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| <b>Divalerio v Mount Sinai Hosp.</b>   |
| 2005 NY Slip Op 30536(U)   |
| August 2, 2005   |
| Supreme Court, New York County   |
| Docket Number: 101118/05   |
| Judge: Eileen Bransten   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

-----X  
NANCY DIVALERIO AND WILLIAM DIVALERIO,

Plaintiffs,

-against-

Index No. 101118/05

Motion Date: 6/14/05

Motion Seq. No.: 01

THE MOUNT SINAI HOSPITAL,  
RECANTI/MILLER TRANSPLANTATION,  
INSTITUTE AT MOUNT SINAI HOSPITAL,  
MOUNT SINAI RADIOLOGY ASSOCIATES,  
HEPATOBIILIARY CLINIC AT THE MOUNT  
SINAI HOSPITAL, MICHAEL SCHILSKY, M.D.,  
GABRIEL GONDOLESI, M.D. "JOHN/JANE" YANG, M.D.,  
LEONA KIM SCHLUGER, M.D., THOMAS  
SCHIANO, M.D., ITZHAK NIR, M.D., PAUL WATERS, M.D.,  
ROHIT BHOJO SHAHANI, M.D., GREGORY  
MCKENNA, M.D., M. GENOVESE, M.D., DAVID JAFFE, M.D.,  
THOMAS FISHBEIN, M.D., JOHN/JANE DOES", M.D.,  
1 through 3, whose names are unknown, and  
"JOHN/JANE DOES", R.N., 1 through 3,  
whose names are unknown,

Defendants.

-----X  
PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 306-b, plaintiffs Nancy Divalerio ("Ms. Divalerio") and William Divalerio ("Mr. Divalerio") move for an order granting a 120-day extension of their time to serve process upon defendants Leona Kim Schluger, M.D. ("Dr. Schluger"), Itzhak Nir, M.D. ("Dr. Nir"), Gregory McKenna, M.D. ("Dr. McKenna"), M. Genovese, M.D. ("Dr. Genovese"), "John/Jane" Yang, M.D. ("Dr. Yang"), Paul Waters, M.D. ("Dr. Waters"), Michael Schilsky, M.D. ("Dr. Schilsky"), and other unknown doctors. Defendants do not oppose plaintiffs' motion.

*Background*

In this medical malpractice action commenced on January 25, 2005, plaintiffs allege that defendants improperly performed a liver biopsy on Ms. Divalerio on September 17, 2002, puncturing her liver and diaphragm. Plaintiffs' Affirmation in Support of Motion ("Aff."), at 3.

Plaintiffs attempted to serve Drs. Schluger, Nir, McKenna, Genovese, Yang, Waters and Schilsky on March 2, 2005 at Mount Sinai Hospital ("Hospital"), at which time they learned that these defendants were no longer employed by the Hospital. Aff., at 4. Although plaintiffs attempted to obtain the defendants' current or last-known addresses by conducting Internet searches and hiring a private investigator, they were unable to find this information. Aff., at 4-5.

The statute of limitations on this action expired on March 17, 2005. Aff., at 6. Plaintiffs' time to serve defendants pursuant to CPLR 306-b expired on May 25, 2005. *Id.*

On March 21, 2005, plaintiffs served a Notice of Discovery and Inspection ("Disclosure Request") on the Hospital, Recanti/Miller Transplantation Institute at Mount Sinai, Mount Sinai Radiology Associates, Hepatobiliary Clinic at the Mount Sinai Hospital, Gabriel Gondolessi, M.D., Thomas Schiano, M.D., Rohit Bhoj Shahani, M.D., and David Jaffe, M.D. Aff., at 6. In this Disclosure Request, plaintiffs demanded the full name, title, dates of employment, current employment status, last known address, and social security

number of each of the defendants -- except for Dr. Schluger, whose information they have.

*Id.*

On approximately May 27, 2005, plaintiffs served defendants with this motion seeking an extension of their time to serve and to effectuate process upon defendants.

#### Analysis

CPLR 306-b requires a plaintiff to serve a copy of the initiating papers on the defendant within 120 days of filing the action. Section 306-b, moreover, authorizes courts to grant an extension of time to serve upon a showing of good cause or in the interest of justice. The “good cause” and “interest of justice” requirements are stated in the alternative, meaning that each provides a distinct and separate basis for extension of the time to serve. *Leader v. Maroney*, 97 N.Y.2d 95 (2001). Thus, a plaintiff who does not establish good cause for failing to timely serve may still prevail by demonstrating that the interest of justice demands extension of the time to serve.

#### Good Cause

To demonstrate good cause, plaintiff must first show diligence in attempting to effectuate service. *Leader v. Maroney*, 97 N.Y.2d, at 95. Once plaintiff has made this showing, the court may consider other factors in deciding whether to grant an extension. *Id.*

Specifically, the court may weigh the promptness of plaintiff's request, whether defendants will be prejudiced by the untimely service, and whether the delay is due to counsel's neglect, inadvertence or mistake. *Id.*

Here, plaintiffs have demonstrated good cause warranting an extension of their time to serve defendants.

To begin, plaintiffs have exercised reasonable diligence in trying to serve and effectuate process upon the yet-unserved defendants. Plaintiffs attempted to serve Drs. Schluger, Nir, McKenna, Genovese, Yang, Waters and Schilsky at the facility where they rendered treatment to Ms. Divalerio. They also hired an investigator to ascertain their last-known addresses. Furthermore, plaintiffs served the Hospital and its affiliated institutions with a Disclosure Request requiring them to provide the unserved defendants' last-known addresses or business affiliations. *Aff.*, at 7. Plaintiffs, moreover, promptly requested an extension of the time to serve prior to the expiration of the 120-day deadline and only ask for another 120 days to effectuate process. This is a not a case in which plaintiffs stood idle.

There is absolutely no evidence that the delay has been caused by counsel's neglect or mistake. On the contrary, plaintiffs have made every reasonable effort to effectuate service.

**Interest of Justice**

In any event, plaintiffs are also entitled to an extension of time to serve in the interest of justice.

To obtain an extension in the “interest of justice,” plaintiff need not demonstrate reasonable diligence in attempting to effectuate service as a threshold matter. *Leader v. Maroney*, 97 N.Y.2d 95 (2001). Instead, the court may consider the plaintiff’s diligence along with other relevant factors, including the potential merit of plaintiff’s cause of action, the date the statute of limitations expires, the length of delay in service, any prejudice to defendants as a result of untimely service, and the promptness of plaintiff’s request for an extension. *Id.*

As discussed *supra*, plaintiffs have demonstrated reasonable diligence in attempting to effectuate process upon the defendants. Furthermore, at this early state, it appears that plaintiffs’ action against the unserved defendants may have sufficient merit so as to warrant an extension of their time to serve.

Finally, the Statute of Limitations expired on March 17, 2005, and, therefore, denial of plaintiffs’ motion for extension of time to effectuate service of process could result in preclusion of their claims. The Court will not deprive plaintiffs – who have been diligent – of their day in court; therefore, plaintiffs’ motion for an extension of time to serve is granted.

Accordingly, it is

ORDERED that plaintiffs' unopposed motion for an extension of time to serve initiating papers pursuant to CPLR 306-b is granted. Plaintiffs are directed to serve defendants within 120 days of June 14, 2005 (the date of submission of this motion); and it is further

ORDERED that defendants are directed to provide plaintiffs with the last-known addresses of the unserved defendants within 45 days of June 14, 2005 pursuant to the parties' stipulation; and it is further

ORDERED that the parties are to appear for a preliminary conference on August 21, 2005.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
~~July~~ \_\_\_\_\_, 2005  
August 2

**FILED**

AUG 26 2005

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



Hon. Eileen Bransten