To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec __x___ Seq. Nos. 1-2 Type __misc.___

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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JANINE JORDAN-COVERT,

Plaintiff,

-against- Index No. 51886/2017

DECISION AND ORDER

PETROLEUM KINGS LLC and KENNETH MARIN,

Defendants.

----------X

The following papers numbered 1 to 6[1] were read on these motions:

Paper	Number
Notice of Motion, Affirmation, and Exhibits	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Affirmation in Reply	4
Notice of Cross-Motion, Affirmation and Exhibits	5
Affirmation and Exhibit in Opposition	6

There are two motions before the Court. The first motion is filed by defendants. It seeks to dismiss the complaint on the basis that (1) the statute of limitations has expired; and (2)

[1]Despite two emails from the Part Clerk indicating that this Part requires Working Copies, as is plainly set forth in our Part Rules, plaintiff failed to send a Working Copy of her reply papers on her cross-motion. Accordingly, it was not considered by the Court, although the Court did read it electronically.

lack of personal jurisdiction. In response, plaintiff brings her motion seeking (1) leave to serve the amended complaint on defendant Petroleum Kings LLC ("Kings"); (2) an extension of 120 days in which to serve defendant Marin pursuant to CPLR § 306-b; or, in the alternative, (3) to deem the complaint timely served nunc pro tunc on Kings' insurance carrier in lieu of serving Kings. In an attempt to see if the action could be settled, the Court held several settlement conferences with the parties. These efforts were ultimately unsuccessful, and this Decision and Order follows.

The facts are not in dispute. The accident in question occurred on February 20, 2014. Plaintiff's car was allegedly hit by defendant Marin, driving a truck owned by Kings. Ten days before the last day of the three-year period in which to commence the action, plaintiff filed her first complaint. In this complaint, she named Marin as well as Petroleum Kings Transport LLC ("Transport"), a separate entity from Kings. The Court notes that both Kings and Transport have the same owner and the same address. They are, however, separate entities with apparently separate, although related, purposes. Transport was not formed until after the accident had occurred.

After the statute of limitations had expired, but within the 120 days allowed for service by CPLR § 306-b, plaintiff served Transport by serving the Secretary of State. When Transport

received the papers, the principal of Transport called plaintiff's counsel to inform them that they had served the wrong company. Plaintiff then promptly filed an amended complaint - although it was already after the statute of limitations had expired - and served Kings by serving the Secretary of State. Service on Kings was accomplished within 120 days of the filing of the amended complaint.

Service on Marin occurred differently. Marin, who lives in Florida, was not served personally. Rather, plaintiff attempted to serve him by substituted service pursuant to CPLR § 308(2), on a person of suitable age and discretion at his "actual dwelling place" or "usual place of abode." The "Return of Service" prepared by the Sheriff, attached as an exhibit to plaintiff's papers, shows that on March 21, 2017, the Sheriff went to a home in Doral, Florida, and was informed that Marin "no longer resides there per Paola Tangerife." Later that day, the Sheriff called plaintiff's attorney, and wrote "per attorney ok to substitute service." The Sheriff returned to the same address on the following day, and purported to serve Marin "by handing a copy to Paola Tangarife." (The Court notes the slightly different spelling of her last name.) This account is fleshed out a bit by an affidavit by the Sheriff, also attached to plaintiff's papers. This affidavit states that when the Sheriff arrived at the address given to him by counsel for plaintiff, the door "was

answered by Paola Tangarife, a resident at said address, who informed me that Mr. Kenneth Marin no long resided there." Later that day, he called plaintiff's counsel, who told him "it was okay to execute substitute service." He returned to that same address on the following day - even though the resident had told him that Mr. Marin no longer lived there - and "Ms. Paola answered the door again and advised me that she'd spoken with Mr. Marin sometime between my two attempts, and he had advised her to accept service on his behalf if I returned."

There was **no** followup mailing done at that time, as is required by CPLR § 308(2), which states, in relevant part, that "such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing." Nor did plaintiff file the affidavit of service at that time, as the statute plainly requires in order to make process complete. Rather, plaintiff first mailed the requisite mailing on September 8, 2017, only **after** reading defendants' papers in reply on their motion to dismiss. This was well after the 120 days for the completion of service upon Mr. Marin had expired.

The Court finds that plaintiff did not serve Mr. Marin timely. In order to properly effectuate substituted service

pursuant to CPLR § 308(2), service had to be done at his "actual dwelling place" or "usual place of abode," not at his former residence. As the Court of Appeals has explained,

> The "nail and mail" provision of the CPLR permits a plaintiff to mail duplicate process to the defendant at his last known residence, but clearly requires that the "nailing" be done at the defendant's "actual place of business, dwelling place or usual place of abode". While there may be some question as to whether there is a distinction between "dwelling place" and "usual place of abode", there has never been any serious doubt that neither term may be equated with the "last known residence" of the defendant.

Feinstein v. Bergner, 48 N.Y.2d 234, 239-241 (1979) ("The summons here was affixed to the door of defendant's last known residence rather than his actual abode. That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court."). *See also Citibank, N.A. v. Keller*, 133 A.D.2d 63, 64, 518 N.Y.S.2d 409, 411 (2d Dept. 1987) (service was ineffectual when "The summons in each case was affixed to the former marital residence, which was the defendant's last known residence, rather than his actual dwelling place or usual place of abode."). For this reason alone, service on Mr. Marin is inadequate.

Moreover, the fact that the mailing was not done within 20 days after the service upon Ms. Tangerife is also fatal. As the Second Department has recently explained, "Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and

mailing requirements have been strictly complied with." *CitiMortgage, Inc. v. Twersky*, 153 A.D.3d 1230, 1232, 61 N.Y.S.3d 297, 298 (2d Dept. 2017). Put another way, "It is a two-step form of service in which a delivery and a mailing are both essential." *Washington Mut. Bank v. Murphy*, 127 A.D.3d 1167, 1174-75, 10 N.Y.S.3d 95, 101 (2d Dept. 2015). The only way for plaintiff to save the service on Mr. Marin is if this Court grants her motion for an extension pursuant to CPLR § 306-b.

CPLR § 306-b provides, in relevant part, that "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." It is well-settled that "good cause shown" means that plaintiff must have made "reasonably diligent efforts." *Wilbyfont v. New York Presbyterian Hosp.*, 131 A.D.3d 605, 607, 15 N.Y.S.3d 193, 194 (2d Dept. 2015) ("The affidavits submitted by the plaintiff in support of her motion failed to establish that she exercised reasonably diligent efforts in attempting to effect proper service of process upon the appellant and, thus, she failed to show 'good cause.'").

In contrast, the "interest of justice" standard "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties.

. . . [T]he 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." *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105-06 (2001).

Turning to the facts here, it is clear that plaintiff did not meet the standards for "good cause" because she did not use reasonably diligent efforts to serve Mr. Marin, as discussed above. Not only did plaintiff wait until nearly the very last date to commence the action, but (1) her purported substituted service was not at Mr. Marin's residence, but upon a person who stated that he no longer resided there; (2) she never did the requisite follow up mailing; and (3) she failed to file the affidavit of service. Indeed, it is clear that plaintiff never even bothered to review the "Return of Service" from the Sheriff to verify if service had been completed properly.[2] If she had, she would have realized the problems listed above, and could have taken timely action to correct them. Or, alternatively,

[2]If the Sheriff's affidavit is accurate, plaintiff should have realized she had a problem on March 21, 2017, when the Sheriff called counsel for plaintiff and stated "Mr. Marin was no longer residing at [the address]," instead of responding "it was okay to execute substitute service," since it was certainly not "okay."

plaintiff could have immediately sought an extension of time pursuant to CPLR § 306-b from the Court.

Instead, plaintiff waited more than two months after defendants brought their motion to dismiss to first seek relief. This was **months** after the 120 days expired, without any explanation for the lengthy delay. This is not good cause.

Nor does the interests of justice standard help plaintiff here "in view of the lack of diligence shown by the plaintiff, including the one-year delay between the time the summons and complaint were filed and the time the cross motion to extend her time to serve the summons and complaint was made, the 9 ½-month delay between the expiration of the statute of limitations and the respondent's receipt of notice of the action, the failure to make any showing of merit, and the lack of an excuse for the failure to effect timely service." *Garcia v. Simonovsky*, 62 A.D.3d 655, 656, 877 N.Y.S.2d 692 (2d Dept. 2009). *See also Colon v. Bailey*, 26 A.D.3d 454, 456, 810 N.Y.S.2d 511, 512 (2d Dept. 2006) ("The plaintiffs' lack of diligence throughout the proceedings and their failure to establish that their claim was meritorious justified the court's denial of their cross motion for an extension of time in the interest of justice.").

So here, too, plaintiff lacks an excuse for waiting so long to make this motion, when plaintiff did not even review the Return of Service until the 120-day period was long over. The

events in question occurred in February 2014, and plaintiff does not indicate in any way how prejudice would **not** inure to defendants. *See Valentin v. Zaltsman*, 39 A.D.3d 852, 835 N.Y.S.2d 298, 299 (2d Dept. 2007) (improvident exercise of discretion to allow extension when plaintiffs, "without any justification, failed to move for an extension of time until after the defendants raised the defense of untimely service."); *Hobbins v. N. Star Orthopedics, PLLC*, 148 A.D.3d 784, 788, 49 N.Y.S.3d 169, 172 (2d Dept. 2017) ("plaintiff also failed to establish her entitlement to an extension of time for service of the summons and complaint in the interest of justice."); *Umana v. Sofola*, 149 A.D.3d 1138, 1140, 53 N.Y.S.3d 343, 345 (2d Dept. 2017).

Accordingly, the Court finds that plaintiff did not demonstrate either good cause or that the interests of justice supported her belated attempt to extend the time to serve Mr. Marin. The motion is thus denied and the action is dismissed as to Mr. Marin.

Turning to the motions concerning the service upon Kings, the Court first notes that "the burden of proving jurisdiction is upon the party asserting it." *Preferred Elec. & Wire Corp. v. Duracraft Prod., Inc.*, 114 A.D.2d 407, 494 N.Y.S.2d 131, 132 (2d Dept. 1985). Kings contends that it should be dismissed from the action because the amended summons and complaint were not filed

until after the statute of limitations had expired. In response, plaintiff argues that by naming and serving Transport instead of Kings, it was a mere "misnomer" that can be disregarded. In support of this contention, she cites the case of *Simpson v. Kenston Warehousing Corp.*, 154 A.D.2d 526, 526-27, 546 N.Y.S.2d 148, 149 (2d Dept. 1989). In that case, the plaintiff named "Kenston Warehousing Corp., rather than Kenston Trucking Co., Inc." in the complaint, and served it upon the sole shareholder and officer of both corporations. The Court found that this was a mere misnomer, holding that "Where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that two criteria are met. The first criterion is that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect. The second criterion is that the intended but misnamed defendant would not be prejudiced."

Although these entities were served via the Secretary of State, rather than personally, the case of *Holster v. Ross*, 45 A.D.3d 640, 642-43, 846 N.Y.S.2d 261, 264 (2d Dept. 2007), is directly on point. In that case, the plaintiff was allegedly injured by a doctor named Hank Ross. Instead of suing him, the plaintiff named and served Bruce Ross, Hank Ross's brother, who

was also an orthopedist and shareholder of the Ross Group. Both brothers had the same business address. Plaintiff served Bruce Ross at the offices of the Ross Group. In addressing the plaintiff's motion to allow correction of a misnomer under CPLR § 305(c), the Court observed that "Hank Ross does not dispute that service of the summons and complaint at his actual place of business was sufficient to obtain jurisdiction over him pursuant to CPLR 308(2). Nor does he deny that he received actual notice of the institution of the lawsuit, or assert that he would be prejudiced if the misnomer were corrected." The Court went on to find that since "The pleadings allege the date and nature of the alleged malpractice with sufficient specificity that the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue," it would allow the amendment to reflect that the proper defendant was Hank, not Bruce.

So, too, here, the Court finds that plaintiff named the wrong party unintentionally; Kings received notice timely - allegedly calling counsel for plaintiff to inform them of the mistake; and Kings has asserted no prejudice if the misnomer were corrected. Accordingly, the Court denies defendants' motion to dismiss the complaint as to Kings; and denies plaintiff's motion for leave to serve an amended complaint upon Kings as moot.

All other requests for relief are denied. The remaining parties are directed to appear for a Preliminary Conference in the Preliminary Conference Part, Courtroom 800, on May 21, 2018 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 23, 2018

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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