

Dewald v Smith

2025 NY Slip Op 33538(U)

September 19, 2025

Supreme Court, New York County

Docket Number: Index No. 160181/2024

Judge: Hasa A. Kingo

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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. HASA A. KINGO PART 05M

Justice

-----X

JEROME W DEWALD,

Plaintiff,

- v -

DANIELLE COLLIN SMITH, PHILIP L. MILSTEIN, NEW
YORK CITY POLICE DEPARTMENT, THOMAS G.
DONLON,

Defendant.

-----X

INDEX NO. 160181/2024

MOTION DATE 08/14/2025

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 45, 46, 47, 50, 52, 53

were read on this motion to EXTEND TIME.

Upon the foregoing documents, Plaintiff Jerome Dewald (“Plaintiff”) moves for an order extending the time to serve Defendants Danielle Collin Smith (“Smith”) and Philip L. Milstein (“Milstein”). For the reasons set forth herein, the motion is granted in part and to the extent set forth herein.

BACKGROUND

This action arises from Plaintiff’s association with defendant Danielle Collin Smith and subsequent arrest by members of the New York City Police Department (“NYPD”) (NYSCEF Doc No. 5, amended complaint).¹ On November 1, 2024, Plaintiff commenced this action by filing a summons and complaint, which interposed causes of action against Smith (NYSCEF Doc No. 1). An affidavit of service filed by Plaintiff on November 4, 2024 indicates that a process server delivered copies of the summons, complaint, and an annexed affidavit of Plaintiff to Smith by personal service on November 6, 2024 at 10:46 a.m. at 30 W. 63rd Street, 8V, New York, New York 10023 (NYSCEF Doc No. 4). On November 23, 2024, Plaintiff filed an amended complaint, which added defendants Philip Milstein, the New York City Police Department (“NYPD”), and Thomas G. Donlon (“Donlon”), in his official capacity as Interim Police Commissioner of the NYPD (NYSCEF Doc No. 5).

On January 5, 2025, Plaintiff moved for partial summary judgment on the eighth cause of action against Smith, and “on the elements of false reporting within the first cause of action for malicious prosecution (NYSCEF Doc Nos. 13-19). Pursuant to a decision and order of this court

¹ The background is cited here as relevant to this motion. A fuller recitation of the factual allegations set forth in the complaint is contained in this court’s decision and order dated February 26, 2025 (NYSCEF Doc No. 19).

dated February 26, 2025, the motion was denied because Plaintiff failed to demonstrate proof of service of the amended complaint on either defendant, answer was not joined, and the causes of action for conversion/trespass and malicious prosecution are facially defective (NYSCEF Doc No. 19).

On March 20, 2025, Plaintiff moved pursuant to CPLR § 306-b for an extension of time to serve the amended complaint upon Smith and Milstein (NYSCEF Doc No. 20). The motion was granted without opposition and for good cause shown by a decision and order of this court dated April 22, 2025 (NYSCEF Doc No. 32). The order extended Plaintiff's time to serve Smith and Milstein for 120 days from entry of the order (*id.*). The order was entered on April 22, 2025, extending the time for service to August 20, 2025.

On August 13, 2025, Plaintiff filed the instant motion by which he moves for a second 120-day extension of time to serve Smith and Milstein copies of the amended complaint, authorizing alternate service upon both Defendants, and for an order deeming purported prior service on Smith "valid and effective" pursuant to CPLR § 308 (4) (NYSCEF Doc No. 45). Milstein opposed the appeared by counsel for the limited purpose of opposing this motion only (NSYCEF Doc No. 50). Smith has not opposed the motion or otherwise appeared in the action, but Plaintiff filed a reply and supplemental submissions on September 8, 2025, in which he asserts that service was effectuated on Smith on January 4, 2025 (NYSCEF Doc Nos. 51-53).

DISCUSSION

Pursuant to CPLR 306-b, service of the summons and complaint shall be made within 120 days after the commencement of the action. Upon motion, a court may, within its discretion, grant an extension of time within which to effect service for good cause shown or in the interest of justice (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). Whereas the "good cause" standard requires a showing of reasonable diligence, under the broader "interest of justice" standard, "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" (*id.* at 105).

In support of his motion, Plaintiff submits a notice of motion, a memorandum of law, personal affirmation in which he attests to his efforts to serve Smith and Milstein, and several exhibits including an "Intelligence Dossier" in which he sets forth his "Service of Process Strategy for [] Milstein and Ogden Cap Properties, LLC, a process server's affidavit of non-service for each defendant, certain documents served in connection with other proceedings in which Plaintiff and Smith are parties, and documents related to a request to obtain Smith's address from the United States Postal Service (the "Postal Service") (NYSCEF Doc Nos. 45-47). Plaintiff argues that he has demonstrated "extraordinary" diligent efforts to serve Smith and Milstein by preparing "a detailed intelligence dossier analyzing multiple sources to identify defendants' likely addresses and business locations," hiring a process server to serve each defendant, and timely filing his motion before expiration of the previously extended deadline to serve (NYSCEF Doc No. 47, memo in support at 3-4).

Milstein appeared by counsel for the limited purposes of opposing the motion. Milstein argues that the court should disregard Plaintiff's representations regarding the process server's actions as hearsay and that, even if the court considers this information, Plaintiff has not demonstrated diligent efforts because he waiting three months to make a second attempt to serve Milstein at his alleged residence and did not make any attempt to effect service at Milstein's place of business, despite Plaintiff's representations that he has "confirmed" that Milstein maintains his actual place of business at 545 Madison Avenue, New York, New York (NYSCEF Doc No. 50, aff in opposition at 2-3). Milstein further argues that the motion should be denied because the statute of limitations on Milstein's third cause of action for conspiracy to commit malicious prosecution has expired (*id.* at 3).

A review of Plaintiff's motion submissions does not support a finding that he made diligent efforts to serve Milstein since commencement of this action, and, therefore, he has not demonstrated good cause to grant the motion. Since the court's last order granting additional time for service, Plaintiff only made one attempt to serve Milstein by personal service at his home address, and only made a total of two attempts to serve Milstein since this action was commenced. No admissible evidence was submitted that demonstrates any attempt to serve Milstein at his actual place of business, despite Plaintiff's representation that he identified 545 Madison Avenue as Milstein's "definitive principal place of business" (NYSCEF Doc No. 47, exhibit A).

The court also declines to grant the motion as to Milstein in the interest of justice. As an initial matter, on its fact, the amended complaint does not interpose any meritorious causes of action against Milstein. Plaintiff does not allege that Milstein was present at any of the events described in the complaint, every allegation against Milstein in the amended complaints asserted "upon information and belief," Plaintiff's claims against Milstein are based entirely upon Plaintiff's conclusory allegation that Milstein "has an interest in an ongoing litigation with plaintiff" and Smith's statement on September 8, 2024 that "she had 'a direct line to Philip Milstein'" (NYSCEF Doc No. 5, amended complaint ¶¶ 3, 10, 13, 16).

Moreover, the only causes of action interposed against Milstein are the third cause of action for conspiracy to commit malicious prosecution and the fourth cause of action for conspiracy to commit abuse of process, which cannot survive independent of the underlying claims for malicious prosecution and abuse of process (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 110 [1st Dept 2009] [New York does not recognize an independent cause of action for civil conspiracy, untimely or non-viable claims cannot form the basis for a civil conspiracy]). Where the cause of action for malicious prosecution is asserted against a civilian complainant, rather than the prosecuting authority, the plaintiff must demonstrate that the defendant "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (*Du Chateau v Metro-N. Commuter R. Co.*, 253 AD2d 128, 131 [1st Dept 1999]). The amended complaint lacks factual allegations to support a cause of action for malicious prosecution against Milstein. The complaint similarly fails to plead factual allegations to support a cause of action for abuse of process, for which the statute of limitations has also run (*see Andesco, Inc. v Page*, 137 AD2d 349, 356 [1st Dept 1988] [citing three elements of cause of action for abuse of process] ["; *see Beninati v Nicotra*, 239 AD2d 242, 242 [1st Dept 1997] [abuse of process is an intentional tort with a one year statute of limitations]). Considering these factors, the court declines to grant the motion in the interests of justice.

Plaintiff also has not demonstrated diligent efforts to serve Smith with a copy of the amended complaint. The process server affidavit submitted in support of his motion indicates that he only made one attempt to serve Smith after the court extended the deadline for service by an additional 120 days, despite purported knowledge of her place of employment. Nevertheless, a further extension of time to serve Smith is granted in the interests of justice.

This action was commenced on November 1, 2024. On November 1, 2024, Plaintiff timely served a copy of the summons and complaint on Smith by personal service (NYSCEF Doc No. 4, affidavit of service). The court acquired personal jurisdiction over Smith by virtue of this service of process (CPLR § 308 [1]). However, Plaintiff thereafter filed an amended complaint that interposed new and additional claims for relief against Smith and several newly added defendants. Because Smith has not appeared in the action, the amended complaint must be served upon her in the same manner as a summons (CPLR § 3012 [a]). Plaintiff has been unable to effect service upon Smith in this manner, but Smith has actual notice of the action by virtual of personal service of the original complaint and of the prior motion for summary judgment upon her (*see* NYSCEF Doc No. 17, affidavit of service). Given this, and in light of Smith's efforts to evade service as evidenced by her actions in the New York City Small Claims proceeding, an additional extension of time to serve and leave to serve the amended summons by alternate service is warranted in the interests of justice (*see* NYSCEF Doc No. 53, transcript). Therefore, the motion is granted with respect to Smith.

Accordingly, it is

ORDERED that Plaintiff's motion for a further extension to serve defendants Philip L. Milstein and Danielle Collin Smith is granted in part with respect to Danielle Collin Smith only; and it is further

ORDERED that Plaintiff's time to serve defendant Danielle Collin Smith is extended for a period of 60 days from entry of this order; and it is further

ORDERED that service upon Danielle Collin Smith may be effectuated by certified mail, return receipt requested to her last known address and email upon Danielle Collin Smith by her known email address at noodle927@hotmail.com; and it is further

ORDERED that such service upon Danielle Collin Smith shall be complete upon the filing of a proper affidavit of service to the electronic docket demonstrating that service has been effectuated in the manner set forth herein; and it is further

ORDERED that the remainder of the motion is denied as to Philip L. Milstein; and is further

ORDERED that all causes of action are dismissed as against defendant Philip L. Milstein; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to enter judgment dismissing defendant Philip L. Milstein from this case and amend their records to reflect such change in the caption herein; and it is further

ORDERED that service of this order 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 Section J of the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court's website).

This constitutes the order and decision of the court.


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9/19/2025
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: