SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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CHARLES UDOH,

Plaintiff,

- v -

COMMUNITY FAMILY HEALTH CENTER, DR. DAVID LAZALA, ALEX GRACIE, INSURANCE COMPANIES for COMMUNITY FAMILY HEALTH CENTER, DR. DAVID LAZALA, and ALEX GRACIE, and JOHN JOE and JANE JOHN DOE and JOHN JANE,

Defendants.

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INDEX NO. 101441/2024

MOTION DATE 07/24/2025

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS/CPLR 3211(a)(8)/IMPROPER SERVICE OF PROCESS.

In this action to recover damages, inter alia, for medical malpractice, the defendants Dr. David Lazala and Alex Gracie move pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them on the ground that the court lacks personal jurisdiction over them because they were not properly served with the summons and complaint. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against the defendants Dr. David Lazala and Alex Gracie.

The plaintiff commenced this action on December 30, 2024 by filing a summons and complaint (*see* CPLR 304[a]). He thus had 120 days thereafter (*see* CPLR 306-b), or until April 29, 2025 within which to properly serve copies of the summons and complaint upon Lazala and Alex Gracia, incorrectly sued herein as Alex Gracie.

CPLR 308 requires that service of process upon a natural person must be effectuated either by personally delivering the summons to that person (CPLR 308[1]), by personally delivering the summons to a person of suitable age and discretion at that defendant's actual place of business, dwelling place, or usual place of abode and *thereafter* mailing the summons

to the defendant's last known residence or actual place of business (CPLR 308[2]), or, after diligent attempts unsuccessfully have been made to serve the defendant by one of those two methods, by affixing the summons to the door of that defendant's actual place of business, dwelling place, or usual place of abode and *thereafter* mailing the summons to the defendant's last known residence or actual place of business (CPLR 308[4]). CPLR 3211(a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." "'It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant'" (*Krisilas v Mount Sinai Hosp*., 63 AD3d 887, 889 [2d Dept 2009], quoting *McMullen v Arnone*, 79 AD2d 496, 499 [2d Dept 1981]; *see Mortgage Elec. Reg. Sys., Inc. v Congregation Shoneh Halochos*, 189 AD3d 820, 823 [2d Dept 2020]). CPLR 3211(e) provides, in relevant part, that

> "an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

Lazala and Gracia both asserted improper service of process as an affirmative defense in their answers, which were served and filed on May 15, 2025. They moved to dismiss the complaint insofar as asserted against them on that ground on July 3, 2025 (*see* CPLR 2211); hence, their motion was properly made pursuant to CPLR 3211(a)(8), and was timely.

As relevant to the instant action, CPLR 308(2) permits delivery of 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"

"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] [emphasis added]).

In the one affidavit of service filed by the plaintiff, his process server alleged that she served copies of the summons and complaint on April 11, 2025 at 126 Nagle Avenue, New York, New York 10040 by personally delivering them to an unidentified "Spanish" female. The affidavit of service, however, did not indicate which, if any, of the four named defendants was the subject of that personal delivery, and did not assert that an additional copy of the summons and complaint was ever mailed to either Lazala or Gracia at their last known residences or their actual places of business after the initial copy had been delivered to the woman described in the affidavit. Moreover, in support of the motion, Lazala submitted his own affirmation, in which he admitted that, as of April 11, 2025, his actual place of business was indeed located at 126 Nagle Avenue, New York, New York, but averred that he never received the required follow-up mailing at that address, let alone a mailing in a properly marked envelope, as required by CPLR 308(2). Gracia submitted his own affirmation as well, in which he asserted that he had previously worked at 126 Nagle Avenue, but that he last worked there in May 2022, so that this address was not his actual place of business, either for delivery or mailing purposes, as of April 11, 2025, nor was it his dwelling place or usual place of abode at any time.

In opposition to the motion, the plaintiff submitted a memorandum of law, in which he attempted to litigate the merits of his claims against Lazala and Gracia, submitted copies of discovery demands, and noted that those defendants' insurer as of 2022, when his claims allegedly accrued, had acknowledged in writing that he had asserted claims against them. In a sur-reply affirmation submitted without permission of the court, which the court need not

consider (*see* 22 NYCRR 202.8-c; *Zyskowski v Chelsea-Warren Corp.*, 238 AD3d 498, 499 [1st Dept 2025]), he alleged that he himself had mailed additional copies of the summons and complaint to Lazala and Gracia at the Nagle Avenue address, but did not indicate when he did so and, thus, whether the alleged follow-up mailing was effectuated within 20 days after the personal delivery of those papers to the unidentified woman at that address (*see* CPLR 308[2]). He also made hearsay allegations that a process server again mailed those papers to that address, but he did not indicate the identity of the process server or the date when he or she effectuated that mailing.

Even were the court to consider the plaintiff's sur-reply affirmation, it would be constrained to grant the motion in any event. In this respect, the plaintiff did not and could not rebut Gracia's statement that, when the papers were personally delivered to the Nagle Avenue address on April 11, 2025, the latter had not worked at the Nagle Street address for almost three years. Hence, service upon Gracia was improper no matter the method employed to effectuate it. Moreover, counsel for Lazala and Gracia correctly argued, in an affirmation, that any attempted service effectuated by the plaintiff himself was void, since CPLR 2103 prohibits service of process by a party himself or herself, but instead requires another person to effectuate it (*see Matter of Wein v Thomas*, 51 NY2d 862, 863 [1980], *affg* 78 AD2d 611, 611 [1st Dept 1980], *affg* Index No. 18865/1980 [Sup Ct, N.Y. County, Oct. 7, 1980]; *Munoz v Reyes*, 40 AD3d 1059, 1059 [2d Dept 2007]; *Matter of Sloan v Knapp*, 10 AD3d 434, 434-435 [2d Dept 2004]; *Miller v Bank of New York*, 226 AD2d 507, 507-508 [2d Dept 1996]). He further correctly noted that, assuming for argument's sake that a process server mailed copies of the summons and complaint to Lazala on July 14, 2025, as the plaintiff suggested, this mailing was void because it was effectuated, without court permission, beyond the 120-day period articulated in CPLR 306-b (*see generally Oberlander v Moore*, 191 AD3d 1009, 1010 [2d Dept 2021] [court's extension of plaintiff's time to file proof of deliver-and-mail service did not also extend the deadline for effectuating the mailing prong of such service; since CPLR 306-b

requires that both the delivery and mailing be effectuated with 120 days of commencement of action, the defendants' CPLR 3211(a)(8) motion to dismiss complaint was granted]).

The plaintiff's remaining contentions are without merit.

Accordingly, it is

ORDERED that the motion of the defendants Dr. David Lazala and Alex Gracie to dismiss the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants Dr. David Lazala and Alex Gracie; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendants Dr. David Lazala and Alex Gracie; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Dr. David Lazala and Alex Gracie.

This constitutes the Decision and Order of the court.

9/29/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**