

Doe v O'Connell

2024 NY Slip Op 32990(U)

August 19, 2024

Supreme Court, Kings County

Docket Number: Index No. 534448/2023

Judge: Wavny Toussaint

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At an IAS Trial Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street Brooklyn, New York, on the 14th day of August, 2024.

P R E S E N T :

HON. WAVNY TOUSSAINT
Justice.

An Individual Described Herein by the Pseudonym,
"JANE DOE",

Plaintiff,

Index No.: 534448/2023

-against-

DECISION AND ORDER

GREG O'CONNELL, O'CONNELL CORPORATION,
ABC CORPORATIONS 1-10 and JOHN DOES
INDIVIDUALS 1-10,

Defendants.

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

Papers Numbered

20- 30
31-35; 51- 56
36-50; 57- 59

Upon the foregoing papers in this action to recover damages for personal injuries, plaintiff moves (Seq. 03) for an order, pursuant to CPLR § 306-b, granting an extension of time to serve the Summons with Notice on all named defendants. Defendant Greg O'Connell (acting individually and for O'Connell Corporation) (defendants) oppose the motion and move (Seq. 04) for an order dismissing the complaint, pursuant to CPLR § 306-b, contending the Summons and Notice was not timely served. Defendants also move to

dismiss the complaint, pursuant to CPLR Rule 3211(a)(8), alleging lack of personal jurisdiction.

Plaintiff's motion (Seq. 03) is granted for reasons more fully discussed below. Defendants' motion (Seq. 04) is denied.

BACKGROUND

Plaintiff initiated this action by Summons with Notice, filed on November 22, 2023, under the Adult Survivors Act, as codified under CPLR § 214-j ("ASA"), the Civil Rights Law 50-b, and other New York statutes, designed to protect against unwanted sexual abuse. Plaintiff alleges sexual assault and intentional infliction of emotional distress as caused by defendants, though the details of the alleged abuse have not yet been disclosed. Plaintiff seeks monetary damages from defendants on account of the alleged abuse.

PROCEDURAL HISTORY

Having commenced this instant action on November 22, 2023, plaintiff had 120 days, or until March 21, 2024, as proscribed under CPLR § 306-b to serve the Summons with Notice on defendants. Prior to serving defendants however, plaintiff moved by Order to Show Cause (Seq. 02), also filed on November 22, 2023, seeking to proceed anonymously. Plaintiff also sought a temporary restraining order (TRO) permitting her to continue using a pseudonym pending resolution of the Order to Show Cause, and preventing defendants from disclosing her identity except to the attorneys on record. On December 19, 2023, pursuant to the court's directives, plaintiff filed an Affirmation in Support of her Order to Show Cause (Seq. 02), asserting that without the ability to proceed as "Jane Doe", her mental and physical well-being would be negatively impacted.

On February 21, 2024, another Justice of this court determined that the Order to Show Cause did not comply with 22 NYCRR § 202.8, and that the TRO needed to be re-filed, notice of which was uploaded to e-file on February 22, 2024. Subsequently, on March 14, 2024, plaintiff filed an amended Order to Show Cause and again sought an emergency TRO. The Court signed the amended Order to Show Cause on March 18, 2024 (NYSCEF Doc. No. 19) and directed plaintiff to serve defendants with the motion papers, along with the Summons with Notice, on or before March 25, 2024. On March 20, 2024, one day before expiration of the 120-day deadline for service of the Summons with Notice, plaintiff filed the within motion (Seq. 03), pursuant to CPLR § 306-b, seeking to extend the time to serve defendants. Plaintiff completed the service of the Order to Show Cause as directed on March 25, 2024 (NYSCEF Doc. Nos. 27 and 28).

Thereafter, plaintiff's amended Order to Show Cause (Seq. 02) was resolved by stipulation of the parties dated April 17, 2024, permitting plaintiff to proceed anonymously under the pseudonym "Jane Doe" (NYSCEF Doc. No. 48). Defendants opposed plaintiff's motion to extend the time to serve defendants (Seq. 03) and moved (Seq. 04) to dismiss the complaint for failure to timely serve the Summons with Notice and for lack of personal jurisdiction, citing CPLR § 3211(a)(8).

PARTIES' CONTENTIONS

Plaintiff's Motion (Seq. 03)

Plaintiff argues that the motion (Seq. 03) to extend the time to serve the Summons with Notice pursuant to CPLR § 306-b should be granted because of good cause, in the interest of justice, and for lack of prejudice to defendants. Plaintiff argues that good cause exists for an extension of the 120-day period under CPLR § 306-b because plaintiff had

filed a timely emergency Order to Show Cause to proceed anonymously and was waiting for it to be signed in order to serve defendants thereby identifying herself only under the pseudonym, "Jane Doe". When it became unclear whether the Order to Show Cause would be signed before the 120-day service period expired, plaintiff asserts she timely moved for an extension. As the signed Order to Show Cause directed plaintiff to serve the Summons and Notice on defendants on or before March 25, 2024, plaintiff submits she complied and completed the service on March 25, 2024, only two business days later. Plaintiff further argues that in light of the short delay in service, as effected pursuant to the Order to Show Cause, defendants were not prejudiced. In any event, under these facts, plaintiff argues the motion should also be granted in the interest of justice.

Defendants' Opposition

Defendants contend plaintiff's motion should be denied, arguing plaintiff had ample time (i.e., 120 days) to effectuate service of her Summons with Notice and that plaintiff simply allowed the statutory deadline to pass without justification or excuse. The defendants contend there is no record of the plaintiff's attempt to serve or reach out to the defendants since the filing of this action on November 22, 2023. Defendants contend they are prejudiced by the plaintiff's lack of diligence to effectuate service which has now caused a delay in the preparation of their defense, to their detriment. Similarly, the defendants argue, justice would not be served by granting plaintiff's motion because of the expiration of the statute of limitations, the lack of any allegations tending to reveal the merits of plaintiff's claims, the length of delay in service, and plaintiff's failure promptly to request an extension of time.

Defendants contend plaintiff's claims are "suspect" and point to plaintiff's counsel having filed another Adult Survivors Act case entitled *Jane Doe vs. Sternberg, Heller, Mogen Avraham The Shma Cams, LLC*, et al (Supreme Court, Kings County, Index #: 534445/2023) on the same day the instant matter was filed. Defendants contends the allegations are virtually identical in both cases and that in the *Sternberg* matter, as in this case, plaintiff's counsel also waited until March 20, 2024 to file for an extension to effectuate service. On this basis, defendants argue plaintiff's motion is disingenuous and without merit.

Plaintiff's Reply

Plaintiff refutes defendants claim that the delay in service is "without justification or excuse". Plaintiff reiterates that she made the application to extend the service time before expiration of the 120-day time period and that she was awaiting permission to proceed anonymously from the court and effect service accordingly. Plaintiff also argues that she fully complied with the signed Order to Show Cause by timely serving defendants with the Summons with Notice on March 25, 2024, and that the minimal delay is justified for good cause. Furthermore, plaintiff contends her motion should be granted in the interest of justice, as her efforts to proceed as "Jane Doe" is typical of ASA cases.

Defendants' Motion (Seq. 04)

Defendants move (Seq. 04) to dismiss plaintiff's Summons with Notice, pursuant to CPLR § 306-b and CPLR § 3211(a)(8). Defendants raise three arguments in support of their motion. First, defendants contend that plaintiff, in her opposition papers, fails to cite any case law in support of her arguments. Second, defendants contend there is no justification or excuse for the untimely service which may only be excused for "good

cause” or “in the interests of justice.” Defendants reason that neither exception applies here. As for “good cause,” defendants contended plaintiff offers no justifiable excuse for failing to timely serve. To this point, defendants contend that there is no evidence that plaintiff even attempted to serve them within the statutory timeframe and that plaintiff was not hindered by any difficulties in ascertaining the identity or whereabouts of the defendants, with the individual defendant being located at his place of business and the corporate defendants’ location being publicly available. Finally, as to the “interests of justice” standard, defendants contend plaintiff has not provided any substantive allegations to support this claim.

Plaintiff's Opposition

Plaintiff opposes defendants’ motion and assert essentially the same arguments offered in support of Motion Seq. 03. These arguments are not repeated here, except that plaintiff contends a favorable resolution of motion (Seq. 03) would render defendants’ motion to dismiss (Seq. 04) moot.

Defendants' Reply

Defendants reiterate their arguments asserted in their moving papers and further cite to their contentions raised in opposition to plaintiff’s motion (Seq. 03). Additionally, as for plaintiff’s argument that she waited to for the Court’s ruling before serving the defendants, defendants contend that there is no rule that a plaintiff who wishes to proceed anonymously must wait until permission is granted before effectuating service of process. Similarly, defendants contend that plaintiff’s assertion that the defendants won’t be prejudiced is flawed for several reasons. First, defendants contend that plaintiff does not challenge the Second Department cases cited by defendants which hold that process served even two

days late warrants dismissal. Second, defendants claim they are indeed prejudiced, as service delays in ASA cases are inherently more acute because the claims at issue are decades old. Finally, the defendants explain that it is not the defendants' burden to show prejudice; rather, it is the plaintiff's burden to show that defendants will not be prejudiced by a delay. In sum, the defendants contend if the 120-day rule in CPLR §306-b is not enforced and can always be extended by a few days, then it will become a meaningless statute.

DISCUSSION

Motion Seq. 03

The underpinning for plaintiff's motion is tied to her request to proceed anonymously, which required court approval. The 2019 Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases" for the Supreme Court Civil Term, Kings County, provides in Section B(2), "Commencement Under Seal or Anonymous Caption", that: ". . . is a case is filed with an anonymous caption and an accompanying OSC to maintain the anonymous caption and to seal, the Kings County Clerk files the case as anonymous pending court review". Plaintiff here complied with the Kings County protocol. Similarly, the Supreme Court, Civil Branch for New York County provides that: "If a party wishes to commence an action under seal or use an anonymous caption. . . [t]he County Clerk cannot do either without a court order" (see Rules of the Sup Ct., Civ. Branch, NY County, County Clerk Litigation Functions, Section C(2), "*Commencing Actions Claimed to Be Confidential*"; and, e.g., *Matter of K.R. v Clerk of New York County*, 2017 NY Slip Op. 31789, *5 [Sup. Ct. NY Cty. 2017] ["Further, by simply denominating himself as "K.R." in the caption without court approval, the petitioner

did not follow the proper procedure for using an anonymous caption . . . If a party wishes to commence an action under seal or use an anonymous caption. . . [t]he County Clerk cannot do either without a court order."]).

"In determining whether to grant a plaintiff's request to proceed anonymously, the court must use its discretion in balancing [the] plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to [the] defendant" (*Doe v Mesivtha, Inc.*, 224 AD3d 661, 662 [2d Dept. 2024], [*citations omitted*]). "Among the factors the court should consider are: 1) whether the plaintiff is challenging governmental activity or an individual's actions, 2) whether the plaintiff's action requires disclosure of information of the utmost intimacy, 3) whether identification would put the plaintiff [or innocent third-parties] at risk of suffering physical or mental injury, 4) whether the defendant would be prejudiced by allowing the plaintiff to proceed anonymously, and 5) the public interest in guaranteeing open access to proceedings without denying litigants access to the justice system" (*id.*). While plaintiff's application to proceed anonymously ultimately was resolved by stipulation, the basis for plaintiff's application nonetheless was supported by the record. Plaintiff alleges in her affirmation, among other things, that after having experienced sexual abuse, she experiences "anxiety, shame, feelings of guilt, anger, nightmares, panic and depression" (NYSCEF Doc. No. 16). Further, this action is purely private, and plaintiff has not made public any of the allegations asserted herein.

Pursuant to CPLR § 306-b "[s]ervice of the summons and complaint. . . shall be made within one hundred twenty days after the commencement of the action . . . If 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, or upon good cause

shown or in the interest of justice, extend the time for service" (CPLR § 306-b). "Good cause and interest of justice are two separate and independent statutory standards" (*State of N.Y. Mortg. Agency v. Braun*, 182 AD3d 63, 66 [2nd Dept. 2020]; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 96, [2001]). Generally, "[t]o establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service" (*U.S. Bank Nat'l Ass'n v. Bindra*, 217 AD3d 719, 720 [2nd Dept. 2023]). "If good cause for an extension is not established, courts must consider the interest of justice standard of CPLR § 306-b" (*Bumpus v. N.Y.C. Transit Auth.*, 66 AD3d 26, 32 [2nd Dept. 2009]). The interest of justice standard is "a separate broader and more flexible provision which could encompass a mistake or oversight as long as there was no prejudice to the defendant" (*Leader*, 97 NY2d at 102). Most importantly, 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 ... and empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion" (*id.*).

Here, based on the record before the Court, plaintiff has demonstrated good cause and has met the interest of justice standard in support of the extension request. With respect to the good cause determination, the record indicates plaintiff initially sought approval by Order to Show Cause to proceed anonymously at the same time the Summons with Notice was filed (NYSCEF Doc. No. 2). Court approval of plaintiff's application was necessary to preserve plaintiff's anonymity before service of process due to the highly sensitive nature of the action's content (*Alana Doe, et al. v. Ferdous Khandker, et al.*, 221 AD3d 782, 782-783 [2d Dept. 2023]). However, after three months, plaintiff's initial Order to Show Cause, filed on November 22, 2023, was rejected on February 22, 2024 (NYSCEF

Doc. No. 8). Shortly after the rejection, a new order to show cause was filed on March 14, 2024 (NYSCEF Doc. No. 14), which was sent to this Court and signed on March 18, 2024 (NYSCEF Doc. No. 19).

The filing of the initial Order to Show Cause at the commencement of the action demonstrates that plaintiff diligently sought, well before expiration of the 120-day service time period, the appropriate court approval to proceed anonymously. Such approval was a necessary precursor to effect service of process accordingly. Plaintiff's diligence is further supported by the submission of Motion Seq. 03, filed on March 20, 2024, in which formal application was made to extend the time for service, one day before expiration of the 120-day service time-period. These circumstances merit a finding of good cause and comports with *U.S. Bank Nat'l Ass'n* insofar as plaintiff has demonstrated reasonable diligence in attempting service of the Summons with Notice, which was frustrated by court delays.

Furthermore, this result is mandated by the Second Department decision in *C.N. (Anonymous) v West Islip Union Free School District*, 215 AD3d 684, 686 [2d Dept. 2023], which addressed a very similar factual pattern as in the instant matter, and held:

“Here, the plaintiff proffered compelling reasons for the 15-day delay in serving the complaint, which was in part attributable to circumstances beyond the plaintiff's control. The plaintiff promptly moved for leave to proceed anonymously and was denied a temporary restraining order which would have permitted the filing of the complaint with an anonymous caption while that motion was pending, and that motion was not decided until after the time to comply with the first demand for a complaint had expired. Thus, contrary to the Supreme Court's determination, the plaintiff demonstrated a reasonable excuse for the delay. Moreover, the court's determination that the plaintiff “has not alleged a meritorious claim” is not supported by the record (*C.N. (Anonymous)*, 214 AD3d at 686, *citation omitted*).”

Were there not a showing of good cause, the Court also finds that an extension would be warranted under the interest of justice standard. Upon the circumstances noted above, service was effectuated a mere four days beyond the 120-day period. Defendants' opposition failed to establish any prejudice due to the four-day service delay and the Court can find no viable reason to dismiss plaintiff's claims under the totality of these circumstances. Defendants' remaining arguments to the contrary are unavailing, particularly where defendants reference several other ASA cases filed by plaintiff's counsel to contend there was no reason plaintiff could not serve or attempt service on them in a timely manner as in the referenced matters (*see* NYSCEF Doc. No. 31). Defendants highlight the *Jane Doe v. Sternberg, Heller, Mogen Avraham The SHMA Camps, LLC*, Kings Cty. Index No.: 534445/2023 matter, in which an emergency application to extend the time to effect service also was filed just prior to expiration of the 120-day period. Unlike here, however, it appears the emergency application in *Sternberg* was never signed. The order to show cause to proceed anonymously in all the other cases referenced by defendants either were approved with sufficient time to effect service before expiration of the 120-day period or the application to extend the time for service was granted.

Motion seq.04

In light of the Court's resolution of Motion Seq. 03, defendants' argument that plaintiff's service delay was not justified, is without merit. Defendants' additional arguments also lack merit. Accordingly, defendants' motion is denied.

CONCLUSION

Accordingly, it is hereby


ORDERED, that plaintiff's motion (Seq. 03) for an order, pursuant to CPLR § 306-b, granting an extension of time to serve the Summons with Notice on defendants, is granted and the service effected on March 25, 2024, as directed in the signed Order to Show Cause, is deemed timely, *nunc pro tunc*; and it is further

ORDERED, that defendants have thirty (30) days, from the date this decision and order is served with Notice of Entry, to interpose a response to the Summons with Notice; and it is further

ORDERED, that defendants' motion (Seq. 04) is denied in all respects.

All relief not specifically granted herein has been considered and is denied. This constitutes the decision and order of the court.

E N T E R



JSC

HON. WAVNY TOUSSANT
J. S. C.

KINGS COUNTY CLERK
FILED
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