Teman v Wolff
2011 NY Slip Op 34079(U)
December 27, 2011
Supreme Court, Nassau County
Docket Number: 5700/11
Judge: Joel K. Asarch
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

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LORI G. TEMAN, as Executrix of the Estate of KENNETH I. TEMAN, deceased, and LORI G. TEMAN, Individually,

Plaintiffs,

- against -

DECISION AND ORDER

Index No: 5700/11

EDWARD WOLFF, M.D., CHRISTOPHER HANLON, M.D., and EDWARD WOLFF, M.D., P.C.

Motion Sequence Nos: 001 and 002
Original Return Date: 09-21-11
10-17-11

Defendants.

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PRESENT:
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 8 were submitted on this Notice of Motion and Notice of Cross-Motion on October 17, 2011:

	Papers numbered
Notice of Motion, Affirmation and Affidavit in Support	1-3
Notice of Cross Motion, Affirmation and Affidavit	4-6
Affirmations in Opposition to Cross Motion	7
Reply Affirmation	8

The motion by the plaintiff, Lori G. Teman, as Executrix of the Estate of Kenneth I. Teman, deceased, and Lori G. Teman, individually, for: (1) a default judgment pursuant to CPLR 3215 as against defendant Christopher Hanlon, M.D., or alternatively; (2) for an order pursuant to CPLR 306-b granting her an additional 120 days to re-serve defendant Christopher Hanlon, M.D.; and

The cross-motion by the defendant Christopher Hanlon, M.D., for an order dismissing the complaint insofar as interposed against him, are decided as follows:

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On or about August 20, 2009, the decedent, Kenneth I. Teman, passed away while being treated at Syosset Hospital for a heart attack. Immediately prior thereto, the plaintiffs claim that they attempted to contact defendant Edward Wolf, M.D. – the decedent's treating physician – but were unable to reach him and spoke instead to defendant Christopher Hanlon, M.D. ["Dr. Hanlon" or the "defendant"], who was covering for Dr. Wolff that day (L. Teman Aff., ¶¶ 3-4; Hirschberger Opp. Aff., ¶¶ 3-4).

According to the plaintiff, Dr. Hanlon misdiagnosed the decedent's symptoms during their telephone conversation with him, which caused further delays in his seeking treatment, and which allegedly contributed to his demise from a lack of oxygen to his brain (Hirschberger Opp. Aff., ¶¶ 3-4).

Thereafter, by summons and verified complaint dated April 12, 2011, Lori G. Teman, individually, and as Executrix of Kenneth Teman's estate, commenced the within medical malpractice and wrongful death action as against the defendants Christopher Hanlon, M.D., Edward Wolff, M.D. and Edward Wolff, M.D.. P.C. (Hirschberger Aff., Exh., "1").

According to the plaintiff, she made several efforts to serve the defendant Dr. Hanlon within the statutory 120-day, post-filing service period (*see,* CPLR 306-b), namely: (1) two attempted services in May of 2011, at an address counsel then believed was Dr. Hanlon's office location; and (2) then two July, 2011 service attempts at a UPS store (July 11 and July 20), where counsel believed that Dr. Hanlon maintained a valid mailing address associated with his practice (Hirschberger [Opp] Aff., ¶¶ 9-10; Hirschberger [Main] Aff., Exh. "2"). Proof of service was filed with the County Clerk's office on July 26, 2011.

The plaintiff – relying on the July 20, 2011 service – contends that Dr. Hanlon's answer was

due no later than August 9, 2011, and that he has yet to answer or otherwise appear in the action (Hirschberger Aff., ¶¶ 4, 7-8). In light of the foregoing, the plaintiff now moves for a default judgment as against defendant Dr. Hanlon, or alternatively, for leave to extend her time to serve Dr. Hanlon pursuant to CPLR 306-b. Notably, the plaintiff's motion was made some 17 days after the 120-day service period prescribed by CPLR 306-b expired.

Dr. Hanlon has opposed the plaintiff's motion and cross-moves for an order dismissing the complaint insofar as interposed against him.

Preliminarily, the plaintiff does not seriously dispute that the underlying service relied upon – made in July of 2010 at a UPS store location – while timely when originally attempted, was defective since service was not properly made in accord with the requirements of CPLR 308[2], *i.e.*, service was not made at the defendant's actual place of business, dwelling place, usual place of abode or last known residence (*Samuel v. Brooklyn Hosp. Center,* 88 AD3d 979, 980 [2nd Dept. 2011]; *Kearney v. Neurosurgeons of N.Y.*, 31 AD3d 390 [2nd Dept. 2006]). Notably, "CPLR 308(2) requires strict compliance" and "the plaintiff must carry the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*Samuel v. Brooklyn Hosp. Center*, *supra,* 88 AD3d at 980; *Santiago v Honcrat,* 79 AD3d 847, 848 [2nd Dept. 2010]; *Kearney v. Neurosurgeons of N.Y.*, *supra*, 31 AD3d 390, 39; *see also, Goralski v. Nadzan*, 89 AD3d 801 [2nd Dept 2011]).

However, upon the facts presented, and in the exercise of the Court's discretion, that branch of the plaintiff's motion which is for an extension of time to re-serve Dr. Hanlon pursuant to CPLR 306-b, should be granted.

To establish her entitlement to the extension sought, the plaintiff was required to show either

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good cause for her failure to properly serve Dr. Hanlon "with the summons and complaint within 120 days after filing or that an extension of time to effect service should be granted in the interest of justice" (*Redman v South Is. Orthopaedic Group, P.C.*, 78 AD3d 1147, 1148 [2nd Dept. 2010] *leave to app denied*, 16 NY3d 707 [2011]; *see*, *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104–107 [2001]; *Thompson v. City of New York*, 89 AD3d 1011 [2nd Dept 2011]; *Bumpus v. New York City Transit Authority*, 66 AD3d 26, 32 [2nd Dept. 2009]; *see also, Slate v Schiavone Constr. Co.*, 4 NY3d 816, 817 [2005]; *Moss v Bathurst*, 87 AD3d 1373, 1374 4th Dept. 2011]). The statutory, "good cause" and "interest of justice" extension grounds are separately existing bases for relief, to which different criteria apply (*Leader v. Maroney, Ponzini & Spencer*, *supra*, 97 NY2d 95, 104–107; *Moss v Bathurst*, *supra*, 87 AD3d at 1374; *Bumpus v. New York City Transit Authority*, *supra*, 66 AD3d 26, 32; *Spath v Zack*, 36 AD3d 410, 413-414 [1st Dept. 2007]). Specifically, while the statutory "good cause" prong of the statute requires that a plaintiff demonstrate, *inter alia*, reasonable diligence in attempting service (*Bumpus v. New York City Transit Authority*, *supra*, 66 AD3d 26, 31-32), courts may also consider the broader, more flexible, "interest of justice" standard, under which a plaintiff is not required to show either diligent efforts or exigent circumstances (*Leader v. Maroney, Ponzini & Spencer*, *supra*, 97 NY2d at 104–106; *Moss v Bathurst*, *supra*, 87 AD3d at 1374; *Bumpus v. New York City Transit Authority*, *supra*, 66 AD3d 26, 32; *Spath v Zack*, *supra*).

Rather, "[w]hen deciding whether to grant an extension of time to serve a summons and complaint 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 [potentially] 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'" (*Thompson*

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v. City of New York, *supra*, 89 AD3d 1011, *quoting from, Leader v. Maroney, Ponzini & Spencer*, *supra*, 97 NY2d at 105–106; *Gilkes v. New York Wholesale Paper*, 89 AD3d 574 [1st Dept 2011] *Frank v Garcia*, 84 AD3d 654, 655 (1st Dept. 2011]; *Bumpus v. New York City Tr. Auth., supra*, *Stryker v. Stelmak*, 69 AD3d 454 [1st Dept. 2010]).

"The determination of whether to grant the extension in the interest of justice is within in the discretion of the motion court" (*Owens v. Chhabra*, 72 AD3d 664, 665 [2nd Dept. 2010]).

With these principles in mind, and upon weighing the constellation of relevant factors (*Leader v. Maroney, Ponzini & Spencer*, *supra*, at 101; *Cooper v. New York City Bd. of Educ.*, 55 AD3d 526, 527 [2nd Dept. 2008]), the Court finds that an exercise of discretion in favor of granting the requested extension is warranted (*see*, *Mendez v. New York Methodist Hosp.*, 87 AD3d 1114, 1115 [2nd Dept. 2011]; *Owens v. Chhabra*, *supra*, 72 AD3d 664, 665 *see also, Pandolfi v Langer*, 32 Misc.3d 1213(A) [Supreme Court, Nassau County 2011]).

Here, the record indicates, among other things, that the plaintiff made several efforts to serve the defendant within the 120-day period after the complaint was filed (*Thompson v. City of New York, supra*; *Frank v Garcia. supra*, 84 AD3d at 655). Additionally, the plaintiff has reasonably described the efforts expended in attempting to serve defendant Hanlon and articulated certain difficulties and complications she experienced in doing so, including, *inter alia*, the fact that Dr. Hanlon had apparently ceased practicing medicine in New York and re-located to an out-of-state residence (*see*, Hanlon Aff., ¶¶ 6-7; Hirschberger [Opp] Aff., ¶¶ 10-12).

Additionally, the record further supports the conclusions (1) that the ensuing delay was not unduly lengthy (*Bumpus v New York City Tr. Auth., supra*, 66 AD3d at 37; *White v Maradiaga*, 8 AD3d 559, 560 [2nd Dept. 2004]); (2) that service – albeit defective – was timely when attempted

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(*Spath v Zack*, *supra*, 36 AD3d 410, 413-414); (3) that the wrongful death limitations period has now expired (*Gilkes v. New York Wholesale Paper*, *supra*; *Chiaro v D'Angelo*, 7 AD3d 746 [2nd Dept. 2004]; *Griffin v Our Lady of Mercy Med. Ctr.*, 276 AD2d 391 [1st Dept. 2000]); and (4) that the defendant has not established the existence of prejudice sufficient to warrant denial of the motion (*Thompson v. City of New York*, *supra*, 89 AD3d 1011; *Cooper v. New York City Bd. of Educ.*, *supra*, 55 AD3d 526, 527). Nor was the plaintiff's application merely a reaction to a prior-made motion to dismiss (*cf.*, *Khodeeva v. Chi Chung Yip*, 84 AD3d 1030, 1031 [2nd Dept. 2011]; *Calloway v. Wells*, 79 AD3d 786, 787 [2nd Dept. 2010]), but rather, was an affirmatively noticed motion made within a relatively short period after the 120-day period expired.

While certain other factors may weigh less favorably in support of the plaintiff's application (*see*, *Bumpus v. New York City Transit Authority*, *supra*, 66 AD3d at 36), the court in its discretion finds that the evidence, when viewed in its totality, establishes the plaintiff's entitlement to the requested extension (*e.g.*, *Moss v Bathurst*, *supra*, 87 AD3d at 1374; *Cooper v. New York City Bd. of Educ.*, *supra*, 55 AD3d 526, 527; *Pandolfi v Langer*, *supra*).

Accordingly, it is

ORDERED that the motion by the plaintiff Lori G. Teman, as Executrix of the Estate of Kenneth I. Teman, deceased, and Lori G. Teman, individually, is **granted to the extent** that the branch thereof pursuant to CPLR 306-b, which is for additional time to re-serve the defendant Dr. Hanlon is granted and the time to serve said defendant is extended by 120 days from the date hereof, and the motion is otherwise denied, and it is further

ORDERED that the cross -motion by the defendant Christopher Hanlon, M.D., for an order dismissing the complaint insofar as interposed against him, is **denied**.

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The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 27. 2011

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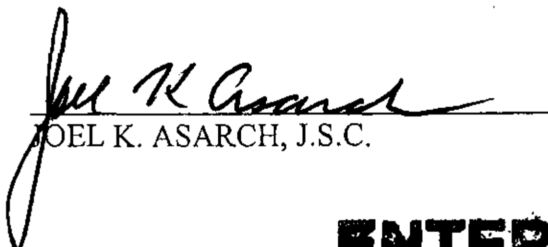

JOEL K. ASARCH, J.S.C.

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ENTERED
JAN 05 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE