

Wynn v Burleigh

2016 NY Slip Op 33142(U)

May 26, 2016

Supreme Court, Westchester County

Docket Number: 54980/2015

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LISA MARIE WYNN,

Plaintiff,

-against-

NOEL B. BURLEIGH

Defendant.
-----X

DECISION AND ORDER

Sequence Nos. 1 and 2

Index No. 54980/2015

RUDERMAN, J.

The following papers were considered in connection with defendant’s motion for an order dismissing plaintiff’s complaint pursuant to CPLR 306-b and CPLR 3211(a)(5), and plaintiff’s cross-motion for an extension of time to serve the summons and complaint:

| <u>Papers</u> | <u>Numbered</u> |
|------------------------------------------------------------------------------|-----------------|
| Notice of Motion, Affirmation in Support, and Exhibits A – D | 1 |
| Notice of Cross Motion, Affirmation, and Annexed Exhibits | 2 |
| Affirmation in Opposition to Cross-Motion and in Reply to Defendant’s Motion | 3 |
| Affirmation in Reply | 4 |

The plaintiff Lisa Marie Wynn commenced this action on March 31, 2015 to recover damages for personal injuries allegedly sustained in a rear-end collision that occurred on April 1, 2012 on the Cross Bronx Expressway when plaintiff’s automobile was struck from behind by defendant Noel B. Burleigh’s vehicle. Plaintiff served the defendant with the summons and complaint on July 31, 2015. The defendant now moves for an order pursuant to CPLR 306-b dismissing plaintiff’s complaint for failure to serve the defendant within the require 120-day period after the filing of the summons and complaint. The defendant also moves to dismiss the complaint as time barred, pursuant to CPLR 3211(a)(5). The plaintiff submits written opposition and cross-moves for an order extending plaintiff’s time to serve the summons and complaint *nunc pro tunc*.

In support of his motion, defendant argues that plaintiff’s cross-motion for an extension of time to serve defendant should be denied because plaintiff failed to promptly move the Court for such an order, and only did so in response to plaintiff’s motion to dismiss the complaint. Defendant

also asserts that plaintiff has failed to meet her burden under CPLR 306-b, which requires plaintiff to demonstrate that there is “good cause” for an extension of time, or that such an extension is in the “interest of justice.” In addition, defendant contends that he would be severely prejudiced in the investigation of the accident if plaintiff’s complaint were not dismissed because 3 ½ years have elapsed since the accident, making witnesses difficult to locate. Lastly, defendant avers that, prior to the late service of the summons and complaint, he had no notice that plaintiff was claiming an injury resulting from the accident, or that she intended to bring a personal injury action against him.

In opposition, plaintiff makes no attempt to argue that an extension of time is warranted for good cause under CPLR 306-b. Instead, plaintiff asserts that she should be allowed an extension, *nunc pro tunc*, in the interest of justice. According to plaintiff, the defendant cannot have been prejudiced by the short two day delay in service of the summons and complaint. Moreover, the defendant should have been aware that an action was contemplated since a police report was made at the scene of the accident, and plaintiff was taken to the hospital in an ambulance as a result of her injuries.

Analysis

CPLR 306-b requires service of a summons and complaint to be made within one hundred twenty days after the commencement of an action or proceeding. (*See* CPLR 306-b.) If service is not made upon a defendant within the time provided, “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.” (*Id.*)

In order to establish good cause, a plaintiff is required to demonstrate that he or she made reasonably diligent efforts to effect service on the defendant. (*See Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 31-32 [2d Dept. 2009].) The interest of justice standard, however, “requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties.” (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105-06 [2001].) In determining whether an extension of time is warranted in the interest of justice, “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 the defendant.” (*Burwell v. Yonkers Gen. Hosp.*, 6 A.D.3d 478, 480 [2d Dept. 2004].)

In the instant action, plaintiff has failed to show good cause to extend the time for service. Plaintiff provides no explanation as to why service was made two days after the expiration of the 120-day time period required by CPLR 306-b. Nor does plaintiff attempt to demonstrate that it made any efforts to serve the defendant prior to July 31, 2015.

Nevertheless, in considering all the relevant factors, the Court finds that plaintiff’s cross-motion for an order extending the time for service *nunc pro tunc* should be granted, in the interest of justice. (*See Leader*, 97 N.Y.2d at 106 [“No one factor [considered on a motion to dismiss a viable claim under CPLR 306-b] 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”].)

Here, the action was timely commenced on March 31, 2015 and the statute of limitations has since expired such that plaintiff would be barred from recommencing her suit against the defendant if the complaint were dismissed at this juncture. (*See Beauge v. New York City Tr. Auth.*, 282 A.D.2d 416 [2d Dept. 2001] [granting an extension of time where the action was timely commenced and plaintiff’s claims would be extinguished without an extension since the Statute of Limitations had already expired].)

In addition, plaintiff has not demonstrated any prejudice attributable to the delay in service, which only occurred a mere two days after the expiration of the 120-day time period. (*See Abu-Aqlein v. El-Jamal*, 44 A.D.3d 884 [2d Dept. 2007] [trial court acted within its discretion in granting extension of time where summons and notice were served only 17 days after the 120-day time period]; *see also Fernandez v. Morales Bros. Realty, Inc.*, 110 A.D.3d 676, 677 [2d Dept. 2013][extension of time granted where, *inter alia*, pleadings were served 3 days late and defendant failed to show any prejudice attributable to the delay in service].) Indeed, the fact that plaintiff was taken from the scene of the accident in an ambulance militates against defendant’s claim that he had no notice plaintiff would claim an injury as a result of the accident, or bring a personal injury action against the defendant.

Lastly, through her submission of the complaint, plaintiff has demonstrated a meritorious cause of action. (*See Moundrakis v. Dellis*, 96 A.D.3d 1026, 1027 [2d Dept. 2012] [expiration of the statute of limitations, evidence of a potentially meritorious cause of action, and lack of

demonstrable prejudice to the defendant, among other factors, were sufficient to warrant an extension of time for service]; *see also El-Jamal*, 44 A.D.3d 884 [extension of time to effect service properly granted where verified complaint demonstrated the merits of the action].)

Based upon the foregoing, it is hereby,

ORDERED that the branch of defendant's motion to dismiss the complaint for failure to timely serve the summons and complaint, pursuant to CPLR 306-b, is denied; and it is further

ORDERED that the branch of defendant's motion to dismiss the complaint as time barred, pursuant to CPLR 3211(a)(5), is denied; and it is further

ORDERED that plaintiff's cross-motion for an order extending the time for service *nunc pro tunc* to July 31, 2015 is granted; and it is further

ORDERED that plaintiff's service of the summons and complaint upon the defendant on July 31, 2015 is hereby deemed timely; and it is further

ORDERED that the parties appear on Monday, June 27, 2016 at 9:30 a.m. in the Preliminary Conference Part of the Westchester County Supreme Court, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

May 25, 2016



HON. TERRY JANE RUDERMAN, J.S.C.