

**Mascio v Schlifstein**

2024 NY Slip Op 32723(U)

July 10, 2024

Supreme Court, New York County

Docket Number: Index No. 805255/2018

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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ROBIN MASCIO,

Plaintiff,

- v -

TODD R. SCHLIFSTEIN, D.O., JEFFREY GOLDSTEIN, M.D., KATHRYN E. MORAN, P.A., AJA SNOW, P.A., FOUNTAIN MEDICAL GROUP HOLDINGS, INC., FOUNTAIN MEDICAL HOLDINGS, INC., EGA MEDICAL MANAGEMENT, LLC, NACSIP, INC., NACSIP, INC., doing business as LAKE MAHOPAC PHARMACY & SURGICAL, NAGI WISSA, DORVIT PHARMACY, INC., doing business as THE CURE PHARMACY, THIRD AVENUE LERMAN PHARMACEUTICS, INC., VISHI PHARMACY CORP., doing business as THE CURE PHARMACY, DAVID LERMAN, INSYS THERAPEUTICS, INC., and JOHN and JANE DOES 1-5,

Defendants.

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**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 228, 229, 230, 231, 232, 233, 234, 235, 236, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251

were read on this motion to/for DISMISS/X-MOTION TO EXTEND TIME TO SERVE.

In this action to recover damages for medical malpractice, arising from the plaintiff's alleged addiction to prescription opioid narcotics, the defendant Kathryn E. Moran, P.A., moves pursuant to CPLR 3211(a) and 306-b to dismiss the complaint insofar as asserted against her on the ground that the court lacks personal jurisdiction over her, based upon improper service of process (CPLR 3211[a][8]), and that the action is time-barred insofar as asserted against her (CPLR 3211[a][5]). The plaintiff cross-moves pursuant to CPLR 306-b to extend the time within which to serve process upon Moran, and to compel Moran to provide the plaintiff's counsel with Moran's home and work addresses. Moran's motion is denied. The plaintiff's cross motion is granted, Moran's counsel shall, on or before July 25, 2024, provide the plaintiff's attorney with Moran's current actual place of business and residence address, and the plaintiff's time within

which to serve process upon Moran is extended up to and including September 30, 2024, in accordance herewith.

The plaintiff commenced this action on July 31, 2018, asserting multiple causes of action stemming from her alleged addiction to prescription opioid narcotics. In her first and second causes of action, the plaintiff alleged that Moran, a physician's assistant employed by the defendant Fountain Medical Group Holdings, LLC, failed fully to inform her of the nature of the medication prescribed to her, and committed medical malpractice by negligently prescribing the opioid narcotics. On February 21, 2019, Moran moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her, alleging lack of personal jurisdiction based upon improper service of process (MOT SEQ 002). On March 18, 2019, the plaintiff moved to extend her time to effectuate service of process on Moran and compel the exchange of Moran's home and work addresses (MOT SEQ 003). On June 10, 2019, the defendant Insys Therapeutics, Inc. (Insys), filed a petition in voluntary bankruptcy under Chapter 11 of the United States Code (11 USC §§ 101, *et seq.*). On June 11, 2019, Insys filed, with this court, a notice of bankruptcy filing and imposition of automatic stay. On June 24, 2019, the court (Madden, J.) issued an order memorializing the stay of the action (*see* 11 USC § 362; *Howell v New York Post Co.*, 81 NY2d 115 [1993]), and denied the motions made under both sequences 002 and 003 "with leave to renew upon the lifting of the bankruptcy stay, or upon further order of the court."

On June 27, 2022, this court dissolved the stay. On October 28, 2022, counsel for Moran filed a letter requesting that this court consider the motion that she previously had submitted under motion sequence 002, and deem it to be fully submitted, nunc pro tunc. On November 10, 2022, this court clarified that Justice Madden's order had denied the defendant's motion and, therefore, the motion was no longer pending. In response to this court's directive requiring that Moran re-notice that motion under a new sequence number, Moran made the instant motion to dismiss on May 5, 2023. On June 21, 2023, the plaintiff cross-moved to

extend her time to serve Moran with process, the same relief that the plaintiff had sought under motion sequence 003.

The court rejects the plaintiff's contention that Moran's motion must be denied as untimely by virtue of CPLR 3211(e). CPLR 3211(e) provides, in relevant part, that a motion to dismiss based on a lack of personal jurisdiction must be made within 60 days of the defendant's answer that had raised the issue as an affirmative defense. Moran filed her initial motion to dismiss for improper service of process under motion sequence 002 on February 21, 2019, and, thus, within 60 days after the filing of her answer on December 27, 2018. Due to the bankruptcy stay, however, that motion was denied, with leave to renew upon the lifting of the stay or further order of this court. Neither the order imposing the stay, nor the order dissolving the stay, imposed any time limit within which Moran was required to renew her motion. There is no explicit or implicit time limit for the submission of a motion to renew (*see Weaver v State of New York*, 112 AD2d 416, 416 [2d Dept 1985]; *Patterson v Town of Hempstead*, 104 AD2d 975, 976 [2d Dept 1984]; *Begler v Saltzman*, 53 AD2d 578, 579 [1st Dept 1976]; *Prude v County of Erie*, 47 AD2d 111, 114 [4th Dept 1975]), and, inasmuch as no final judgment had been entered at the time that Moran made the instant motion, it cannot be said that the motion is untimely (*see e.g. Dinallo v DAL Elec.*, 60 AD3d 620, 620 [1st Dept 2009]). Therefore, this court concludes that Moran's motion is not barred by CPLR 3211(e), and that the time in which Moran did move to renew was reasonable.

Upon commencing this action on July 31, 2018, the plaintiff had 120 days, or until November 28, 2018, within which to serve process upon Moran (*see* CPLR 306-b). According to an affidavit of service executed by process server Andre Meisel, on November 27, 2018, a copy of the summons and complaint was served at Moran's alleged place of business at 211 East 51st Street (the 51st Street office) by personal delivery to someone by the name of Juliett "Smith," who identified herself as Moran's co-worker. On November 28, 2018, a copy of the summons and complaint was also mailed to that location. In an affidavit submitted by one

Julieta Sanchez, a medical assistant who worked at the 51st Street office, Sanchez explained that, while she knew Moran, the 51st Street office was not Moran's actual place of business, dwelling place, or usual place of abode as of November 27, 2018. She also explained that Moran had not worked at that location since late April 2018. Finally, Sanchez stated that, not only was she not authorized to accept service on behalf of Moran, but she also never was handed, and did not accept, papers from the process server, despite being aware of the pendency of the lawsuit and that a female fitting her description allegedly accepted service of the summons and complaint. In an affidavit by Moran, she explained that, while she believed that Julieta "Smith" was Julieta Sanchez, the medical assistant, Sanchez was not authorized to accept service on her behalf. Moran also explained that she stopped working at the 51st Street office in late May 2018.

The plaintiff has the burden of demonstrating proper service of process by a preponderance of the evidence (*see Steuhl v CRD Metalworks, LLC*, 159 AD3d 1182, 1184 [3d Dept 2018]). CPLR 308(2) authorizes a plaintiff to serve the summons and complaint upon a natural person,

"by delivering the summons within the state to a person of suitable age and discretion at the *actual place of business, dwelling place or usual place of abode* of the person to be served and *by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business* in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law"

(emphasis added). "Personal jurisdiction is not acquired absent compliance with both the delivery and mailing requirements of the statute" (*Everbank v Kelly*, 203 AD3d 138, 143 [2d

Dept 2022]). In opposition to Moran's motion, the plaintiff submitted the process server's affidavit of service and documentation of an internet search undertaken to locate Moran's business addresses. The court notes that, of the two New York addresses that the internet search yielded, plaintiff only attempted service at one of them, that is, the 51st Street office.

When a plaintiff seeks to effectuate service pursuant to CPLR 308(2), it is irrelevant to the court's inquiry whether the defendant did or did not expressly authorize a person at his or her actual place of business to accept service on his or her behalf. They need only be persons of suitable age and discretion (*see Matter of Savitt*, 161 AD3d 109, 114-115 [1st Dept 2018]; *City of New York v VJHC Dev. Corp.*, 125 AD3d 425, 425 [1st Dept 2015]; *Charnin v Cogan*, 250 AD2d 513, 517-518 [1st Dept 1998]; *Public Administrator of County of N.Y. v Markowitz*, 163 AD2d 100, 100-101 [1st Dept 1990]). Consequently, if the 51st Street office was in fact Moran's actual place of business, Juliett "Smith," or even Juliett Sanchez, would qualify as a person of suitable age and discretion thereat, since she was "of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant" (*Roldan v Thorpe*, 117 AD2d 790, 791 [2d Dept 1986], quoting *City of New York v Chemical Bank*, 122 Misc 2d 104, 108-109 [Sup Ct, N.Y. County 1983]; *see Costine v St. Vincent's Hosp. & Med. Ctr.*, 173 AD2d 422, 423 [1st Dept 1991]). Even if the plaintiff established that a copy of the summons and complaint were, in fact, delivered to Sanchez, the question for the court is whether the 51st Street office constituted Moran's actual place of business at the time that copies of the summons and complaint were delivered to the recipient.

An address qualifies as a person's actual place of business within the meaning of CPLR 308(2) only if the person is "physically present with regularity" at the address and is "shown to regularly transact business at that location" (*1136 Realty, LLC v 213 Union St. Realty Corp.*, 130 AD3d 590, 591 [2d Dept 2015] [internal quotation marks omitted]; *see Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831, 833 [2d Dept 2013]; *Sage Realty Corp. v Wallack Firm*,

P.C., 75 Misc 3d 186, 189 [Sup Ct, N.Y. County 2022]). CPLR 308(6) defines “actual place of business” as “any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.”

The plaintiff failed to rebut Moran’s showing that the 51st Street office was not her actual place of business in November 2018, when service was attempted there. Hence, the court concludes that service of process was not properly effectuated upon Moran. The court, however, declines to dismiss the complaint against her on that ground.

As the Appellate Division, First Department, has explained, 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 [are] 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]). 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. In light of the court’s determination to extend the plaintiff’s time to serve Moran, it denies Moran’s motion to dismiss the complaint insofar as asserted against her.

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).

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

"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).

This action does not qualify for an extension of time under the "good cause" exception, as the plaintiff made only one attempt to serve Moran within the statutory 120-day period at only one location, and did not attempt service at the other location that had been identified in the plaintiff's counsel's internet search. Nonetheless, upon consideration of the factors articulated by the Court of Appeals in *Leader*, it qualifies under the "interest of justice" category (see *Henneberry v Borstein*, 91 AD3d at 495-496). The allegations in the complaint are not facially non-meritorious, the plaintiff did not evince a significant delay in attempting service upon Moran, and the request for the extension of time was made within a reasonable time after Moran challenged the propriety of service. Moreover, Moran has been on notice of the suit against her and has since been engaged in discovery proceedings, including appearing for discovery conferences, serving discovery demands, and filing a motion to compel disclosure of the terms

of a settlement purportedly reached between the plaintiff and defendant Insys. Consequently, the court sees no prejudice against Moran if the time to serve her with process were extended.

Finally, the court notes that, while Moran also moved for relief pursuant to CPLR 3211(a)(5) in her notice of motion, she made no actual argument and provided no facts or case law regarding the expiration of the statute of limitations in this matter. In any event, with respect to the medical malpractice cause of action asserted against Moran, the applicable limitations period is two years and six months from the last date of treatment, which the plaintiff here alleged was on or about September 2016 (see CPLR 214-a). Therefore, the limitations period would have expired on or about March 2019, approximately eight months after plaintiff filed this lawsuit against all the defendants, including Moran, on July 31, 2018. Thus, the statute of limitations had not expired against Moran when this action was commenced against her.

Accordingly, it is,

ORDERED that the motion of the defendant Kathryn E. Moran, P.A., to dismiss the complaint insofar as asserted against her is denied; and it is further,

ORDERED that the plaintiff's cross motion is granted; and it is further,

ORDERED that,

- (a) on or before July 25, 2024, the attorney for the defendant Kathryn E. Moran, P.A., shall provide the plaintiff's attorney with her residence and office addresses at which she may be served with process or, alternatively, the defendant Kathryn E. Moran, P.A., shall authorize her attorneys in this action, in writing, to accept process on her behalf, upon which the plaintiff may effectuate service by uploading a new copy of the summons and complaint to the New York State Court Electronic Filing system,
- (b) the plaintiffs' time to serve process upon the defendant Kathryn E. Moran, P.A., is extended up to and including September 30, 2024, and
- (c) the plaintiff is permitted to serve process upon Kathryn E. Moran, by overnight delivery service to either or any of the residence or office addresses identified by Kathryn E. Moran, in accordance with this order, provided that the plaintiff obtains, from that delivery service, proof of delivery to such address or addresses.

This constitutes the Decision and Order of the court.

7/10/2024

DATE

JOHN J. KELLEY, J.S.C.

MOTION:

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

CROSS MOTION:

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