SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Sonia Ramirez,

Plaintiff,

Index No.
805300/2016

DECISION and ORDER

- against -

Mot. Seq. 001

N.Y. Laser Cosmetic Center and Ayman Shahine, M.D.,

Defendants.

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

On July 26, 2016, plaintiff Sonia Ramirez ("Ramirez") commenced this medical malpractice action by summons and complaint. Ramirez alleges that Ayman Shahine, M.D. ("Shahine"), and N.Y. Laser Cosmetic Center ("NYLCC"), departed from accepted standards of medical practice by negligently and unlawfully performing plastic surgery on Ramirez in January 2014 and rendering subsequent medical treatment through June 2014. Ramirez alleges that Shahine was not licensed or certified to perform plastic surgery, and performed the procedures in a negligent manner which caused Ramirez to sustain serious personal injuries.

Shahine interposed an answer on November 15, 2017, and an amended answer on November 16, 2017. The second affirmative defense of the amended answer asserts "that proper service of process was never effectuated upon the defendant in accordance with the New York Civil Practice Law and Rules, Section 308, and this Court lacks personal jurisdiction over the defendant." The tenth affirmative defense asserts, "Pursuant to CPLR 306(b), this action is void in its entirety on the ground that service was not effectuated within 120 days of the filing of the Summons and Complaint."

Presently before the Court is Shahine's motion pursuant to CPLR 3211 (a) (8) and 308 (2) for an Order dismissing Ramirez's complaint. Shahine claims that

Ramirez failed to acquire personal jurisdiction over him because she failed to serve him within 120 days from the filing of the Summons and Complaint. Shahine also claims that the service that was purportedly rendered was not proper. Ramirez opposes. NYLCC is not moving for any relief.

Shahine submits an affidavit in support of his motion to dismiss. In his affidavit, Shahine attests, "Throughout the month of October 2017, a man presented to my office a number of times at 1 West 34th Street, #402, New York, New York, 10001, and asked to leave a Summons and Complaint with my office staff. After the man did not obtain the name of anyone on my staff, he left the office and took the Summons and Complaint with him. This same scenario happened a few times throughout the month of October 2017." Shahine further attests, "On October 25, 2017, or October 26, 2017, the Summons and Complaint was left on the front desk of my office. It is unknown by me or anyone on my staff who left the Summons and Complaint there, or if anyone was sitting at the front desk on the day the papers were left." Shahine states, "I have no record of receiving a copy of the Summons and Complaint in the mail."

Shahine argues that the service made on him on October 25, 2017, or October 26, 2017, is defective and occurred almost eleven months after the expiration of the 120 day deadline.

In opposition, Ramirez submits the attorney affirmation of her attorney Mitchell Segal, Esq. ("Segal"); a letter dated February 22, 2016 from Segal to Shahine requesting a copy of Ramirez's medical records; and affidavits of service of Michael Cohen ("Mr. Cohen") attesting to service on NYLCC and Shahine on October 20, 2017.

Ramirez argues that Shahine's motion should be denied "in the interests of justice," because the statute of limitations has now expired, "[t]he delay in service was law firm error by mis-calendaring the date for service; the Plaintiff has a meritorious cause of action and the defendants have not been prejudiced at all by the later service of process in the instant action." Ramirez also argues that "Defendant had actual notice that the litigation was imminent" based on Ramirez's requests for her medical records.

Ramirez also argues that based on Cohen's affidavits of service, Cohen served Shahine and NYLCC on October 20, 2017 by delivering a copy of the Summons and Complaint to "JANE DOE (REFUSED NAME), RECEPTION, who verified that the intended recipient actually is employed at this location." Cohen also avers that

he mailed a copy of the Summons and Complaint by First Class Mail to Shahine at 1 West 34th Street, Suite 402, New York, NY 10001 in an envelope bearing the legend "Personal and Confidential." Ramirez requests a traverse hearing be held if the Court finds there exists issues concerning the service made upon Shahine.

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]) 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

Under CPLR § 308(2), if a summons is served "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," it must also be mailed "to the person to be served at his or her last known residence" or "by first class mail to the person to be served at his or her actual place of business. . ."

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz,* 7 A.D.3 d 459 [1st Dept. 2004]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]).

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 . . .

CPLR § 306-b provides that service of the summons and complaint shall be made "within 120 days after the filing of summons and complaint". "For purposes of satisfying the 120-day period of CPLR § 306-b, only the service itself (delivery to a person of suitable age and discretion and mailing) need take place within the 120-day period. The filing of the proof of service can take place afterwards." (*Zhang v. Rong*, 2007 WL 4144248, [N.Y. Sup., October 31, 2007]).

CPLR § 306-b provides, "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 within 120 days of the summons and complaint. (*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.)

Discussion

Ramirez was to serve Shahine under CPLR 306-b "within 120 days after the filing of summons and complaint [July 26, 2016]," which would have been on or before November 23, 2016. Ramirez did not purportedly serve Shahine until October 20, 2017, which was almost 11 months after the expiration of the 120 day deadline. Ramirez therefore has the burden to demonstrate either good cause for an extension of time to effect service, or that such an extension is warranted in the interest of justice.

Ramirez is not entitled to an extension for good cause. "The plaintiff failed to show good cause for [her] failure since [she] admittedly made no attempt to serve the defendant within 120 days after the filing of the summons and complaint..." *Ambrosio v. Simonovsky*, 62 A.D.3d 634, 634 (2d Dep't 2009). Moreover, to the extent that Ramirez argues that the delay in service was caused by law firm error, "good cause" extension does not include conduct that is considered to be "law office failure." (*Henneberry*, 91 A.D.3d at 496).

Additionally, Ramirez has failed to demonstrate that an extension should be granted in the interest of justice. As stated above, in determining whether an extension is warranted in the interest of justice, 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). Here, while the statute of limitations has now expired, many other factors weigh in favor of Shahine. Ramirez has failed to demonstrate the meritorious nature of her cause of action. Ramirez's complaint is supported by an affirmation by her attorney Segal, which states, "I am currently unable to file a Certificate of Merit in the instant action ... as the defendants refuse to supply the plaintiff's medical records to me after requesting them by mail, fax and phone." Segal states, "I will file a Certificate of Merit within 90 days from the receipt of the plaintiff's medical records." In opposition to Shahine's motion, Ramirez's attorney Segal states, "Plaintiff has a meritorious action." However, no additional information is provided concerning the alleged meritorious claim and to date, Ramirez has not filed a Certificate of Merit.

Additionally, Ramirez has also failed to demonstrate the reason for the almost 11 month delay in service. Ramirez's claim that the delay in service resulted from law office error is unsubstantiated. Ramirez provides no details concerning this

alleged error or an affidavit from someone who specifically states he or she has personal knowledge of the alleged "mis-calendaring." Moreover, Ramirez does not explain her delay in seeking an extension of time until Shahine moved to dismiss. Ramirez has known since November 2017 of Shahine's defenses of improper service of process and failure to effectuate service within 120 days of filing of the Summons and Complaint. Furthermore, Ramirez has also failed to demonstrate that Shahine was "on notice that litigation was going to be commenced" based on Ramirez's request for her medical records in February 2016 (Affirmation in Opposition, para. 13). Ramirez's February 2016 request for medical records from Shahine makes no reference to a potential litigation. Accordingly, Ramirez has failed to demonstrate either good cause or that the interest of justice would be afforded to warrant an extension of time for service.[1]

Wherefore it is hereby

ORDERED that defendant Ayman Shahine, M.D.'s motion to dismiss the Complaint as against him is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action as against defendant N.Y. Laser Cosmetic Center is severed and shall proceed.

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

Dated: APRIL 16, 2018

Eileen A. Rakower, J.S.C.

[1] To date, Ramirez has not affirmatively cross moved for any relief. *Blam v. Netcher*, 17 A.D.3d 495, 496 [2d Dep't 2005]("... in the absence of a cross motion the Supreme Court should not have considered the defendant's informal request for an extension of time to answer...").