

**White v Wa-Hi Diner, LLC**

2018 NY Slip Op 32480(U)

October 1, 2018

Supreme Court, New York County

Docket Number: 159266/2017

Judge: Robert D. Kalish

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

**PRESENT: Hon. \_\_\_\_\_ Robert D. KALISH  
Justice**

**PART 29**

**GARVIN WHITE, Individually, and as  
Proposed ADMINISTRATOR of the Estate of  
GLORIA WHITE, DECEASED,**

**INDEX NO. 159266/2017**

**MOTION DATE 7/31/18**

**Plaintiff,**

**MOTION SEQ. NO. 001**

- v -

**WA-HI DINER, LLC d/b/a WAHI DINER,**

**Defendant.**

**NYSCEF Doc Nos. 2-32 were read on this motion to dismiss.**

Motion by Defendant Wa-Hi Diner, LLC d/b/a Wahi Diner (“Wahi”) pursuant to CPLR 306-b and 3211 (a) (3) and (5) to dismiss the complaint is granted to the following extent.

The cross-motion by Plaintiff Garvin White, Individually, and as Proposed Administrator of the Estate of Gloria White, Deceased pursuant to CPLR 205 (a) granting leave to Plaintiff to commence an action based on the same facts and occurrences of this present action within six months of dismissal of the instant action is denied as premature.

The cross-motion by Plaintiff pursuant to CPLR 306-b to enlarge the time to effect service of process on Wahi nunc pro tunc either to February 26, 2018, or to within 30 days of an order of the Court permitting such enlargement, is granted to the following extent.

**BACKGROUND**

Plaintiff commenced the instant action on October 18, 2017 by e-filing a summons and verified complaint. (Rothman affirmation, exhibit 1 [Complaint].) The Complaint alleges, in sum and substance, that decedent Gloria White (“Mrs. White”) passed away on April 28, 2016, due to the negligence of Wahi. The Complaint alleges that Mrs. White purchased and consumed food delivered to her by Wahi, which operates a diner at 3915 Broadway, New York, New York (the “Premises”), on June 6, 2015, and that the food caused Mrs. White to become gravely ill with a bacterial or viral food-borne illness. The Complaint further alleges that Mrs. White was hospitalized on June 8, 2015, and was in critical condition and comatose by June 9, 2015. The Complaint then alleges that Mrs. White remained comatose and in intensive care until July 8, 2015, when she was transferred to a nursing home. The Complaint further alleges that Mrs. White passed away at the nursing home on April 28, 2016, having never regained consciousness.

The complaint alleges causes four causes of action: (1) negligence; (2) pain and suffering; (3) wrongful death; and (4) loss of services for Garvin White, allegedly Mrs. White's son.

On May 9, 2018, Defendant filed the instant motion pursuant to CPLR 306-b and 3211 (a) (3) and (5) to dismiss the Complaint. Defendant argues pursuant to CPLR 306-b that the Complaint should be dismissed because Plaintiff has failed to serve Wahi with process. Defendant indicates that, although an affidavit of service had not yet been filed as of the time of the filing of the instant motion, on February 26, 2018, at approximately 12:30 p.m., a person employed by Defendant as a cashier received a copy of the summons and complaint while working at the Premises. Defendant argues that this cashier was not in charge of Wahi's funds and was not authorized to accept legal papers on Wahi's behalf.

Defendant further argues that the Complaint should be dismissed for lack of capacity. Defendant argues that Garvin White was merely the Proposed Administrator of the Estate when this action was commenced and lacked capacity to sue as a matter of law. Defendant also argues that the wrongful death cause of action should be dismissed because the statute of limitations has run and Defendant has yet to be served with process.

On June 19, 2018, Plaintiff filed his opposition papers which included a cross-motion pursuant to CPLR 205 (a) granting leave to Plaintiff to commence an action based on the same facts and occurrences of this present action within six months of dismissal of the instant action. In his opposition papers, Plaintiff concedes that Garvin White had not yet been duly qualified as the Administrator of the Estate when the action was commenced. Plaintiff then indicates that Garvin White was issued Letters of Administration of the Estate of Gloria White on March 5, 2018. (Emanuel affirmation, exhibit C.) Plaintiff further concedes that, "as the complaint herein was admittedly timely filed before Plaintiff was duly appointed Administrator, the Action is a legal nullity which must be dismissed for want of legal capacity." (*Id.* ¶ 14.) Plaintiff then indicates that he does not oppose that branch of the instant motion which is made pursuant to CPLR 3211 (a) (3). Plaintiff argues that the balance of Defendant's motion is moot.

Plaintiff then argues in support of his cross-motion that CPLR 205 (a) applies to the instant action because it was timely commenced and will have been dismissed due to the lack of a qualified administrator. Plaintiff further argues that, although the statute of limitations will have run on the wrongful death cause of action, CPLR 205 (a) permits Plaintiff to commence a new action within six months of dismissal of the instant action pursuant to CPLR 3211 (a) (3).

On June 22, 2018, Defendant filed its papers in opposition to Plaintiff's cross-motion and in further support of Defendant's motion. Defendant argues, in sum and substance, that the matter should be dismissed with prejudice because CPLR 205 (a) is unavailable where a Plaintiff fails to obtain personal jurisdiction over the Defendant. Defendant further argues that, as such, that branch of Defendant's motion that is made pursuant to CPLR 306-b is not moot and dismissal should be granted on that basis and the cross-motion pursuant to CPLR 205 (a) should be denied.

On July 16, 2018, Plaintiff filed papers in further opposition to Defendant's motion, in further support of its first cross-motion, and which included a second cross-motion pursuant to CPLR 306-b to enlarge the time to effect service of process on Wahi nunc pro tunc either to February 26, 2018, or to within 30 days of an order of the Court permitting such enlargement. Plaintiff argues that Wahi's cashier stated to its process server that she was authorized to accept service on behalf of Wahi. Plaintiff further argues that it is immaterial that Defendant contests service of process because the dismissal pursuant to CPLR 3211 (a) (3) would not be on the merits, CPLR 205 (a) should apply, and the balance of Defendant's motion is moot.

Plaintiff then requests that, if the Court finds that a lack of personal jurisdiction in the instant case would preclude the application of CPLR 205 (a), the Court enlarge Plaintiff's time to serve Defendant with process and either deem the prior service made timely nunc pro tunc or provide an additional 30 days for Plaintiff to serve Wahi in the interest of justice. Plaintiff argues that such an extension should be granted in the interest of justice because the action was timely commenced, Plaintiff diligently attempted proper service on numerous occasions, Plaintiff mistakenly served an individual who allegedly misstated her authority to accept service, medical records establish that Plaintiff possesses a meritorious claim, the statute of limitations has run, and Defendant had timely notice of a claim by Plaintiff as early as August 2015.

Defendant argues in its papers submitted in opposition to Plaintiff's second cross-motion that the Court should not consider the second-cross motion because CPLR 2215 does not permit a party to serve multiple cross-motions upon the moving party. Defendant then argues that the second cross-motion should be denied because Plaintiff waited over nine months from when the action was commenced to make the application and because Defendant would be prejudiced by not receiving timely notice of Plaintiff's claim.

### DISCUSSION

Defendant has argued, and Plaintiff has conceded, that the action should be dismissed pursuant to CPLR 3211 (a) (3). The Court agrees. CPLR 3211 (a) (3) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that[] the party asserting the cause of action has no[] legal capacity to sue." Pursuant to EPTL § 5-4.1, "[t]he personal representative . . . of a decedent who is survived by distributes may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued." EPTL § 1-2.13 provides that "[a] personal representative is a person who has received letters to administer the estate of a decedent." EPTL § 11-4.1 provides that [a]ctions or proceedings brought by or against a personal representative must be brought by or against him in his representative capacity."

"[O]nly a duly appointed representative may maintain an action on behalf of an estate." (*Sam Kyung Cho v Yongshin Cho*, 45 AD3d 388, 389 [1st Dept 2007].) "A personal representative who has obtained letters of administration to administer the estate of a decedent is the only party who is authorized to commence [such] an action []." (*Jordan v Metropolitan Jewish Hospice*, 122 AD3d 682, 683 [2d Dept 2014].) In *Mendez v Kyung Yoo* (23 AD3d 354,

354 [2d Dept 2005]), the Appellate Division, Second Department cited favorably to the result in a prior wrongful death and medical malpractice action where the prior action was dismissed for lack of capacity to sue because the prior action was commenced by a proposed administrator. Similarly, in *Richards v Lourdes Hosp.* (58 AD3d 927, 927–928 [3d Dept 2009]), the Appellate Division, Third Department noted that, in a prior action, a mother lacked the capacity to sue as proposed administrator of an infant’s estate.

In the instant action, it is conceded that the instant action was commenced by a proposed administrator. As such, Garvin White lacked the capacity to sue in the instant action.

The balance of the motion and cross-motions concerns what happens next. On the one hand, Garvin White, who has since become Administrator and now has capacity to sue, would like to be able to avail himself of the CPLR 205 (a) saving statute and commence a new wrongful death action. On the other hand, Wahi seeks finality to a cause of action where the statute of limitations ran nearly six months ago.

Having considered the papers submitted, the Court finds that Defendant’s motion pursuant to CPLR 306-b, which is, in effect, also made pursuant to CPLR 3211 (a) (8), is not mooted by Plaintiff’s concession that the matter should be dismissed pursuant to CPLR 3211 (a) (3). CPLR 205 (a) provides, in relevant part, that

“[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

Here, the question of whether personal jurisdiction was obtained over Defendant is outcome determinative of whether CPLR 205 (a) would be available to Plaintiff, and Plaintiff has conceded that, at minimum, Defendant was not served with process pursuant to CPLR 306-b within 120 days of commencement of the action. As Plaintiff has cross-moved both for leave to commence a new action pursuant to CPLR 205 (a) and an extension of time to serve Defendant pursuant to CPLR 306-b, the Court must first consider whether to consider the second cross-motion before addressing the cross-motions further.

Defendant has argued that the Court should not consider Plaintiff’s second-cross motion because CPLR 2215 does not explicitly permit multiple cross-motions. To be sure, CPLR 2215 permits that “a party may serve upon the moving party a notice of cross-motion.” (Emphasis added.) Nevertheless, the Appellate Division, First Department has considered second cross-motions on their merits. (*See, e.g., Bernstein v Freudman*, 136 AD2d 490 [1st Dept 1988].) Moreover, the Appellate Division, Second Department affirmed a motion court that granted a

plaintiff's second cross-motion to extend the time to serve the complaint. (*See Nigro v Eastco Bldg. Svcs., Inc.*, 6 AD3d 514 [2d Dept 2004].)

It is important to remember that a cross-motion is by its very nature an optional procedural tool available to parties in the interest of judicial economy and saving time and costs to parties and their counsel. There is no rule barring Plaintiff from having made his own independent motion pursuant to CPLR 306-b to extend the time to serve Defendant well after Defendant's motion was fully submitted. That Defendant itself moved under CPLR 306-b and Plaintiff later cross-moved under that same provision serves the interests of all parties and of the Court. Moreover, Defendant has had a full and fair opportunity to submit a set of opposition papers in response to each cross motion. As such, the Court will consider the second cross-motion pursuant to CPLR 306-b on its merits.

CPLR 306-b provides that

“[s]ervice of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made *within one hundred twenty days after the commencement of the action or proceeding*, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. 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 that defendant, or *upon good cause shown or in the interest of justice*, extend the time for service.”

(Emphases added.) “[W]here, as here, service is not timely made, the court may, within its discretion, extend the time for service upon either good cause [shown] or in the interest of justice.” (*Nunez-Ariza v Nell*, 161 AD3d 614 [1st Dept, May 24, 2018], citing *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001].) The “good cause shown” and “interest of justice” standards are “two separate standards by which to measure an application for an extension of time to serve.” (*Leader*, 97 NY2d at 104.)

“In applying the interest of justice standard, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, 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.” (*Nunez-Ariza*, 164 AD3d at 614 [internal quotation marks omitted].) “No one factor is determinative.” (*Id.*)

Here, the Court finds both that Plaintiff has adequately shown good cause for this Court to grant it an extension of time to serve Defendant and that to do so would be in the interest of justice. The Court finds that Plaintiff made diligent efforts to serve process upon Defendant within 120 days of commencing the action as demonstrated by the affidavit of due diligence. The Court finds further that Plaintiff has adequately shown that it would be in the interest of justice to

grant it an extension of time to serve Defendant based upon that the statute of limitations has run, the meritorious nature of Plaintiff's causes of action, and the minimal delay past 120 days until Plaintiff served Defendant's employee, who was operating a cash register at its diner and allegedly stated that she was authorized to accept service on behalf of Defendant. The Court is not persuaded by Defendant's arguments regarding prejudice, as Defendant filed in the instant motion in May 2018 and conceded that its cashier received the summons and complaint on February 26, 2018, and that the papers made their way to a member of Defendant. As such the Court will enlarge Plaintiff's time to serve Defendant with process.

The Court finds further that, aside from being untimely, Plaintiff has shown prima facie by means of the affidavit of service submitted on its first cross-motion that it served Wahi with process pursuant to CPLR 311 (a) (1). Plaintiff has shown prima facie that, when a copy of the summons and complaint was left with Wahi's employee/cashier, and when that employee stated she was authorized to accept service, she was an "agent authorized . . . to receive service." (CPLR 311 (a) (1); *see Landauer Ltd. v Joe Monani Fish Co., Inc.*, 101 AD3d 653 [1st Dept 2012], *revd on other grounds* 22 NY3d 1129; *Arvanitis v Bankers Trust Co.*, 286 AD2d 273 [1st Dept 2001]; *Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 273 [1980] ["[a defendant] generally cannot be heard to complain that the summons was delivered to the wrong person when the process server has gone to its offices, made proper inquiry of the defendant's own employees, and delivered the summons according to their directions".])

While Defendant has submitted an affidavit by a member of Wahi in support of its motion stating that the employee/cashier "is not in charge of the funds of the defendant corporation" and "is not authorized by [Wahi] to accept legal papers," this affidavit does not adequately refute Plaintiff's prima facie showing that the employee/cashier told its process server that she was authorized to accept service of the summons and complaint on behalf of Defendant. The Court finds that Plaintiff's process server reasonably relied on the representation by Defendant's employee/cashier that she was authorized to accept the papers. As such, the Court deems service of process effectuated timely upon Wahi nunc pro tunc as of February 26, 2018.

Even if the Court were to have found that Plaintiff's February 26, 2018 attempt at service of process was defective for failure to deliver the summons pursuant to CPLR 311 (a) (1), as the Court has decided to enlarge Plaintiff's time to serve Wahi with process in this action, the Court would have directed further service of process pursuant to CPLR 311 (a) (1) or (b). Moreover, Defendant has appeared in this action, and the parties have mutually agreed that this action must be dismissed. As such, this action is at an end, and the way it ends is now decided.

The only remaining issue is Plaintiff's first cross-motion. Plaintiff seeks, in effect, to have this Court render an advisory opinion as to whether CPLR 205 (a) would be available and applicable in a new action. The Court declines to do so. If a subsequent action is commenced and a statute of limitations defense raised, the issue will be ripe for judicial review and it will be for that motion court to hear it. (*See Brown v Huntington Med. Group*, 229 AD2d 458 [2d Dept 1996]; *see also Carrick v Central Gen. Hosp.*, 51 NY2d 242 [1980].)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant Wa-Hi Diner, LLC d/b/a Wahi Diner pursuant to CPLR 306-b and 3211 (a) (3) and (5) to dismiss the complaint is granted to the extent that it is

ORDERED that the action is dismissed pursuant to CPLR 3211 (a) (3); and it is further

ORDERED that the balance of the motion is denied; and it is further

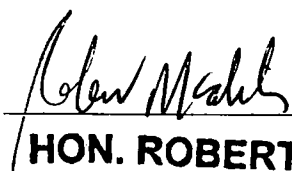
ORDERED that the cross-motion by Plaintiff Garvin White, Individually, and as Proposed Administrator of the Estate of Gloria White, Deceased pursuant to CPLR 205 (a) granting leave to Plaintiff to commence an action based on the same facts and occurrences of this present action within six months of dismissal of the instant action is denied as premature; and it is further

ORDERED that the cross-motion by Plaintiff pursuant to CPLR 306-b to enlarge the time to effect service of process on Defendant nunc pro tunc either to February 26, 2018, or to within 30 days of an order of the Court permitting such enlargement, is granted; and it is further

ORDERED that Defendant shall, within 20 days of entry, serve a copy of this order with notice of entry upon Plaintiff and upon the Clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: October 1, 2018  
New York, New York

 J.S.C.  
**HON. ROBERT D. KALISH**

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED       NON-FINAL DISPOSITION
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER       SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE