

Ali v Stona
2017 NY Slip Op 32162(U)
October 13, 2017
Supreme Court, New York County
Docket Number: 805108/2017
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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WINSTON ALI AS EXECUTOR OF THE ESTATE OF
ZANIFA ALI,

Plaintiff,

Index No.
805108/2017

**DECISION and
ORDER**

- against -

Mot. Seq. 001

LURLINE P. STONA, HILLSIDE POLYMEDIC
DIAGNOSTIC & TREATMENT CENTER, INC.,
INTUITIVE SURGICAL, INC.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

On March 20, 2017, Plaintiff Winston Ali (“Winston”) commenced this medical malpractice action by summons and complaint on behalf of the estate of Zanifa Ali (“Zanifa”). Winston alleges that Defendants Lurline P. Stona (“Stona”), a nurse practitioner, and Hillside Polymedic Diagnostic & Treatment Center, Inc., (“Hillside”) departed from accepted standards of medical practice by failing to timely diagnose Zanifa’s ovarian cancer. Winston also claims that Defendant Intuitive Surgical Inc., (“Intuitive”) manufactured a defective productive (the “da Vinci device”) that resulted in Zanifa’s cardiopulmonary failure and death. Additionally, Winston alleges *inter alia* that Intuitive failed to provide warning of the risks associated with the da Vinci device. Intuitive and Hillside interposed their Answers on May 1, 2017 and May 31, 2017 respectively. Stona served and filed an Answer on May 31, 2017 wherein she plead an affirmative defense based on lack of personal jurisdiction. On June 19, 2017, Stona served and filed an amended answer that also plead an affirmative defense based on lack of personal jurisdiction.

Presently before the Court is Stona’s motion pursuant to CPLR 3211 (a) (8) and 308 (2) for an Order dismissing Winston’s complaint. Stona claims that Winston failed to acquire personal jurisdiction over her because Winston did not properly

serve process. In support, Stona submits Plaintiff's process server's affidavit wherein Samuel Berk avers that on May 10, 2017, he served a "SUITABLE AGE PERSON by delivering and leaving a true copy of the SUMMONS & COMPLAINT . . . with JOHN DOE, CO-WORKER at 187-30 HILLSIDE AVENUE, JAMACIA, NY 11432, the said premises being the respondent's place of WORK." (Stona's exhibit C) The affidavit further provides that the process server then mailed a true copy of the summons and complaint to "LURLINE P. STONA C/O HILLSIDE POLYMEDIC DIAGNOSTIC & TREATMENT CENTER INC. at the address of 187-30 HILLSIDE AVENUE, JAMACIA, NY 11432 . . ." (Stona's exhibit C) Stona additionally submits an affidavit wherein she states, "[M]y employment with Hillside ended in or around September of 2016 and I have not worked at that location since. Therefore, I was not employed nor did I otherwise work there on May 10, 2017, when the process server delivered and mailed the papers." (aff of Stona at 2)

Winston cross-moves pursuant to CPLR 3012 (d) and 306-b for an order extending Winston's time to serve Stona with the summons and complaint nunc pro tunc. Alternatively, Winston moves for an Order compelling Stona to accept a pleading untimely served upon a showing of reasonable excuse or default. Winston claims that he "contacted Hillside . . . on April 13, 2017 . . . and spoke to the receptionist . . . who confirmed . . . Stona's employment." (affirmation of Weitzman at 2) Additionally Winston claims that on Hillside's website, "Stona is currently listed . . . as a provider." (affirmation of Weitzman at 2) In support, Winston submits a screenshot of Hillside's website whereon it provides, "As a Family Nurse Practitioner at Hillside . . . [Stona] perform[s] all aspects of primary care . . ." (Winston's exhibit 2) Winston also argues that "the relevant statutes of limitations have now expired; if . . . Stona's Motion to Dismiss is granted, Plaintiff's . . . claims will be time-barred." (affirmation of Weitzman at 9) Winston further asserts *inter alia* that Stona's objection to improper service is waived under CPLR 3211 (e) because she did not file her notice of motion within 60 days after filing the pleading. (affirmation of Weitzman at 10)

Stona opposes Winston's cross-motion. She asserts that Winston has not demonstrated that he has a meritorious claim. She also argues that her motion to dismiss was timely under General Construction Law § 25-a because the 60th day fell on Sunday July 30, 2017 and therefore her time to file extended to the following Monday.

Timeliness of Motion to Dismiss

CPLR 3211 (a) (8) provides that, “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant . . .” However, “an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading.” (CPLR 3211 [e]) Should these sixty days end “on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day . . .” (General Construction Law § 25-a [1]) Additionally, “[a] party may amend his pleading once without leave of court within twenty days after its service . . .” (CPLR 3025 [a]) This pleading as of right “relates back to and speaks as of the time of the filing of the original pleading.” (*Iacovangelo v Shepherd*, 5 NY3d 184, [2005])

Service of Process

CPLR 308 (2) states,

“Personal service upon a natural person shall be made by . . . delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served . . .”

A process server’s affidavit constitutes *prima facie* evidence of proper service. (*Matter of Nazarian v Monaco Imports, Ltd.*, 255 AD2d 265 [1st Dept 1998].) However, a defendant’s “sworn, nonconclusory denial of service” is sufficient to dispute the veracity or content of the process server’s affidavit. (*NYCTL 199801 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004].)

CPLR 306-b Standard

CPLR 306-b provides that,

“Service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding . . . 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 the defendant, or upon good cause shown or in the interest of justice, extend the time for service.”

A “good cause” extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. (*Henneberry v. Borstein*, 91 A.D.3d 493, 496 [1st Dept 2012].) 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 A.D.3d 26, 32 [1st Dept 2009].) The “good cause” extension, however, does not include conduct that is considered to be “law office failure.” (*Henneberry*, 91 A.D.3d at 496.)

An extension “in the interest of justice” is broader and more flexible than a “good cause” extension and can include law office failures as long as there is no prejudice to the defendant. (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105 [2001] [“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”].) A court “may consider [plaintiff’s] diligence, or lack thereof, along with any other relevant factor . . . 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.” (*Henneberry*, 91 A.D.3d at 496, citing *Leader*, 97 N.Y.2d at 105-106.)

Accordingly, in *Lippett v Education Alliance* (14 AD3d 430, 431 [1st Dept 2005]), the First Department of the Appellate Division held that a cross motion for an extension of time to effect service pursuant to CPLR 306-b should be granted where: the action was timely commenced, plaintiff made a good faith attempt to serve defendant and defendant received actual notice of the claim within the 120-day period and before the expiration of the statute of limitations.

Discussion

Preliminarily, Stona's motion to dismiss is timely. In her Answer served and filed on May 31, 2017, Stona objected on the ground that this Court lacks personal jurisdiction over her. Within 20 days of May 31, 2017 and in accordance with CPLR 3025 (a), Stona amended her Answer as of right on June 19, 2017. Again, Stona raised the affirmative defense of lack of personal jurisdiction. This Amended Answer "related back to and speaks as of the time of the filing of the original pleading." (*Iacovangelo*, 5 NY3d at 187) Accordingly, Stona moved to dismiss this action within sixty days of May 31, 2017 when she served the Answer. However, this sixty day period ended on Sunday July 30, 2017 and therefore General Construction Law § 25-a permitted Stona to move on the next succeeding business day, Monday July 31, 2017. Because Stona served and filed this instant motion to dismiss on Monday July 31, 2017, she did not waive her objection that the summons and complaint were not properly served. (*see* CPLR 3211 [e])

The affidavit of Winston's process server Samuel Berk constitutes *prima facie* evidence of proper service in accordance with CPLR 308 (2). (*Nazarian*, 255 AD2d at 266) However, Stona's sworn affidavit wherein she states that she was not employed at Hillside on May 10, 2017 is a nonconclusory denial sufficient to dispute the veracity of Berk's affidavit. (*NYCTL*, 7 AD3d at 460)

Like the plaintiff in *Lippett v Education Alliance*, Winston's cross-motion for an extension of time to effect service pursuant to CPLR 306-b should be granted in the interest of justice. Winston timely commenced this action on March 20, 2017 within the relevant statute of limitations period. (*see Lippett*, 14 AD3d at 431) He made a good faith attempt to serve Stona in accordance with CPLR 308 (2) on May 10, 2017. (*see Lippett*, 14 AD3d at 431) Winston made diligent efforts to ascertain whether Stona was employed by Hillside by contacting Hillside and researching the care providers on its website. (*see Henneberry*, 91 A.D.3d at 496) Stona received actual notice of the claim within the 120-day period of March 20, 2017 as evidenced by her Answer interposed on May 31, 2017. (*see Lippett*, 14 AD3d at 431) Stona does not show how she would be prejudiced by an extension especially at this early juncture in the litigation. (*see Henneberry*, 91 A.D.3d at 496.) However, Winston asserts that at this time "the relevant statutes of limitations have now expired [and] if . . . Stona's Motion to Dismiss is granted, Plaintiff's . . . claims will be time-barred." (affirmation of Weitzman at 9)

Wherefore it is hereby,

ORDERED that Defendant Lurline P. Stona's motion pursuant to CPLR 3211 (a) (8) and 308 (2) for an Order dismissing Plaintiff Winston Ali's complaint as against Stona is denied without prejudice to renew should Winston Ali fail to effect service within 30 days of this Order's entry; and it is further

ORDERED that Plaintiff Winston Ali's cross-motion pursuant to CPLR 306-b for an order extending Winston's time to serve Defendant Lurline P. Stona with the summons and complaint is granted to the extent that Winston may serve Stona within 30 days of this Order's entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: OCTOBER 13, 2017


Eileen A. Rakover, J.S.C.