

Raymond v Elfar

2015 NY Slip Op 32830(U)

November 19, 2015

Supreme Court, Sullivan County

Docket Number: 2569-2014

Judge: Mark M. Meddaugh

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At a term of the Supreme Court of the
State of New York, held in and for the
County of Sullivan, at Monticello,
New York, on August 28, 2015

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

-----X
DENNIS RAYMOND and EVELYN RAYMOND,

Plaintiffs,

-against-

**DECISION/ORDER
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RJI # 52-36521-2015**

**ABDUL ELFAR, M.D., CATSKILL REGIONAL
MEDICAL CENTER, LINDA THOMPSON, N.P.,
FERNDALE ADULT HEALTH, N.P. PLLC, and
SULLIVAN EMERGENCY SERVICES, P.C.,**

Defendants.

-----X
**Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court**

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MEDDAUGH, J.:

The Defendant, Abdul Elfar, M.D., has moved for an Order, pursuant to CPLR 3211(a)(8)(e), dismissing the Plaintiff's case on the grounds that the Court has not obtained personal jurisdiction over him.

The action was commenced on November 3, 2014, with the filing of the Summons and Complaint at the Sullivan County Clerk's Office. The Plaintiff filed an Affidavit of Service indicating the service was effected upon Dr. Elfar on November 14, 2014, by serving a person of suitable and age and discretion (CPLR §308(2)) at the Catskill Regional Medical Center (CRMC), and thereafter mailing a copy of same to the Defendant at the address for the hospital.

The Defendant served an answer, on June 12, 2015, with an affirmative defense asserting that personal jurisdiction had not been obtained over the Defendant. It is argued, in support of the instant motion, that the Catskill Regional Medical Center was not Dr. Elfar's "actual place of business" at the time that service was made. In Dr. Elfar's affidavit he indicates that he worked at CRMC, as an employee of Sullivan Emergency Services, P.C., until April of 2014, when he left that employment. On September 7, 2014, he entered into a written employment agreement with a practice in the State of Connecticut, Sharon Emergency Medicine, P.C., and his employment with this new practice continued through November 14, 2015, the date on which the Plaintiff attempted to serve him at CRMC.

Therefore it is argued that the Plaintiff failed to serve Dr. Elfar at his "actual place of business" in accordance with CPLR 308(2), and that personal jurisdiction has not been obtained

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over the Defendant.

In response, the Plaintiff cross-moved for an order granting the following relief: (1) deeming that the service upon Dr. Elfar on November 14, 2014 to be sufficient service of process; (2) dismissing the affirmative defense of lack of personal jurisdiction; (3) to enlarge Plaintiff's time to effect service pursuant to CPLR §306-b, in the event that the November 14, 2014 service is deemed insufficient; (4) to direct Dr. Elfar to reveal his residence address, in the event that the November 14, 2014 service is deemed insufficient; and (5) to schedule a hearing on the issue of whether the Defendant must reimburse the Plaintiffs pursuant to CPLR 312-a(f) in the event that the November 14, 2014 service is deemed insufficient.

The Plaintiffs indicate that their verified complaint asserts a cause of action for medical malpractice allegedly committed by Dr. Elfar on January 4, 2014, when he treated the Plaintiff, Dennis Raymond, at the CRMC Emergency Department. It is alleged that the Defendant failed to notify the Plaintiff and his primary physician of the results of the Plaintiff's blood culture which revealed gram positive cocci and that, as a result, the Plaintiff was not properly or timely treated and suffered a stroke.

Plaintiffs' counsel indicated that the summons and complaint were also mailed to the Defendant at the address for CRMC on November 11, 2014, with a request pursuant to CPLR §312-a that the Defendant acknowledge service to avoid being liable to the Plaintiffs for further process costs.

It is further asserted that, on November 14, 2014, the summons and complaint were delivered to an administrative secretary at CRMC, who accepted service without indicating that the Defendant was no longer employed by Sullivan Emergency Services, P.C.. The summons and complaint were then mailed to the Defendant, in accordance with CPLR §308(2), to the address

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for CRMC.

The Plaintiffs assert that, until the instant motion was made, they were never informed that Dr. Elfar had left his employment with Sullivan Emergency Services, P.C. and was working at a hospital outside of New York State. As of the date of the affirmation of Plaintiffs' counsel in support of the cross-motion, the Plaintiffs had not yet been successful in serving Dr. Elfar, and counsel asserts that Dr. Elfar was attempting to evade service.

It is further asserted by Plaintiffs' counsel that she requested that Defendant's counsel accept service, and she warned that she would seek a judgment pursuant to CPLR §312-a(f) for costs if she were forced to serve the Defendant by other means. Counsel for the Defendant declined to accept service, asserting that the attempted service was not properly made pursuant to CPLR §312-a.

The Plaintiffs ask, as alternative relief, that their time to serve the Defendant be extended pursuant to CPLR §306-b, if the Court finds that service of process has not been timely effected upon Dr. Elfar. In support of this request, the Plaintiffs cites the following factors for the Court to consider in making its determination: that the Statute of Limitations has not yet expired; that service was made within the 120-day period provided for in CPLR §306-b, even if such service is found to be defective; that the Defendant received actual notice of the claim and/or action; that the Plaintiffs have continued to attempt to effect service after learning of the Defendant's challenge to jurisdiction; that the Defendant cannot show prejudice; and that the Plaintiffs have proceeded diligently and in good faith, and have established good cause to extend their time to serve process.

The Plaintiffs also ask that Dr. Elfar be directed to reveal his current home address in order that they can effect service upon him at that address.

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In reply, Defendant's counsel asserts that the Plaintiff has not set forth any competent evidence to rebut Dr. Elfar's assertion that CRMC was not his actual place of business on November 14, 2015.

It is also asserted that Dr. Elfar never received notice of the lawsuit directly from the Plaintiffs, and he only learned of it from his counsel, who also represents the co-Defendant, Sullivan Emergency Services, P.C., and that actual notice is not sufficient in any event to obtain personal jurisdiction in the absence of proper service.

The Plaintiffs' request for a traverse hearing is also opposed by the Defendant, on the grounds that such relief is not appropriate where the Plaintiff has failed to make a prima facie showing of proper service.

The Defendant's counsel has also argued that jurisdiction has not been obtained pursuant to CPLR §312-a, as there is no proof that there was a mailing to a proper address at which the Defendant receives mail, nor is there any acknowledgment of service from Dr. Elfar. It is further argued that the Defendant is not liable for the cost of alternative service without strict compliance with the requirements of CPLR §312-a.

In opposition to the Plaintiffs' application to extend the time to effectuate service pursuant to CPLR §306-b, the Defendant argues that the Plaintiffs have failed to establish the requisite "good cause" or "the interest of justice." It is argued that the Plaintiffs have failed to demonstrate the meritorious nature of the action against Dr. Elfar, in that the results of the blood culture results were not available until after Dr. Elfar had gone off duty, and, therefore, he cannot be held responsible for failing to act upon the results of that test.

CONCLUSIONS OF LAW

CPLR § 308(2) permits personal service on a natural person by delivering the summons

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within the state to a person of suitable age and discretion at the “actual place of business” of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner.

In the case at bar, the Defendant has presented proof that he was no longer employed at the Catskill Regional Medical Center on November 14, 2014, the date on which service was made upon a person of suitable age and discretion at the hospital. The Affidavit of Service indicates that the required mailing was also sent to the Defendant at the address for the hospital.

Section 308(6) of the CPLR provides that an actual place of business “shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business” (*see, e.g., Vid v. Kaufman*, 282 A.D.2d 739, 740, 724 N.Y.S.2d 756, 757 [2 Dept., 2001] in which service was upheld where service was effected upon a person of suitable age and discretion at a retired physician’s former practice location, where the physician’s name appeared on the lobby directory and on the door to the medical practice, the officer manager represented that the physician was busy and that she would accept service, and she then provided the process server with a business card for the practice bearing the physician’s name).

The Plaintiff in this case at bar has attempted to rely on an internet listing from www.vitals.com, which indicates that Dr. Elfar is affiliated with Catskill Regional Medical Center, to establish that the hospital can be considered as Dr. Elfar’s actual place of business for purposes of the CPLR §308(2). But the Defendant’s counsel has asserted that this listing was not generated by Dr. Elfar, and that the contents of the listing makes a request that the doctor claim the profile contained thereon.

The Court finds, based on the foregoing, that this internet listing does not establish that the Defendant has held out the hospital as his place of business, as of the date of service.

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In Pierce v. Vill. of Horseheads Police Dept., 107 A.D.3d 1354, 970 N.Y.S.2d 95 [3 Dept., 2013], the Court held that, because service is necessary to obtain personal jurisdiction over a defendant, strict compliance with the statutory methods of service is required. The Third Department also held, in that case, that service upon a person of suitable age and discretion at a Defendant's former place of employment is ineffective to confer personal jurisdiction (*id.* at p. 1356, *see also* Balendran by Balendran v. N. Shore Med. Grp., P.C., 251 A.D.2d 522, 674 N.Y.S.2d 724 [2 Dept., 1998]; Maloney v. Braeside Apartments Co., 193 A.D.2d 1112, 598 N.Y.S.2d 640 [4 Dept., 1993]; Cont'l Hosts. Ltd. v. Levine, 170 A.D.2d 430, 565 N.Y.S.2d 222 [2 Dept., 1991]).

Accordingly, the Court finds that, where as here, the Defendant has presented un-refuted proof that he had not been employed at the Catskill Regional Medical Center for at least six months prior to November 14, 2014, the date on which service was made upon a person of suitable age and discretion, the Plaintiff has failed to sustain its burden of demonstrating the service was proper (Balendran by Balendran v. N. Shore Med. Grp., P.C., *supra.*). It has also been held that this burden is not satisfied by the process server's reliance on a representation, by a person of suitable age and discretion at the Defendant's former place of employment, that she was authorized to accept service (Cont'l Hosts. Ltd. v. Levine, *supra.*), or as asserted in this case, that the secretary at CRMC did not offer any indication that Dr. Elfar no longer worked there.

Therefore, the Court finds that the service upon a person of suitable age and discretion at the Catskill Regional Medical Center is insufficient to confer personal jurisdiction over the Defendant, Abdul Elfar, MD.

The Plaintiffs have also asked, as alternative relief, that their time to serve the Defendant be extended pursuant to CPLR §306-b, which section permits the Court, in an exercise of

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discretion, to extend the time for service “upon good cause shown or in the interest of justice.”

In the seminal case of Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 104, 736 N.Y.S.2d 291 [2001], the Court of Appeals observed that “good cause” and the “interest of justice” are two separate and independent statutory standards. To establish good cause for an extension, a Plaintiff must demonstrate reasonable diligence in attempting service (*id.* at p. 106). The interests 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 [3d Dept., 2005]), as it permits the Court to balance a number of competing interests, including “diligence, or lack thereof, . . . 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 v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 105–106, 736 N.Y.S.2d 291 [2001]).

There are, however, a number of cases in which the Plaintiff’s time to serve a summons and complaint was extended, pursuant to CPLR §306-b, where the service was timely made within the 120–day period, but was subsequently found to have been defective, in which the Courts did not specify whether the extension was granted for good cause shown or in the interests of justice (Lee v. Corso, 300 A.D.2d 385, 750 N.Y.S.2d 781 [2 Dept., 2002]; Citron v. Schlossberg, 282 A.D.2d 642, 723 N.Y.S.2d 712 [2 Dept. 2001]); Murphy v. Hoppenstein, 279 A.D.2d 410, 410, 720 N.Y.S.2d 62 [1 Dept., 2001]; Gurevitch v. Goodman, 269 A.D.2d 355, 702 N.Y.S.2d 634, 636 [2 Dept., 2000]; *see also* Stryker v. Stelmak, 69 A.D.3d 454, 892 N.Y.S.2d 102 (1 Dept., 2010); which appears to have granted on a good cause basis).

In the case at bar, the Plaintiff attempted to promptly¹ serve the Defendant, by serving a

¹Service was made on November 14, 2014, within 11 days of the commencement of the action.

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person of suitable age and discretion at Catskill Regional Medical Center, where the Defendant was working at the time the alleged malpractice occurred. The Plaintiffs assert that they were not notified that the service was defective until the Defendant moved to dismiss, and the Plaintiffs promptly cross-moved to extend the time to effect service.²

Therefore, the Court finds that the Plaintiffs acted diligently to effect service, even though the service is now found to be defective. The Court also finds that the Plaintiff promptly requested an extension once the defect in service was revealed, and that there is no demonstrable prejudice to defendant (*Dujany v. Gould*, 63 A.D.3d 1496, 882 N.Y.S.2d 343 [3 Dept., 2009]).

The Court also finds that the Plaintiffs failed to provide evidence of the merits of their claim, as the complaint was verified by their attorney, and the motion was not supported with an affidavit from a person with personal knowledge of the facts (*see, Vidal v. 452 Wyckoff Corp.*, 131 A.D.3d 600, 601, 15 N.Y.S.3d 175, 177 [2 Dept., 2015]; *Hine v. Bambara*, 66 A.D.3d 1192, 1193, 889 N.Y.S.2d 685, 687 [3 Dept., 2009]; *Rosenzweig v. 600 N. St., LLC*, 35 A.D.3d 705, 826 N.Y.S.2d 680 [2 Dept., 2006]; *Amodeo v. Gellert & Quartararo, P.C.*, 26 A.D.3d 705, 810 N.Y.S.2d 246, [3 Dept., 2006]), which is a significant factor (*see, Pierce v. Vill. of Horseheads Police Dept., supra.*)³

The Court has also considered the Statute of Limitations in this case has not expired and, therefore, if the motion to dismiss were granted, the Plaintiffs could merely re-commence an action against Dr. Elfar, which could then result in further motion practice to consolidate the two

²Although the Defendant's answer, dated June 12, 2014, contained the defense of lack of personal jurisdiction, the basis for this defense was not set forth, and the Plaintiffs' claim that it was not until the Defendant's motion to dismiss that they were notified as to the factual basis for the claim of a defect in service.

³The Court also notes, however, that the Defendant's argument that the Plaintiffs failed to establish the merits of their claim was supported only by the affidavit of Defendant's counsel, rather than from a person with personal knowledge of the facts

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cases.

The Court notes that, in making a determination under the “interest of justice standard” under CPLR §306-b, no one factor is determinative (*Leader v. Maroney, Ponzini & Spencer, supra* at p. 106), and the Court finds that a balancing of all the factors supports a determination that the Plaintiffs be granted an extension of time to re-serve the summons and complaint on Dr. Elfar.

The Court notes that is in receipt of an Affidavit of Personal Service upon the Defendant, Abdul Elfar, M.D., which indicates that the amended summons and amended verified complaint was personally delivered on him on August 31, 2015 at an address located in Fishkill, New York⁴. The Affidavit of service appears to be an original and it was time-stamped by the Office of Court Clerk in Sullivan County on September 24, 2015. The Court was not provided with any indication that a copy of the affidavit was provided to the Defendant’s counsel. The Plaintiffs did request in their motion papers, however, that if service is effected upon the Defendant while this motion was pending, that the Court deem such service effective nunc pro tunc.

Therefore, the Court shall grant the Plaintiffs’ motion to extend their time to serve the summons and complaint upon Dr. Elfar, which service shall be completed within 120 days of the date of service of this decision and order with notice of entry thereon on Plaintiff’s counsel. If the amended summons and amended complaint were personally delivered to the Defendant, Abdul Elfar, on the 31st day of August, 2015, then such service shall be deemed to be in

⁴The Court was also provided with an Affidavit of Service, indicating that the summons and complaint was personally delivered to the Defendant at the Emergency Room of Sharon Hospital in Sharon, Connecticut. The Court notes that the affidavit does not refer to the Amended Summons and Amended Complaint, nor does it appear that the affidavit meets the requirements of CPLR 306.

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compliance with the terms of this order.

The Defendant's motion to dismiss is denied, with leave granted to renew the application if the Plaintiff fails to effect service in compliance herewith.

The Court shall deny the Plaintiffs' request for Dr. Elfar's home address, as they have failed to establish, under the circumstances of this case, that they are entitled to demand such information before obtaining personal jurisdiction over the Defendant.

The Plaintiffs have also requested that the Defendant be required to reimburse them, pursuant to CPLR 312-a(f), for the expense for follow-up service on the Defendant. The Defendant has denied that he received the summons and complaint which the Plaintiffs mailed to his former place of employment, and it has been found herein to be undisputed that the Defendant was no longer working at CRMC at the time the mailings were sent to the Defendant at the hospital's address. The Court finds that, under these circumstances, where the summons and complaint was mailed to the Defendant's former business address and the Defendant has denied receiving same, the Plaintiffs are not entitled to be reimbursed for the costs of followup service.

WHEREFORE, based on the foregoing, it is hereby

ORDERED that the Plaintiffs' motion to extend their time to serve the summons and complaint upon Dr. Elfar is granted, which service shall be completed within 120 days of the date of service of this decision and order with notice of entry thereon on Plaintiffs' counsel; and it is further

ORDERED that, if the summons and complaint were personally delivered to the Defendant, Abdul Elfar, on the 23rd day of August, 2015, the Plaintiff may establish such service by submitting an affidavit which complies with the requirements of CPLR 306 (*see also*, CPLR

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305(c)), which service shall then be deemed to be in compliance with the terms of this order; and it is further

ORDERED that the Defendant's motion to dismiss is denied, with leave granted to renew the application if the Plaintiff fails to effect service in compliance herewith; and it is further

ORDERED that the Plaintiffs' request for Dr. Elfar's home address is denied; and it is further

ORDERED that the Plaintiffs' request that the Defendant be required to reimburse them, pursuant to CPLR 312-a(f), for the expense for follow-up service on the Defendant is denied.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: November 19, 2015
Monticello, New York


ORIGINAL

ENTER: Mark M. Meddaugh
HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated July 29, 2015
2. Affirmation of Robert R. Sappe, Esq., dated July 29, 2015
3. Affidavit of Abdul Elfar, M.D., sworn to July 23, 2015
4. Notice of Cross-Motion, dated August 20, 2015
5. Affirmation of Younie J. Choi, Esq., dated August 20, 2015
6. Reply Affirmation of Alejandra R. Gil, Esq., dated August 25, 2015