

Santos-Rodriguez v Steinway Coffee Shop LLC

2020 NY Slip Op 34439(U)

December 4, 2020

Supreme Court, Queens County

Docket Number: 702113/20

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

Short Form Order

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

**PART 35
HON. TIMOTHY J. DUFFICY**

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**ERASTO SANTOS-RODRIGUEZ and
ALFONSO RUFINO RAMIREZ MARTINEZ,**

Plaintiffs,

**Index No.: 702113/20
Mot. Date: 11/24/20
Mot. Seq. 1**

FILED

-against-

**12/7/2020
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**STEINWAY COFFEE SHOP LLC (D/B/A
STEINWAY COFFEE SHOP), JOSE CARMELO
PALAGUACHI, and JOSE VIRGILIO
PALAGAGUACHI,**

**COUNTY CLERK
QUEENS COUNTY**

Defendants.

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The following numbered papers were read on this motion by defendant Jose Carmelo Palaguachi for an order dismissing the plaintiffs’ action against him, pursuant to CPLR 3211(a)(1), (7) and (8); and the cross-motion by plaintiffs for an order extending plaintiffs’ time to serve the Summons and Complaint upon defendant Jose Carmelo Palaguachi.

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits.....	EF 10-19
Notice of Cross Motion-Affidavits-Exhibits.....	EF 23-28
Replying Affidavits.....	EF 30

Upon the foregoing papers, it is ordered that the motion by defendant Jose Carmelo Palaguachi is denied, as moot; and plaintiffs’ cross-motion is granted.

Plaintiffs commenced this action against defendants alleging violations of New York’s Labor Law.

Defendant Jose Carmelo Palaguahi moves for an order, *inter alia*, dismissing the action, pursuant to CPLR 3211(a)(8), for failing to serve the Summons and Complaint upon him. Plaintiffs cross-move for an order granting an extension of time to properly serve defendant Jose Carmelo Palaguachi with the Summons and Complaint.

At the outset, moving defendant Jose Carmelo Palaguachi has established that he was not properly served, pursuant to the provisions of CPLR 308. While the record

reflects that, in June, 2020, a process server purportedly served the Summons and Complaint upon Jose Carmelo Palaguachi at the residential address of 3767 102nd Street, Corona, NY. Said defendant submits an affidavit, wherein he avers, *inter alia* that: he has never lived at the address of 3767 102nd Street, Corona, NY; he never received documents from that alleged service; and that he has resided at 3763 102nd Street, Apt. 1, Corona, NY, since 2005.

The Court finds that the plaintiffs have not obtained jurisdiction over defendant Jose Carmelo Palaguachi. However, plaintiffs now cross-move for an order requesting an extension of time to serve the moving defendant, pursuant to CPLR 306-b. The cross-motion is granted.

In determining whether to grant an extension of time in the interests of justice, the Court must weigh factors such as the plaintiff's diligence in serving defendant, the expiration of the statute of limitations, the merits of the claim, the length of delay in service, the promptness of plaintiff's motion, and prejudice to defendant Khanam (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001].) Such “extensions of time should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service’ . . . regardless of the expiration of the Statute of Limitations after filing and before service” (*Murphy v Hoppenstein*, 279 AD2d 410 [1st Dept 2001][internal citations omitted]).

Plaintiffs have presented sufficient evidence to allow an extension of time to serve the Summons and Complaint upon defendant Jose Carmelo Palaguachi, in the interests of justice. Plaintiffs have demonstrated via submission of, *inter alia*, an affidavit of plaintiff's process server, that service was diligently attempted upon defendant,, Jose Carmelo Palaguachi.

Therefore, pursuant to CPLR 306-b, the Court grants plaintiffs leave to re-serve defendant Jose Carmelo Palaguachi, in light of the fact that the action was timely commenced by filing of a summons and complaint (*Murphy v Hoppenstein*, 279 AD2d 355 [2d Dept 2000] [extension of time granted where initial service was improper; *Gurevitch v Goodman*, 269 AD2d 355 [2d Dept 2000] [instead of dismissing action for improper service, the court granted leave to plaintiff to re-serve defendant]), as directed below.

As the Court does not have personal jurisdiction over defendant Jose Carmelo Palagachi, the Court need not address the remaining branches of the motion.

Accordingly, it is

ORDERED that the moving defendant’s motion is denied, as moot; and it is further

ORDERED that the plaintiffs’ cross-motion for an extension of time to serve the Summons and Complaint upon defendant Jose Carmelo Palaguachi, is granted; and it is further

ORDERED that the plaintiffs’ time to serve process on defendant Jose Carmelo Palaguachi is extended for an additional sixty (60) days from the date that this Order appears in the minutes of the Queens County Clerk–NYSCEF system.

The foregoing constitutes the decision and order of the Court.

Dated: December 4, 2020



TIMOTHY J. DUFFICY, J.S.C.

FILED

12/7/2020

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**COUNTY CLERK
QUEENS COUNTY**