – 72

Defendant Shaili Kapadia, PT s/h/a Kapadia, PT (“Kapadia”) moves for an Order, pursuant to CPLR 5015 (a) (4), to vacate the default judgment rendered against said defendant on May 30, 2023, and for an Order, pursuant to CPLR 3211 (a) (8), dismissing Plaintiff’s action as against Kapadia for failure to obtain personal jurisdiction; and Plaintiff cross moves for an Order, pursuant to CPLR 306-b, extending Plaintiff’s time to serve the summons and complaint, and permitting Plaintiff to serve Kapadia through his counsel.

Plaintiff commenced this action on January 12, 2022, for alleged medical malpractice against multiple defendants. In an affidavit of service, process server Terence Kelly (“Kelly”) averred that he affixed a copy of the summons and complaint to the door of Kapadia’s “usual place of abode” at 109 West Marie Street, Hicksville, New York, on May 12, 2022, at 7:25 p.m. Kelly served the summons and complaint by mail to the same address

on the same date. The affidavit of service also sets forth that Kelly made one prior attempt to serve Kapadia on May 12, 2022, at 12:20 p.m. at the same address.

Kapadia did not interpose an answer, and Plaintiff moved for a default judgment pursuant to CPLR 3215 (a). Default judgment was granted against Kapadia on May 30, 2023.

In support of the instant motion to vacate the default judgment and dismiss the complaint, Kapadia submits a personal affidavit stating that he moved from 109 West St. Marie Street to the state of Maryland in February 2022, and he no longer resided at the address where service was attempted on May 12, 2022. Kapadia also argues that Plaintiff failed to show due diligence before resorting to CPLR 308 (4) “nail and mail” service.

Under CPLR 308 (4), personal jurisdiction may be obtained over a natural person by affixing the summons to the door of the person’s dwelling place or usual place of abode, and mailing the summons to their last known residence, but this service is only authorized when “service under paragraphs one and two cannot be made with due diligence.” “The due diligence requirement of CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received” (*County of Nassau v Letosky*, 34 AD3d 414, 415 [2d Dept 2006], quoting *Gurevitch v Goodman*, 269 AD2d 355 [2d Dept 2000]). Due diligence “may be satisfied with a few visits on different occasions and at different times to the defendant’s residence or place of business when the defendant could reasonably be expected to be found at such location at those times” (*Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007]). Generally, the affidavit of service must set forth the details of these attempts, so that the court may determine whether due diligence has been exercised on a case-by-case basis (*see Barnes v City of New York*, 51 NY2d 906 [1980]). A plaintiff fails to show due diligence where, for example, two of the three attempts were made on weekdays during business hours (*County v Nassau*, at 415).

Here, Kelly’s affidavit fails to establish that due diligence was exercised before Plaintiff resorted to “nail and mail” service under CPLR 308 (4). Based on the submissions, the process server made only one attempt to serve Kapadia at his alleged dwelling place on a Thursday at 12:20 p.m. Seven hours later, the summons and complaint were affixed to the door. While due diligence is evaluated based on quality and not quantity of attempts (*see McSorley v Spear*, 50 AD3d 652 [2d Dept 2008], citing *Estate of Waterman*), paying two visits to the home on a single day, once during typical business hours, is clearly insufficient in both quality and quantity.

Accordingly, service of the summons and complaint on Kapadia was improper, and the default judgment dated May 30, 2023, is vacated for lack of personal jurisdiction. Where service was never properly effectuated, the defendant need not show a meritorious defense or excuse for the default (*see CPLR 5015 [a] [4]*). “In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and void” (*Washington Mut. Bank v Murphy*, 127 AD3d 1167 [2d Dept 2015]).

CPLR 306-b provides that the court may extend the time for service upon good cause shown or in the interest of justice. “‘Good cause’ and ‘interest of justice’ are two separate and independent statutory standards” (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31 [2d Dept 2009]). Good cause does not exist where plaintiff failed to make “at least a reasonably diligent effort at service,” but rather where the “failure to timely serve process is a result of circumstances beyond plaintiff’s control” (*id.*). However, if good cause is not established, courts may also consider other factors in the interest of justice, including “the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant” (*id.*, at 32; *see also Leader v Maroney*, 97 NY2d 95, 106 n 3 [2001]).

Here, despite Plaintiff’s insufficient “due diligence” efforts under CPLR 308 (4), Plaintiff did apparently make a good faith attempt to affix the summons and complaint to the door and mail the summons and complaint to the address they believed was Kapadia’s place of abode, unaware he no longer resided there, within the 120-day period after the action was commenced. Even if Plaintiff’s failure to properly serve Kapadia did not constitute good cause, the interest of justice standard is intentionally broader “to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant” (*Leader*, at 105). Because the statute of limitations has since expired, Plaintiff would be left without a remedy against Kapadia if the action is dismissed due to the deficiencies in his affidavit of service. Plaintiff has established a meritorious cause of action through his verified complaint. Although the nearly two-year delay since the time for service expired is a lengthy one, Plaintiff brought this cross-motion to request an extension of time in response to Kapadia’s motion. In light of the previously granted default judgment motion, this was the first time Plaintiff’s counsel was reasonably aware that service was defective, and his cross-motion was prompt and timely. There is no showing of any prejudice to the defendant that would result from the extension of time. Finally, the strong public policy in favor of resolving cases on the merits weighs in favor of vacating the default judgment against Kapadia but also allowing Plaintiff an extension of time rather than dismissing the action. For these reasons, Plaintiff’s cross-motion to extend his time to serve the summons and complaint upon Kapadia is granted.

Accordingly, it is hereby:

ORDERED that the branch of Kapadia’s motion (Seq. No. 2) seeking an Order, pursuant to CPLR 5015 (a) (4), to vacate the default judgment rendered against said defendant on May 30, 2023, is GRANTED; and it is further

ORDERED that the branch of Kapadia’s motion seeking an Order, pursuant to CPLR 3211 (a) (8), dismissing Plaintiff’s action as against Kapadia, is DENIED; and it is further

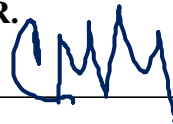
ORDERED that Plaintiff’s cross-motion (Seq. No. 3) seeking an Order, pursuant to CPLR 306-b,

extending Plaintiff's time to serve the summons and complaint, is GRANTED; and it is further

ORDERED that within 30 days of the entry of this Order to NYSCEF, Plaintiff shall serve the summons and complaint on Kapadia in accordance with CPLR 308, and shall also serve Kapadia's counsel by mail, and file proof of such service.

This constitutes the decision and order of this Court.

ENTER.



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**Hon. Consuelo Mallafre Melendez**

**J.S.C.**