At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of June, 2017.

P R E S E N T:

HON. GLORIA M. DABIRI,
Justice.

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MINEL JOHNSON and ANSEL JOHNSON,

Plaintiffs,

- against -

BERNARD RIMPEL, UMESH MISHRA, JOSEPH DERGAN, SARINA CRANAGE, STACEY MARTINDALE, AMER HOMSI, DAVID SCHANER and THE BROOKLYN HOSPITAL MEDICAL CENTER,

Defendants.

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DECISION AND ORDER

Index No. 523101/16

Motion Seq. 1 & 2

The following papers numbered 1 to 9 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 4-5
Opposing Affidavits (Affirmations)	6-8 9
Reply Affidavits (Affirmations)	
Sur-Reply (Affirmation)	
Other Papers	

Upon the foregoing papers defendants Sarina Cranage, CRNA and David Schaner, M.D. seek an order pursuant to CPLR 3211(a)(8) dismissing the complaint against them for lack of personal jurisdiction due to improper service (MS #1). Plaintiffs cross-move for an order pursuant to CPLR 306-b extending their time to serve these defendants and pursuant to CPLR 308(5) authorizing alternative service and compelling counsel for Cranage and Schaner to provide plaintiffs with addresses at which his clients may be served, or permitting plaintiffs to serve Cranage and Schaner by service upon their counsel (MS #2).

BACKGROUND AND PARTIES' CONTENTIONS

On December 28, 2016, plaintiffs commenced this action in connection with medical services rendered by the defendants between March 24, 2014 and July 29, 2014. On February 1, 2017, a process server attempted service upon defendant Cranage pursuant to CPLR 308(2) by personally delivering the summons and complaint to an employee of North American Partners in Anesthesia LLP ("NAPA") and by mailing a copy of the summons and complaint to NAPA's address. On February 15, 2017, the process server attempted service upon defendant Schaner by the same means, to wit, personally delivering and mailing the summons and complaint to NAPA. On March 1, 2017, defendants Cranage and Schaner filed answers which included the affirmative defenses of improper service.

In support of their motion to dismiss defendants Cranage and Schaner provide the affidavit of Steven Weintraub, NAPA's Chief of Risk Management. Mr. Weintraub states that Cranage was no longer employed by NAPA as of August 22, 2014 and that Schaner was no longer employed by NAPA as of June 21, 2015. Thus, it is argued that NAPA was not their "actual place of business" (CPLR 308) at the time that service was attempted (*see Selmani v City of New York*, 100 AD3d 861 [2d Dept 2012]). In opposition, plaintiffs assert that they exercised due diligence, and offer the affidavits of the process server who avers that a NAPA employee who accepted the papers did not advise him that Cranage and Schaner were no longer employed by NAPA, and that the copies of the summons and complaint which he mailed to the defendants Cranage and Schaner at the NAPA address were not returned.

In opposition to the defendants' motion and in support of its cross-motion, plaintiffs argue that they should be granted additional time to serve defendants Cranage and Schaner because plaintiffs acted in good faith in believing that service had been properly made. Plaintiffs' counsel argues that the lateness of his cross-motion should be excused because, while the defendants' March 1, 2017 answers did assert the affirmative defense of lack of jurisdiction, the defendants failed to move to dismiss on this ground until after the statute of limitations had run.[1] In opposition, the defendants argue that the plaintiffs failed to timely address their defective service upon receipt of the defendants' answers and, instead, waited until after the defendants moved to dismiss. Plaintiffs further request that they be permitted to make alternative service upon the defendants pursuant to CPLR 308(5). In opposition, defendants argue that plaintiffs have not demonstrated that conventional service is impracticable.

DISCUSSION

CLPR 306-b permits the court to extend a plaintiff's time for service "upon good cause shown" or "in the interest of justice." "To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service" (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31 [2d Dept 2009], *citing Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105-06 [2001]). Alternatively, the "interest of justice standard" allows the court to 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

[1] Plaintiffs filed their cross-motion on April 27, 2017 – 57 days after the defendants' answers were filed, but only one day after the defendants moved to dismiss. April 27, 2017 was also the 120th day after commencement of the action, i.e., the deadline for service (CPLR 306-b).

action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to [the] defendant' " (*Thompson v City of New York*, 89 AD3d 1011, 1012 [2d Dept 2011], *citing Leader*, 97 N.Y.2d at 105-06). It is in the interest of justice to allow an extension where a timely attempt at service was made but was later found to be defective (*DiBuono v Abbey, LLC*, 71 AD3d 720 [2d Dept 2010]; *Chiaro v D'Angelo*, 7 AD3d 746 [2d Dept 2004]; *Earle v Valente*, 302 AD2d 353 [2d Dept 2003]). The courts commonly grant extensions of time for service to plaintiffs who did not request an extension until after the defendant has moved to dismiss (*e.g.*, *Selmani*, 100 AD3d 861; *Thompson*, 89 AD3d 1011; *DiBuono*, 71 AD3d 720; *Earle*, 302 AD2d 353; *cf Umana v Sofola*, 149 AD3d 1138 [2d Dept 2017]). A defendant has not been prejudiced when it received actual, timely notice of a claim despite defective service (*see Dhuler v ELRAC, Inc.*, 118 AD3d 937 [2d Dept 2014]; *DiBuono*, 71 AD3d 720; *Chiaro*, 7 AD3d 746).

Here, plaintiffs attempted service on February 1, 2017 and February 15, 2017, less than 60 days after they commenced this action. Because NAPA did not reject the papers or inform the process server that NAPA was no longer Cranage and Schaner's actual place of business, plaintiffs had no reason to suspect that service was defective. Thus, plaintiffs have demonstrated reasonable diligence in attempting service upon defendants Cranage and Schaner. Accordingly, good cause warrants an extension of time in which to serve these defendants.

Furthermore, the defendants' affirmative defenses, asserting lack of jurisdiction, were too generic to alert the plaintiffs to the defective service. The defendants' motion to dismiss was the plaintiffs' first notice of the facts which rendered service defective. Plaintiffs promptly cross-

moved for an extension of time to serve the defendants. The defendants timely received actual notice of this action, as evidenced by the filing of their answers on March 1, 2017, and demonstrate no prejudice resulting from the delay. Under these circumstances, an extension of time to effect service is warranted in the interest of justice (CPLR 306-b).

Alternative service under CPLR 308(5) is only available when it has been demonstrated that conventional service – to wit, service pursuant to CPLR 308(1) (personal delivery), CPLR 308(2) (delivery to "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode," plus service by mail), or CLPR 308(4) ("nail and mail" service) – is "impracticable" (*Born To Build, LLC v Saleh*, 139 AD3d 654, 655 [2d Dept 2016]). Here, plaintiffs have offered no evidence that service by conventional means would be impracticable, so alternative service under CPLR 308(5) is not appropriate at this time. Accordingly, it is

ORDERED, that the cross-motion of plaintiffs (MS #2) is granted to the extent that plaintiffs are granted 30 days from the date of entry of this Order to serve the defendants Cranage and Schaner with the summons and complaint, and plaintiffs' motion is otherwise denied; and it is further

ORDERED, that defendants Cranage and Schaner's motion to dismiss (MS #1) is denied.

ENTER,

J.S.C.
HON. GLORIA M. DABIRI
J.S.C.