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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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DAI MANG KIM,

Plaintiff(s),

-against-

HWAK YUNG KIM, MARION NEIDKOWSKI and NICCFRAN, INC.,

Defendant(s).

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Index No. 1818/11

Motion Submitted: 9/1/11
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants Neidkowski and Niccfran, Inc. ("defendants") move this Court for an Order dismissing the complaint pursuant to CPLR § 3211 (a)(5) and (a)(8).

Plaintiff cross-moves for an Order extending the time for service of the summons and complaint upon defendants Neidkowski and Niccfran, Inc.

This personal injury action arises as the result of a motor vehicle accident that occurred on June 9, 2007.

The complaint was originally filed in Queens County on May 17, 2010.

Issue was joined by service of defendants' answer on June 15, 2010. In their combined answer, defendants assert, *inter alia*, the affirmative defenses of lack of jurisdiction due to improper service, and the expiration of the statute of limitations. Thus, defendants have not waived these grounds for dismissal (***CPLR § 3211 [e]***).

On September 23, 2010 the action was transferred to Nassau County. Prior to the transfer, however, defendants moved to dismiss the complaint pursuant to CPLR § 3211(a)(5) and (a)(8). Their motion was denied in Queens County, without prejudice to renewal before this Court (Butler, J.).

A request for judicial intervention and a preliminary conference was served on all parties by defendant Kim on May 25, 2011.

Defendants served the instant renewed motion to dismiss on June 13, 2011. Plaintiff served his cross-motion for leave to extend the time for service on July 25, 2011. Plaintiff never filed a motion for leave to extend the time for service of the summons and complaint with the Queens County Clerk.[1]

Defendants have provided a copy of the affidavit of service upon defendant Neidkowski indicating service made pursuant to CPLR § 308 (4), on June 1, 2010. It is undisputed by plaintiff that plaintiff's counsel attempted to serve defendant Neidkowski on June 1, 2010 by affixing a true copy of the summons and complaint to the door of defendant's residence, without setting forth any prior attempts at service upon Neidkowski. Plaintiff apparently realized the deficiency of this attempt at service, and "a duplicate set of papers was given to a professional process service to complete service" (Affirmation in support of cross-motion, p. 4).

The Court finds that plaintiff's June 1, 2010 attempt at service upon defendant Neidkowski was undoubtedly insufficient to confer this Court with jurisdiction over her person.

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[1]Plaintiff states that his cross-motion to extend was not filed because "Justice Denis J. Butler advised counsel that defendants' motion to dismiss would be rendered moot by his granting of defendant Kim's unopposed motion to change venue." Justice Butler's Decision and Order do not refer to plaintiff's cross-motion.

Defendant Niccfran, Inc. contends that it was never served with process. In his cross-motion, plaintiff includes an affidavit of non-service related to the corporate defendant.[2] According to the process server, he went to the address listed on the New York State Department of State, Division of Corporations website as the address to which process would be mailed by the Secretary of State, but could find no listing for defendant Niccfran, Inc. in the building's directory. Plaintiff never served New York's Secretary of State. Thus, the Court finds that the corporate defendant has never been served in this action.

According to plaintiff's papers submitted in support of the cross-motion, service upon defendant Neidkowski was finally made on September 15, 2010, by leaving a copy of the summons and complaint with a person of suitable age and discretion at defendant's residence, who identified herself to the process server as "Gina Marie Doe." Plaintiff's counsel concedes that the service made on September 15, 2010 occurred on the 121st day after the filing of the summons and complaint.[3]

The statute of limitations to commence this personal injury action arising from a motor vehicle accident is three years (***CPLR § 214 [5]***). This action was timely commenced by filing on May 17, 2010, which preceded the expiration of the statute of limitations on or about June 8, 2010.

Nonetheless, CPLR § 306-b requires service to be made within one hundred twenty days after the filing of the summons and complaint. An extension of time for service is a matter within the court's discretion, and CPLR § 306-b provides two separate standards by which to measure an application for an extension of time to serve (***Leader v. Maroney, Ponzini & Spencer***, 97 N.Y.2d 95, 104, 761 N.E.2d 1018, 736 N.Y.S.2d 291 [2001]). "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 § 306-b***).

The Court recognizes that, although a CPLR § 306-b dismissal is without prejudice, commencement of a new action may be impossible if the statute of limitations has expired, as it has in this case.

Plaintiff's failure to serve the Secretary of State with regard to defendant Niccfran,

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[2]The Court notes that the "affidavit" is not signed by the notary, which is not necessarily a fatal defect (***Carter v. Grenadier Realty***, 83 A.D.3d 640, 922 N.Y.S.2d 86 [2d Dept., 2011]), but it is also undated. Thus, it is not known when the affidavit was sworn to by the process server.

[3]The notary also failed to sign this affidavit of service dated September 20, 2010.

Inc. demonstrates a lack of diligence on his part. Thus, no good cause has been shown by plaintiff for his failure to serve Niccfran, Inc., and an extension of time to serve defendant Niccfran, Inc. is not warranted upon this ground.

As to defendant Neidkowski, plaintiff's first attempt at service was admittedly insufficient. Notwithstanding that the statute of limitations was set to expire seven days from the date of that attempt at service, plaintiff waited until September 15, 2010 to serve Neidkowski. Plaintiff offers no explanation as to why Niedkowski was not served within the statute of limitations period, nor does plaintiff detail any diligent efforts on his part to effect service prior to September 15, 2010.

Furthermore, plaintiff admits that his second attempt at service was made on the 121st day, outside the time limit of CPLR § 306-b, albeit by one day. Yet, plaintiff offers no explanation for violation of the statute, except to state that the process server was told that Niedkowski had moved. Plaintiff offers a Department of Motor Vehicles printout confirming Niedkowski's address. Plaintiff's explanation is unavailing and does not constitute good cause. Plaintiff's efforts at service were apparently first made more than three months after the first deficient attempt at service, and after the statute of limitations had expired. The Department of Motor Vehicles printout is dated September 15, 2010. Thus, it appears to this Court that plaintiff failed to make any efforts to attempt service upon Niedkowski at any time within the 120-day statutory period, i.e., later in June, July, or August 2010.

Accordingly, an extension of time to serve defendant Niedkowski is not warranted upon the ground of good cause shown.

Upon considering if an extension to serve is warranted in the interest of justice, "a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties [is required]. 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" (***Leader, supra*** at 105).

Here, plaintiff failed to seek an extension of time to serve defendants until after defendants' motion to dismiss was made. Plaintiff's claim that he previously served the motion upon defendants is unpersuasive. There is no affidavit of service/mailing presented, and plaintiff admits that he did not file the motion with the Queens County Clerk. Plaintiff also attempts to deflect blame upon the court system for his delay in making a motion

seeking leave for an extension of time to serve by referring to "a long delay in these proceedings to accommodate transfer of the file from Queens County to Nassau County."

The fact of the matter remains that plaintiff did not make a motion before this Court for an extension of time to serve defendants until July 25, 2011, more than one month after defendants moved to dismiss the complaint. Moreover, plaintiff was aware that defendants were going to renew their dismissal motion, given the fact that they previously filed the identical dismissal motion in Queens County, which was denied with leave to renew.

The fact that defendants interposed an answer in this action does not serve as an excuse for late service, but is one factor to be considered. Plaintiff's admittedly insufficient first attempt at service, his failure to promptly rectify that error, his lack of diligence evidenced by his failure to attempt to serve defendants within the 120-day period, his failure to make the motion for an extension of time in Queens County, and his failure to promptly make the motion before this Court constitute a pattern of an extreme lack of diligence, and does not warrant an extension of time in the interest of justice (***Valentin v. Zaltsman***, 39 A.D.3d 852, 835 N.Y.S.2d 298 [2d Dept., 2007]).

Moreover, there is a lack of probative evidence offered as to the claim's merit. Plaintiff's Affidavit of Merit states in conclusory fashion that he was caused to sustain serious and severe injuries as a result of the subject accident, with no evidence supporting his claim that he underwent "arthroscopic surgery."

Based on the foregoing, plaintiff's cross-motion for an extension of time for service of the summons and complaint upon defendants Neidkowski and Niccfran, Inc. is denied (***Johnson v. Concourse Village, Inc.***, 69 A.D.3d 410, 892 N.Y.S.2d 358 (1st Dept., 2010); ***Ambrosio v. Simonovsky***, 62 A.D.3d 634, 878 N.Y.S.2d 191 (2d Dept., 2009); ***Riccio v. Ghulam***, 29 A.D.3d 558, 815 N.Y.S.2d 125 [2d Dept., 2006]).

Defendants' motion to dismiss the complaint is granted, as the statute of limitations has expired, and the Court has not acquired jurisdiction of the defendants due to plaintiff's improper service of the summons and complaint.

The foregoing constitutes the Order of this Court.

Dated: December 6, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
DEC 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE