

**Delucie v Largotta**

2020 NY Slip Op 34144(U)

December 10, 2020

Supreme Court, New York County

Docket Number: 655118/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA A. JAMES**

**PART**

**IAS MOTION 59EFM**

*Justice*

-----X

JOHN DELUCIE,

Plaintiff,

- v -

SEAN LARGOTTA,

Defendant.

-----X

INDEX NO. 655118/2019

MOTION DATE 03/10/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9 were read on this motion to/for EXTEND - TIME

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff John DeLucie for an extension of time to serve the summons and complaint and for alternative service is granted, and it is further

ORDERED that plaintiff John DeLucie shall serve the summons and complaint upon Jeffrey Strauss, counsel for defendant Sean Lagrotta, within forty-five (45) days of service of a copy of this order with notice of entry, and it is further

ORDERED that Jeffrey Strauss, defendant's counsel, is directed to accept service on behalf of Sean Lagrotta; and it is further

ORDERED that within forty-five (45) days after such service, defendant shall answer or otherwise move with respect to the complaint, and it is further

ORDERED that counsel are directed to submit to [59nyef@nycourts.gov](mailto:59nyef@nycourts.gov) and NYSCEF a proposed preliminary conference order or competing proposed preliminary conference order on March 15, 2021.

#### DECISION

In motion sequence 001, plaintiff John DeLucie (DeLucie) moves, pursuant to: (1) CPLR 306-b, for an order extending the time to serve the summons and complaint (Complaint), and (2) CPLR 308 (5), for an order directing service of the summons and Complaint by alternative means.

In this action, Delucie seeks damages arising from a failed venture to own and manage certain restaurants in New York City, New York. DeLucie, Lagrotta, and non-party Mark Thomas Amadei were partners in the ownership of several restaurants, which were managed by Lagrotta. In his complaint, DeLucie alleges that Lagrotta's severe mismanagement of the restaurants resulted in closure of the restaurants and subjected the owners to lawsuits by restaurant employees and the New York State Department of Taxation and Finance.

It is undisputed that DeLucie failed to serve his summons and Complaint within the proscribed 120-day time frame (NYSCEF Doc. No. [NYSCEF] 3, 17)

Douglas M. Schneider (Schneider), counsel for DeLucie, submits an attorney affirmation detailing the efforts to serve Lagrotta using traditional methods (id. at ¶¶ 11-14). Schneider affirms that the first attempt of service at Lagrotta's last known address was unsuccessful because the address failed to identify a floor or apartment number (id. at ¶ 13). Next, Schneider made multiple attempts to serve Lagrotta at his place of employment, the Gansevoort Hotel, but the process server was informed that Lagrotta was either unavailable or in London, despite confirming his presence the same day prior to attempting service (id. at ¶ 14).

Lagrotta fails to identify any prejudice that would result from the granting of the extension sought by DeLucie. The record demonstrates that DeLucie has made diligent attempts to effectuate service, but Lagrotta's apparent absence from the jurisdiction and his employer's unwillingness to cooperate have rendered service pursuant to CPLR 308 (1) and (2) impracticable (id. at ¶ 15, NYSCEF 6, 7). DeLucie contends service pursuant to CPLR 308 (4) is also impracticable as Lagrotta's "place of employment is a world-renowned hotel and there is no way to

affix the summons and [C]omplaint to a door at the facility”  
(NYSCEF 3, ¶ 16).

In opposition, counsel for Lagrotta, Jeffrey T. Strauss (Strauss) affirms in his affirmation that he was not authorized to accept service on Lagrotta’s behalf and opposes the portion of the motion at bar seeking to serve the summons and Complaint on him on behalf of his client, Lagrotta (NYSCEF 9, ¶¶ 3-4).

“A showing of impracticability under 308 (5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to Subdivisions (1), (2) or (4) of CPLR 308” (Franklin v. Winard, 189 AD2d 717, 717, [1st Dept 1993] [internal citation omitted]). “Under CPLR 308 (5), a court is vested with the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308 (1), (2), and (4) are ‘impracticable’” (Born To Build, LLC v Saleh, 139 AD3d 654, 655 [2d Dept 2016] [internal citations omitted]). The court may extend the deadline to serve the summons and Complaint if good cause is demonstrated or if it would serve the interest of justice (*id.*).

Strauss correctly argues that he cannot accept service on behalf of his client unless authorized to do so and that he is not automatically deemed an agent of Lagrotta for the purposes of service of process (*id.*). However, DeLucie has established

that service otherwise upon Lagrotta would be impracticable, having attempted to serve at Lagrotta at his last known address and place of employment, coupled with the fact that Lagrotta's address in London is unknown, effectively preventing an attempt of international service (Kelly v Lewis, 220 AD2d 485, 486 [1st Dept 1995] [court concluded service was impracticable after plaintiff made multiple attempts on different days to serve defendant at last known address]). Furthermore, Strauss fails to assert any prejudice that would arise from his acceptance of service on behalf of Lagrotta or that such service is inadequate to apprise Lagrotta of the instant action or (Born v Saleh, 139 AD3d at 655).

Consequently, this court, in its discretion, shall grant DeLucie an extension of time to serve the summons and Complaint on Lagrotta pursuant to CPLR 306-b and direct Strauss to accept service on behalf of Lagrotta pursuant to CPLR 308 (5).

DEC 10 2020  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE