

Egan v Schattner

2026 NY Slip Op 31205(U)

March 24, 2026

Supreme Court, New York County

Docket Number: Index No. 805104/2025

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

-----X

LEO J. EGAN and MARIA BACERRA EGAN,

Plaintiffs,

- v -

MARK A. SCHATTNER, M.D., JACQUES BEAUVAIS, M.D.,
MEMORIAL SLOAN-KETTERING CANCER CENTER, and
MEMORIAL HOSPITAL FOR CANCER AND ALLIED
DISEASES,

Defendants.

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INDEX NO. 805104/2025

MOTION DATE 01/16/2026

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

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

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, negligent hiring, training, supervision, and retention of healthcare personnel, and loss of spousal consortium, the defendants move pursuant to CPLR 306-b and 3211(a)(8) to dismiss the complaint insofar as asserted against each of them for lack of personal jurisdiction, premised upon the plaintiffs' alleged failure timely and properly to serve them with copies of the summons and complaint. The plaintiffs oppose the motion, and cross-move pursuant to CPLR 306-b, 2001, and 2004 to extend their time to serve the defendants with a copy of the summons and complaint. The defendants oppose the cross motion. The defendants' motion is denied, and the plaintiffs' cross motion is granted to the extent that the plaintiffs shall have until July 15, 2026 within which to serve the defendants Memorial Sloan Ketter Cancer Center and Memorial Hospital for Cancer and Allied Diseases (together the institutional defendants) with copies of the summons and complaint. The plaintiffs' cross motion is otherwise denied as unnecessary.

The crux of this action is that, from May 20, 2022 until October 13, 2022, the defendants negligently failed to treat the plaintiff Leo J. Egan. The plaintiffs commenced this action on April 11, 2025 by filing a summons and complaint. Pursuant to CPLR 306-b, they had 120 days from that date to serve process upon the defendants, or until August 11, 2025, the first business date after the lapse of that 120-day period (see General Construction Law §§ 20, 25-a).

In several affidavits of service sworn to on July 2, 2025, the plaintiffs' process server averred that he attempted to effectuate service upon all of the defendants on June 26, 2025 and June 30, 2025 at three different locations, but was informed that the individual defendants did not work at the locations at which he attempted service upon them, and that the institutional defendants did not accept service of process at those locations. In four affidavits of service sworn to on July 10, 2025, the plaintiffs' process server attested that he served copies of the summons and complaint upon the individual defendants by personally delivering them on July 7, 2025 to a person of suitable age and discretion at 633 Third Avenue, 28th Floor, New York, New York 10017, and mailing additional copies to the individual defendants on July 8, 2025 at that address in an appropriately marked envelope. The process server described the person to whom the summons and complaint was personally delivered as follows: "Gender: Male Race/Skin: White Age: Over 65 Yrs. Weight: Over 200 Lbs. Height: Over 6ft Hair: Black/Gray Glasses: Yes Other." The process server further attested that the recipient refused to give his name, but confirmed that the individual defendants worked at that address. In addition, the process server asserted that this man identified himself as an "administrator" for the institutional defendants who was authorized to accept service on their behalf.

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 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 mailing the summons to the defendant's last known residence or actual place of business (CPLR 308[4]).

More particularly, 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]). CPLR 308(4) provides that

“where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person 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 affixing 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 affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, 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.”

As with CPLR 308(2), employment of the affix and mail method of service “requires *both* affixing and mailing” (*Ventura v City of New York*, 2025 NY Slip Op 33432[U], *3, 2025 NY Misc LEXIS 7558, *6 [Sup Ct, N.Y. County, Sep. 12, 2025] [emphasis added]).

CPLR 311(a)(1) provides that

“Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

“upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or section three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or section three hundred seven of the not-for-profit corporation law.”

Each of the defendants each served an answer to the complaint on July 29, 2025, all of which set forth the affirmative defense that the court lacked personal jurisdiction over them because they were not properly served with process. 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]). The defendants made the instant motion on August 25, 2025, and, thus, “within 60 days after serving the[ir] pleading[s],” as required by CPLR 3211(e).

In his affirmation in support of the motion, the defendant Mark A. Schattner, M.D., asserted that

“I do not know the person described in Plaintiff’s Affidavit of Service as a ‘John Doe’. The person’s description as found in the Affidavit of Service is not familiar to me.

“I learned of the existence of this lawsuit from Memorial Hospital’s Office of General Counsel.

"I have not been personally served with any Summons and Complaint in this lawsuit.

"I am unaware of any attempted service upon me by service of the Summons and Complaint on any person who could be considered to have suitable discretion to deliver the legal documents to me. No-one [sic] who allegedly accepted service on my behalf delivered any Summons and Complaint in this matter to me.

"I never received in the mail, either at my home or my place of business, any envelope containing legal papers in this matter from Plaintiff's counsel or from any process server."

The defendant Jacques Beauvais, M.D., submitted a virtually identical affirmation. In a separate affirmation, the institutional defendants' assistant general counsel, Laura J. Samuels, stated that

"I do not know the person described in Plaintiff's Affidavit of Service as a 'John Doe'. That person's description as found in the Affidavit of Service is not familiar to me. Several people in the Office of General Counsel were asked if they knew the identity of the person described in the Affidavit of Service, and no-one [sic] could think of anyone who matched the description.

"No officer, director, managing or general agent, or cashier or assistant cashier or other agent authorized by appointment or by law to receive service on behalf of Memorial Hospital for Cancer and Allied Diseases has been served with the Summons and Complaint in this matter."

She also averred that the institutional defendants had not received a copy of the summons and complaint from the Secretary of State.

A process server's affidavit of service is prima facie evidence of proper service (see *Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]). The individual defendants' affirmations were insufficient to rebut the process server's affidavits, since, although they denied ever receiving any notices in this action by mail or otherwise, and denied seeing any documents left for them, "such denials of receipt of service in themselves are insufficient to warrant an evidentiary hearing" (*Countrywide Home Loans, Inc. v Smith*, 171 AD3d 858, 859 [2d Dept 2019]). "[M]ere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service" (*Jones v Grooms*, 209 AD3d 584, 584 [1st Dept 2022], quoting *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). This

rule also encompasses mere denials of receipt by mail (see *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 23 [2d Dept 2019]; see also *Engel v Lichterman*, 62 NY2d 943, 944-945 [1984]). “To be entitled to an evidentiary hearing on the issue of service, the defendant[s] w[ere] required to rebut the plaintiff’s prima facie showing by submitting a sworn denial of receipt of service containing specific facts to refute the statements in the process server’s affidavit” (*id.* [emphasis added]). The individual defendants did not do so here. The court rejects the defendants’ contention that merely because 3 persons who worked in a medical establishment that employs more than 21,000 people did not recognize the description of the recipient of process somehow satisfied their burden of establishing that he did not work for the institutional defendants, despite the fact that he worked in the lobby of their facility at 633 Third Avenue, 28th Floor, New York, New York 10017. Inasmuch as Schattner, Beauvais, and Samuels were not familiar with the description of the recipient, the court is hard pressed to understand how they could have any knowledge of whether he was or was not a person of “suitable age and discretion.”

Hence, the court denies those branches of the defendants’ motion which were to dismiss the complaint insofar as asserted against the individual defendants.

With respect to the purported service of process upon the institutional defendants, the court notes that, as a general rule, where a plaintiff submits proof that a corporate employee has represented to a process server that he or she was authorized to accept process on behalf of the corporate defendant, service of process is deemed properly to have been made upon that corporation pursuant to CPLR 311 (see *Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1460 [4th Dept 2014]; see also *Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 273 [1980] [process server’s reasonable belief of recipient’s authority is the crucial factor]; *Passeri v Tomlins*, 141 AD3d 816, 818, n [3d Dept 2016]; *Arvanitis v Bankers Trust Co.*, 286 AD2d 273, 273 [1st Dept 2001]). Nonetheless, since the recipient of process characterized himself as an “administrator” of the institutional defendants, which is a corporate title not enumerated in CPLR 311(a)(1), the court concludes that, under the unique circumstances of

this case, process was not properly effectuated upon those defendants (*see Bushell v City of New York*, 172 AD3d 1156, 1156-1157 [2d Dept 2019]). Nonetheless, the court extends the plaintiffs' time within which to serve the institutional defendants by delivery of process to a person holding one of the job titles enumerated in CPLR 311(a)(1) or delivery of process to the Secretary of State in Albany pursuant to Business Corporation Law § 306.

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.” The plaintiffs, by their cross motion, seek to extend the time for service. 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).

Inasmuch as the plaintiff cannot show that she employed due diligence in attempting to serve the institutional defendants in a proper manner, she cannot show good cause for the requested extension of time. Nonetheless, although this action does not qualify for an extension under the "good cause" exception (see *Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]), the court concludes that it qualifies under the "interest of justice" category (see *Henneberry v Borstein*, 91 AD3d 493, 495-496 [1st Dept 2012]).

"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*"

(*id.* at 495 [emphasis added]; 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.

It is undisputed that the plaintiffs' process server made some attempts to serve the institutional defendants within the statutory 120-day period by making attempts at four different locations, and being told that the papers could not be accepted at three of them. The plaintiff made her cross motion on December 8, 2025, only a few months after the defendants served their answers, all of which asserted the affirmative defense of lack of personal jurisdiction. Thus, it cannot be said that the plaintiff waited so long to seek the extension of time so as to prejudice any defendant (*cf. Nationstar Mtge., LLC v McCallum*, 191 AD3d 480, 480-481 [1st Dept 2021] [plaintiff waited nearly five years after defendant put plaintiff on notice that service

was purportedly improper, nine years after the action was commenced, and five months after the court determined that a traverse hearing was warranted, before moving for an extension of time to effectuate service of process]). Nor can the institutional defendants establish any prejudice if the plaintiffs were granted an extension of time within which to serve them with process, since they obtained notice of the commencement of the action against them in sufficient time to permit them to serve answers only 3½ months after the action was commenced, and one month before the 120-day period of CPLR 306-b had lapsed.


Accordingly, it is,

ORDERED that the defendants’ motion to dismiss the complaint insofar as asserted against them, based on improper service of process, is denied; and it is further,

ORDERED that the plaintiffs’ cross motion for leave to extend the time within which to effect service of process upon the defendants is granted to the extent that the plaintiffs shall have until July 15, 2026 to serve process upon the defendants Memorial Sloan Ketter Cancer Center and Memorial Hospital for Cancer and Allied Diseases pursuant to CPLR 311(a)(1) and/or Business Corporation Law § 306, and the cross motion is otherwise denied as unnecessary.

This constitutes the Decision and Order of the court.

3/24/2026
DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE