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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

LEROY D. BAROCCA and MARIA I. BAROCCA,	TRIAL / IAS PART 29 NASSAU COUNTY
Plaintiffs,	Index No. 5249/11
- against -	Motion Sequence No. 001
CHRISTOPHER GARTEN,	
Defendant.	

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's 4
Defendant's / Respondent's . . . . . _____

The defendant moves pursuant to CPLR 3211 (a) (8), 306-b and 305 (b) to dismiss the underlying action. The defense claims the Court lacks personal jurisdiction because the defendant was not served with the summons and complaint, and 120 days to do so expired. The defense asserts the summons failed to comport with the 305 CPLR (b) notice requirements. The defense also avers the action should be dismissed pursuant to CPLR 3211 (a) (5) because it is barred by the applicable statute of limitations.

The plaintiffs oppose the motion. The plaintiffs assert the defendant's prior counsel accepted service of process for the defendant no later than April 11, 2011, four days after

commencement of the action. The plaintiffs aver the CPLR requirements were satisfied because the summons with notice was served on the defendant within 120 days of the commencement. The plaintiffs maintain that service gave the defendant notice of the nature of the claims, the amount of damages and the money sought by default. The plaintiffs point out the defense fails to offer evidence establishing the date of accrual of any of the plaintiffs' causes of action while the plaintiffs submitted evidence showing the date was no earlier than April 24, 2008.

The defense reiterates defective service because the plaintiffs never served the defendant, but served an unauthorized attorney. The defense points to the plaintiffs burden to assert when their causes of action accrued, and notes the fourth cause of action for fraudulent representation does not comply with CPLR 3016 specificity requirements. The defense adds the plaintiffs' legal citations fail to support a "continuing course of conduct" claim by the plaintiffs.

The Court of Appeals holds:

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (***see***, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit *88 within any cognizable legal theory (***Morone v Morone***, 50 NY2d 481, 484; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 634)

Leon v Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994].

Here, the parties, owners and an architect, executed an agreement for a residential design at 71 Percheron Lane, Roslyn Heights, New York. There were some issues with the Town of North Hempstead. Attorneys represented the parties in their efforts to resolve the issues regarding certain work performed involving the residence. The parties communicated with the assistance of their legal counsels. On April 7, 2011 the plaintiff commenced the instant action. CPLR 306-b provides:

> Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. 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 305 (b) provides:

> If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default.

The Second Department holds:

> The 120–day service provision of CPLR 306–b can be extended by a court, upon motion, "upon good cause shown or in the interest of justice" (CPLR 306–b). "Good cause" and "interest of justice" are two separate and independent statutory standards (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 104, 736 N.Y.S.2d 291, 761 N.E.2d 1018). To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 105–06, 736 N.Y.S.2d 291, 761 N.E.2d 1018)...If good cause for an extension is not established, courts must consider the "interest of justice" standard of CPLR 306–b (***see e.g. Busler v. Corbett***, 259 A.D.2d at 17, 696 N.Y.S.2d 615). The interest of justice standard does not require reasonably diligent efforts at service, but courts, in making their determinations, may consider the presence or absence of diligence, along with other factors (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 105, 736 N.Y.S.2d 291, 761 N.E.2d 1018). The interest of justice standard is broader than the good cause standard (***see Mead v. Singleman***, 24 A.D.3d 1142, 1144, 806 N.Y.S.2d 783), as its factors also include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant (***see Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d at 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018; ***Matter of Jordan v. City of New York***, 38 A.D.3d 336, 339, 833 N.Y.S.2d 8; ***Estey–Dorsa v. Chavez***, 27 A.D.3d 277, 813 N.Y.S.2d 54; ***Mead v. Singleman***, 24 A.D.3d at 1144, 806 N.Y.S.2d 783; ***de Vries v. Metropolitan Tr. Auth.***, 11 A.D.3d 312, 313, 783 N.Y.S.2d 540; ***Hafkin v. North Shore Univ.***

Hosp., 279 A.D.2d 86, 90–91, 718 N.Y.S.2d 379, ***affd.*** 97 N.Y.2d 95, 736 N.Y.S.2d 291, 761 N.E.2d 1018; ***see also Slate v. Schiavone Const. Co.***, 4 N.Y.3d 816, 796 N.Y.S.2d 573, 829 N.E.2d 665)
Bumpus v. New York City Transit Authority, 66 A.D.3d 26, 31-32, 883 N.Y.S.2d 99 [2d Dept, 2009].

The summons with notice here was not defective. The summons with notice here did not leave the defendant conjecturing the exact claims against him rather it met the CPLR 305 (b) requirements (***see Grace v Bay Crane Serv. of Long Is., Inc.***, 12 A.D.3d 566, 785 N.Y.S.2d 472 [2d Dept, 2004]).

This Court determines the purported service of process under CPLR 306-b was effective. Notwithstanding that determination, the plaintiffs show reasonable diligence in attempting service upon the defendant. The plaintiffs demonstrate the previous defense attorney was authorized to accept service of process, and they proffer evidence of reasonable diligence in attempting service upon the defendant. The plaintiffs present evidence the parties' attorneys over a period of time communicated with each other regarding issues related to certain work the defendant performed for the plaintiffs with respect to 71 Percheron Lane, Roslyn Heights, New York. A week, after a March 30, 2011 email from the previous defense attorney the plaintiffs' attorney with no communication from that defense attorney nor the defendant regarding a change of authorization, the plaintiffs' attorney commenced this action on April 7, 2011. The plaintiffs' attorney emailed that same day a letter with reference to the prior service of process authorization and the summons with notice to the previous defense attorney who responded on April 11, 2011, in a letter he was authorized to accept service of process. Further, this Court finds the plaintiffs meet the statutory interest of justice criterion. This Court considered whether there was reasonable diligence in attempting service along with whether there was an expiration of the

applicable statute of limitations, the meritorious nature of the underlying action, the length of purported delay in service, the promptness of a plaintiffs' request for an extension and whether there was prejudice to the defendant. The Court determines there was reasonable diligence in attempting service. The applicable statute of limitations has not expired. Any delay in service asserted by the defendant is short. Any request for an extension, under these circumstances, by the plaintiffs appears expeditious. There is no showing of any prejudice to the defendant under these circumstances.

Accordingly, the motion is denied.

So ordered.

Dated: **March 1, 2012**

ENTER:

J. S. C.

NON FINAL DISPOSITION