

Rosenzweig v City of New York
2017 NY Slip Op 31971(U)
September 18, 2017
Supreme Court, New York County
Docket Number: 155390/2016
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C.

PART 5

MARY ROSENZWEIG

Plaintiff

INDEX NO. 155390/2016

MOT. DATE August 8, 2017

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY and MANHATTAN
AND BRONX SURFACE TRANSIT OPERATING AUTHORITY
Defendants

MOT. SEQ. NO. 001

The following papers were read on this motion to Re-Serve Summons & Complaint

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through F

ECFS DOC No(s). 1-11

Notice of Cross-Motion/Answering Affidavits — Exhibits A through G; 1-3

ECFS DOC No(s). 1-15; 1-8

Replying Affidavits

Exhibits A through F

ECFS DOC No(s). 1-29

In Motion Sequence No. 001 plaintiff moves by Order to Show Cause, pursuant to CPLR §306-b, for leave to re-serve all defendants with the summons and complaint. Defendant, The City of New York, (“City”) cross-moves for an order pursuant to CPLR §3211(a)(8) dismissing Plaintiff’s complaint for failure to properly serve a summons and complaint pursuant to CPLR §306-b; and/or for an order pursuant to CPLR §3211(a)(8) dismissing Plaintiff’s complaint as against the City in that this Court lacks personal jurisdiction over the City; and in opposition to Plaintiff’s Order to Show Cause to extend her time to serve process upon defendants under CPLR §306-b. Defendants, New York City Transit Authority, MTA Bus Company, Metropolitan Transportation Authority and Manhattan and Bronx Surface Transit Operating Authority, (“MTA”), oppose plaintiff’s motion. The motions have been consolidated for decision.

FACTUAL BACKGROUND and CONTENTIONS

This is a personal injury action to recover damages allegedly sustained by plaintiff on June 22, 2015, when she tripped and fell on allegedly defective and misplaced cobblestones surrounding a sidewalk/bus stop tree bed.

On or about September 8, 2015, plaintiff served a Notice of Claim upon the City; and on or about September 18, 2015 plaintiff served a Notice of Claim upon MTA. (Yanover Aff. Ex. B). On December 11, 2015, plaintiff appeared for an examination pursuant to General Municipal Law §50-h (Yanover Aff. Ex. C). Thereafter, plaintiff commenced this action by purchasing an index number and filing a Summons and Complaint with the New York County Clerk’s Office on June 27, 2016. (Mazzalunga Aff. Ex. A). Two days later, on June 29, 2016, plaintiff retained a licensed process server to complete service of the summons and complaint upon all defendants and received confirmation, *vis-à-vis*, affidavits of service, that the pleadings were timely served upon the City on July 22, 2016 and upon MTA on September 20, 2016. Plaintiff also received supporting GPS photographs detailing service of process, which confirmed that service was effected within the statute of limitations, one hundred and twenty days after the commencement of the action. (Yanover Aff., Exs. D and E). Neither the City nor MTA joined issue or otherwise appeared in this action and all defendants maintain that they have no record of plaintiff’s service of process as outlined in the Affidavits of Service.

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After not receiving an Answer from the City, plaintiff contacted Corporation Counsel to inquire as to the status of its Answer. According to plaintiff, she confirmed on January 6, 2017 that no Answer would be forthcoming from the City and that the City believed that no proper service was effectuated. Given the fact that the statute of limitations for plaintiff's claim had now expired, plaintiff filed the instant Order to Show Cause on January 20, 2017, pursuant to CPLR §306-b, seeking leave to re-serve all defendants. In support of her motion, plaintiff contends that she reasonably relied on the professional and licensed process server she had retained to serve all defendants within the applicable statute of limitations. Plaintiff argues that she had no reason to believe that service was not properly effected given the Affidavits of Service and supporting GPS photographs detailing service, and that upon learning that the City had no record of service, she immediately sought leave for an extension of time to re-serve defendants to ensure that this action would proceed without any type of "service cloud" which may result in dismissal.

The City is seeking dismissal of plaintiff's action on jurisdictional grounds, claiming that this court lacks personal jurisdiction over the City, because plaintiff has failed to effectuate service of process in accordance with CPLR §306-b. In support of its cross motion, the City submits the Affidavit of Alexander Ly, who personally conducted a search of the pertinent City files, log books and computerized filing system and found that no summons or verified complaint was served by or on behalf of plaintiff. (Mazzalunga Aff. Ex. C). The City also submits the Affidavit of Madlyn Santana, whose name appears in plaintiff's Affidavit of Service, and who was purportedly personally served on July 22, 2016, by plaintiff's process server. According to Ms. Santana's Affidavit, on July 22, 2016, she was not present at 100 Church Street as the Affidavit of Service indicates, but rather, on that date, she was assigned to Law Department's 350 Jay Street location in Brooklyn, New York and therefore could not have accepted service as the Affidavit of Service indicates. (Mazzalunga Aff. Ex. D).

Based on the above noted Affidavits, the City contends that it has raised issues of fact with respect to service and argues that plaintiff has failed to establish "good cause" with respect to her attempt to effect proper service of process. Additionally, the City argues inasmuch as plaintiff makes no effort to defend the service allegedly performed by her process server and because plaintiff has not requested a traverse hearing to determine the sufficiency of the alleged service denoted in the Affidavit of Service, plaintiff "must be deemed to have waived any claim of diligent efforts at service." Moreover, the City argues that plaintiff failed to follow up with the City until January 6, 2017, even though the City's Answer was due on August 11, 2016, given the purported service date of July 22, 2016. As such, the City contends that plaintiff's conduct in delaying follow up for approximately five months, after the statute of limitations had expired, constitutes dilatory conduct that precludes a finding of "good cause" pursuant to CPLR §306-b. In addition, the City argues that plaintiff is also unable to demonstrate that she is entitled to an extension of time to re-serve under an "interest of justice" analysis.

MTA opposes plaintiff's motion seeking leave to re-serve all defendants, arguing that plaintiff has failed to demonstrate that she can satisfy the interest of justice standards set forth in CPLR §306-b and as such, MTA contends that plaintiff's motion must be denied. Specifically, MTA contends that it has no record of service of the summons and complaint and that plaintiff's Affidavit of Service is demonstrably false. Finally, MTA claims that plaintiff does not have a meritorious cause of action against it, as the location of plaintiff's accident was maintained and controlled by the City, not the MTA.

In opposing plaintiff's motion, MTA submits proof in the form of log entries for the date of purported service which show that Laverne Sterling, the woman identified in plaintiff's Affidavit of Service, was not even working the service desk at the time of the alleged service. Instead, the MTA log books indicate that the desk was being covered by Stephon Cambell (initials SEC) at the time the alleged service was made. (Fairley Aff in Opp., Exs. 1 and 2). As such, MTA argues that plaintiff's Affidavit of Service contains inaccurate information, acknowledging that whether the facial defects de-

tailed in the Affidavits of Service were the result of errors on the part of the process server, or fraud, is a matter between the process server and Plaintiff.

In response to the municipal defendants' arguments, plaintiff maintains that she reasonably relied on the Affidavits of Service provided by the licensed process server and made good faith efforts to follow up with the defendants to determine when the responsive pleadings would be forthcoming. Plaintiff's counsel explains his practice and procedure with respect to awaiting receipt of answers from municipal defendants, specifically, a diary system that was in place and the efforts made at follow up with Corporation Counsel's office; in addition, plaintiff's counsel contacted the process server and obtained the GPS tracking photographs which confirmed the date, time and location information contained within the Affidavits of Service. (Yanover Reply Aff., paragraphs 24-31). When plaintiff's counsel learned that the City was disputing service and that no answer would be served, within two weeks the instant motion was served and filed with the court. Plaintiff contends that the facts before the court merit an extension to reserve all defendants pursuant to CPLR §306-b.

LEGAL STANDARD and ANALYSIS

CPLR §306-b provides, in pertinent part, "Service of the summons and complaint, . . . shall be made within one hundred twenty days after the filing of the summons and complaint, If service is not made upon a defendant within the time period 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 authorizes an extension of time for service in two discrete situations: "upon good cause shown" or "in the interest of justice". *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106 (2001). The Court of Appeals has confirmed that the "good cause" and "interest of justice" prongs of the section constitute separate grounds for extensions, to be defined by separate criteria. *Id.* at 104. In applying fundamental principles of statutory construction, the Court in *Leader* noted that "it is clear that with the amendment to CPLR 306-b, the Legislature gave the courts two separate standards by which to measure an application for an extension of time to serve. The two are stated separately, joined by the word "or" (CPLR 306-b). They cannot be defined by use of the same criteria; otherwise, one would have been sufficient. The view that diligence is an across-the-board requirement . . . merges the two separate grounds for extension, because an exercise of reasonable diligence in attempting service would surely count as good cause" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C306-b:3, at 483; *see also*, Siegel, NY Prac § 63, at 86-87 [3d ed] [a court may allow extension even when no good cause shown])."

The Court went on to explain, "Our analysis is buttressed by an examination of the legislative history behind the amendment [to CPLR 306-b]. The New York State Bar Associations Commercial and Federal Litigation Section Committee on Civil Practice Law and Rules characterized the interest of justice standard as more flexible than the good cause standard, specifically noting that [s]ince the term "good cause" does not include conduct usually characterized as "law office failure," proposed CPLR 306-b provides for an additional and broader standard, i.e., the "interest of justice," to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant". *Id.* at 104-105.

A "good cause" extension requires a showing of reasonable diligence in attempting to effect service upon a defendant. Good cause has been found where "the plaintiff's failure to timely serve process is a result of circumstances beyond [its] control". *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 32 (2nd Dept. 2009) [noting difficulties of service with person in military or difficulties with service abroad through Hague Convention]; *Frank v Garcia*, 84 AD3d 654 (1st Dept. 2011) [failure to timely serve was

result of circumstances beyond plaintiff's control and extension granted under both good cause and interest of justice]. Good cause focusses on plaintiff's diligence in attempting to serve defendants and its reasons for not effecting service despite that diligence. The decision to allow additional time for service of process is a matter within the court's discretion. *Leader v Maroney, Ponzi & Spencer*, 97 NY2d at 101.

As noted by the Court of Appeals, good cause requires a "threshold" showing that plaintiff made reasonably diligent efforts to make timely service, (Id. at 104), while the interest of justice standard takes into account several factors to determine whether a party should be granted additional time to effect service, including diligence in attempting service, the parties' competing interests, the expiration of statutes of limitations, the merit of the case, the length of time service was delayed, any prejudice to the defendant and the promptness of the request for an extension of time. Id. at 105-106. See also, *Hernandez v Abdul-Salaam*, 93 AD3d 522 (1st Dept. 2012); *Frank v Garcia*, 84 AD3d 654 (1st Dept. 2011); *Spath v Zack*, 36 AD3d 410 (1st Dept. 2007); *Lippett v Education Alliance*, 14 AD3d 430 (1st Dept. 2005).

The facts before the court demonstrate that within two days of commencing this action plaintiff retained a licensed, professional process server to serve the defendants in this action. The record demonstrates that through no fault of plaintiff or her counsel, the process server provided counsel with what turned out to be, given the proof submitted by defendants in opposition to plaintiff's motion, erroneous affidavits of service. Plaintiff has also demonstrated that reliance on a licensed process server providing affidavits of service and GPS tracking photographs, which purportedly confirmed the date, time and location information contained in the Affidavits of Service, was reasonable conduct under the circumstances and provides proof of plaintiff's diligence in attempting to timely serve defendants in this matter.

Plaintiff's diligence in attempting service on defendants is further supported by the fact that the persons identified in the Affidavits of Service, are admittedly persons designated by municipal defendants to receive service of process on their behalf. The record before this court demonstrates that plaintiff's conduct in attempting to serve defendants, falls squarely within the "good cause" analysis set forth in CPLR §306-b and the case law interpreting the statute. *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 (2001); *Frank v Garcia*, 84 AD3d 654 (1st Dept. 2011); *Solano v Mendez*, 114 AD3d 614 (1st Dept. 2014). Under the good cause analysis, plaintiff is entitled to more time to serve defendants as the record amply demonstrates that the failure to timely serve was the result of circumstances beyond plaintiff's control.

Plaintiff has also established that defendants' opposition is premised upon cases that are readily distinguishable from the facts of the instant case and as such, offer no support for the City's cross motion to dismiss plaintiff's complaint or MTA's opposition to plaintiff's request for an extension of time to re-serve all defendants. (see *Slate v Schiavon Constr. Co.*, 4 NY3d 816, (2005) [plaintiff showed "extreme lack of diligence", plaintiff provided the wrong address to the process server and there was a one-and-a-half-year delay after the statute of limitations had expired before defendant received actual notice of the action.]; *Hafkin v North Shore University Hospital*, 97 NY2d 95 (2001) [three years had elapsed before defendants were aware of the claim and plaintiff's application was submitted eight months beyond the expiration of the 120 day post filing service period].

Finally, given our courts' preference to decide matters on the merits, *Henneberry v Borstein*, 91 AD3d 493 (1st Dept. 2012), and given the fact that defendants have not demonstrated any prejudice in this matter, having received a timely notice of claim and having conducted an examination of plaintiff pursuant to General Municipal Law §50-h, plaintiff has adequately established "good cause" to extend her time to re-serve defendants in this matter. As noted by the plethora of case law interpreting CPLR §306-b, a "good cause" extension requires a showing of reasonable diligence in attempting to effect ser-

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vice of process. The record demonstrates that plaintiff timely commenced this action and within two days, sent the pleading to a licensed process server, was provided duly notarized and filed Affidavits of Service; within a reasonable amount of time, when she confirmed that the City would be contesting service and not filing an Answer, plaintiff filed the instant application seeking leave to re-serve the defendants within two weeks. This court, in its discretion, finds that plaintiff has demonstrated good cause for an extension to serve defendants in this matter.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's Order to Show Cause, motion sequence No. 001, seeking an extension to serve all defendants in this action pursuant to CPLR §306-b is hereby granted upon good cause and plaintiff's service of the Complaint upon Defendants the City of New York, New York City Transit Authority, MTA Bus Company, Metropolitan Transportation Authority and Manhattan and Bronx Surface Transit Operating Authority, is deemed timely, *nunc pro tunc*; and it is further

ORDERED that defendant City of New York's cross-motion, motion sequence No. 001, seeking to dismiss this action pursuant to CPLR§306-b and §3211(a)(8) is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 31, 2017 at 2:00 p.m. in the DCM Part, Room 103; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

SO ORDERED:

Dated: September 18, 2017

HON. W. FRANC PERRY, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE