

Flores v Union Sq. Eye Care, LLC

2024 NY Slip Op 32814(U)

August 9, 2024

Supreme Court, New York County

Docket Number: Index No. 805230/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M

Justice

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ELSIE FLORES, as Mother and Natural Guardian of
J.S.L., an infant under the age of fourteen (14) years, and
ELSIE FLORES, Individually,

Plaintiff,

- v -

UNION SQUARE EYE CARE, LLC, LAURA C. SPERAZZA,
O.D., LIGHTHOUSE GUILD INTERNATIONAL, INC., and
SUZANNE BALLANTE, O.D.,

Defendants.

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INDEX NO. 805230/2022

MOTION DATE 07/19/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33

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

In this action to recover damages for optometric malpractice, the plaintiff moves pursuant to CPLR 306-b to extend the time within which to serve process upon the defendant Suzanne Ballante, O.D. No party opposes the motion. The motion is granted, and the plaintiff's time within which to serve process upon Ballante is extended up to and including November 8, 2024.

The plaintiff commenced this action on July 14, 2022. Upon commencing the action on that date, the plaintiff had 120 days, extended until the first business date after the lapse of that period (see General Construction Law § 25-a), within which to serve process upon Ballante (see CPLR 306-b). Since the 120-day period lapsed on Friday, November 11, 2022, which was a court holiday, the plaintiff was required to serve the summons and complaint upon Ballante no later than Monday, November 14, 2022. According to an affidavit of service executed on August 12, 2022 by process server Alex Colon, Colon personally delivered a copy of the summons and

complaint on August 5, 2022 to Marianne Ellis at 235 Park Avenue South, New York, New York (the Park Avenue South office), which was believed to be Ballante's place of business. According to Colon's affidavit, Ellis identified herself as the assistant manager of Union Square Eye Care, LLC (Union Square), an optometry practice located at that address. In the same affidavit of service, which was also executed by process server Susan Cortina, Cortina asserted that she mailed an additional copy of the summons and complaint to that location on August 10, 2022, in an envelope addressed to Ballante and marked "Personal and Confidential." On August 25, 2022, the plaintiff filed the Colon/Cortina affidavit of service. Ballante never answered or moved with respect the complaint, and has not otherwise appeared in this action.

On November 22, 2022, the plaintiff mailed a notice to Ballante at the Park Avenue South office, informing her that she was in default in this action for failing to answer or move with respect the complaint, or otherwise appear in this action, on or before October 4, 2022, as required by CPLR 3012(c) and 308(2). Shortly thereafter, the attorney for Union Square contacted the plaintiff's attorney, and informed her that, as of the date of the attempted service, Ballante no longer worked for Union Square. On January 25, 2024, the attorney for Union Square provided the plaintiff's attorney with Ballante's current address.

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]). 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.” Since Ballante was no longer physically present with regularity at the Park Avenue South office in August 2022, and no longer worked there at all, it was no longer her “actual place of business” within the meaning of CPLR 308(2). Hence, service of process was not properly effectuated upon Ballante, and the court lacks personal jurisdiction over her. The plaintiff thus made the instant motion to extend the time for service of process upon Ballante so that she could be properly served at a proper address, and the court could obtain personal jurisdiction over her.

As the Appellate Division, First Department, has explained it, 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.

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 did not make any attempts to locate Ballante between November or December 2022, when they first learned that she no longer worked at the Park Avenue South office, and January 25, 2024, when Union Square’s counsel ultimately informed the plaintiff’s attorney of Ballante’s whereabouts. 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 Ballante in the first instance, and the request for the extension of time was made within a reasonable time after the plaintiff learned of Ballante’s whereabouts. Consequently, the court sees no prejudice against Ballante if the time to serve her with process were extended.

Accordingly, it is,

ORDERED that the plaintiff’s motion is granted, without opposition, and her time to effectuate service of process upon the defendant Suzanne Ballante, O.D., is extended up to and including November 8, 2024.

This constitutes the Decision and Order of the court.

8/9/2024
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
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"/>	OTHER
				REFERENCE