

Krisher v 522 E. 82nd St., LLC
2021 NY Slip Op 32439(U)
November 22, 2021
Supreme Court, New York County
Docket Number: Index No. 161171/2020
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

-----X

MICHAEL KRISHER,

Plaintiff,

- v -

522 EAST 82ND STREET, LLC, MARY LEWIS, JIM LEWIS,
also known as L. JAMES LEWIS, KAMEN MANAGEMENT
CORPORATION, and AL HERNANDEZ

Defendants.

-----X

INDEX NO. 161171/2020

MOTION DATE 08/19/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19

were read on this motion to/for EXTEND – TIME/AMEND PLEADING.

In this action, inter alia, to recover damages for assault and battery, negligent hiring and supervision, and intentional infliction of emotional distress, the plaintiff moves (1) pursuant to CPLR 306-b to extend the time to effectuate service of process upon the defendant Al Hernandez, and (2) pursuant to CPLR 305(a), (b), and (c), CPLR 1003, and CPLR 3025(b) for leave to file and serve a supplemental and amended summons with notice so as to add Margaret Grossi as a defendant and assert claims against her for negligent hiring and supervision, among other things. No party opposes the motion. The motion is granted, the plaintiff's time to serve process upon Hernandez is extended up to and including March 22, 2022, and the plaintiff is granted leave to file and serve a supplemental and amended summons with notice in the form designated as docket entry 13 in the New York State Court Electronic Filing (NYSCEF) system.

The plaintiff commenced this action on December 22, 2020 by filing a summons with notice (see CPLR 304[a], 305[b]). Pursuant to CPLR 306-b, he had 120 days from that date to

serve process upon Hernandez, or until April 21, 2021. The plaintiff was unable to serve process upon Hernandez by that date.

In his affidavit in support of his motion, the plaintiff alleged that he was assaulted and battered by Hernandez on the sidewalk in front of 520 East 82nd Street in Manhattan and that Hernandez was, at the time, acting in the course of his employment with the defendants. The plaintiff asserted that he immediately called the police, and that Hernandez was arrested. According to the plaintiff, he later learned that Margaret Grossi was the owner of the building located at 520 East 82nd Street, that she employed Hernandez as the superintendent at that building, and that at least one tenant of the building provided information that Hernandez was “a known drunk.” In support of the motion, the plaintiff’s attorney submitted both his own affirmation and the affidavit of a process server who unsuccessfully attempted to serve process upon Hernandez. The process server alleged that, at 1:58 p.m. on April 15, 2021, he “made proper and diligent effort to serve said process on” Hernandez at 522 East 82nd Street, but that

“AT THE GIVEN ADDRESS IS A MULTIPLE DWELLING WHERE THE DEFENDANT’S NAME DOES NOT APPEAR ON ANY BELL OR MAILBOX. I KNOCKED ON THE DOOR BUT I RECEIVED NO ANSWER. I NEED THE APARTMENT NUMBER.”

The plaintiff’s attorney also submitted a copy of the relevant police aided report, which identified the place of occurrence as the “street” in “front of 510 East 82nd Street Apt: 1C,” in Manhattan (emphasis added). The attorney himself alleged that

“On multiple occurrences [sic], in or around April 2021, Plaintiff attempted service of process upon Defendant AL HERNANDEZ at 522 East 82nd Street, New York, New York 10028 believed to be a home or work address for that Defendants. However, the Process Server could not effectuate service at the subject premises as Defendant was not present nor working at the time service was attempted to be effectuated. Further, as a result of the Covid Pandemic, new building procedures implemented have also hindered Process Servers’ abilities to conduct many of their usual investigations.

“Both Plaintiff and Counsel are rigorously searching alternate home or work locations of Defendant AL HERNANDEZ.

“Plaintiff’s Process Server attempted to serve Defendant AL HERNANDEZ [at] what was believed to be his work address. However, the process servers could

not locate said individual Defendant in or around the vicinity of the subject premises where the assault occurred.”

Although CPLR 306-b provides that “[i]f 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,” it alternatively authorizes the court, “upon good cause shown or in the interest of justice,” to “extend the time for service.”

As the Court of Appeals explained in *Leader v Maroney* (97 NY2d 95, 105-106 [2001]),

“the legislative history is unequivocal that the inspiration for the new CPLR 306-b provision was its Federal counterpart. The revision was intended to offer New York courts the same type of flexibility enjoyed by Federal courts under rule 4(m) of the Federal Rules of Civil Procedure. Rule 4(m) similarly provides two alternative grounds for a plaintiff seeking an extension of time to serve process. The rule explicitly mandates that ‘if the plaintiff shows good cause for the failure, the court shall extend the time for service] (Fed Rules Civ Pro, rule 4[m]). The rule also authorizes a second, unspecified discretionary basis for extension ‘even if there is no good cause shown’ (1993 Advisory Comm Note, Fed Rules Civ Pro, rule 4[m]; see, *Boley v Kaymark*, 123 F3d 756, 758 [3d Cir], *cert denied* 522 US 1109).

“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. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, 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. We also agree with the Appellate Division majorities that Federal case law analysis of rule 4(m) of the Federal Rules of Civil Procedure provides a useful template in discussing some of the relevant factors for an interest of justice determination (see, e.g., *AIG Managed Mkt. Neutral Fund v Askin Capital Mgt.*, 197 FRD 104, 109 [SD NY]; see also, *State of New York v Sella*, 185 Misc 2d 549, 554 [Albany County Sup Ct] [compiling Federal factors]).

“The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative--the calculus of the court’s decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served.”

(some citations and internal quotation marks omitted).

Other than the one attempt at service made by the plaintiff’s process server, the plaintiff’s attorney did not identify the person or persons who attempted to serve process upon

Hernandez on “multiple” occasions in April 2021, nor the date or time when those attempts were made. Nor does he submit an affidavit from the person who made those attempts. In addition, counsel does not describe what attempts both he and the plaintiff made to search for Hernandez’s alternate home or work locations. Moreover, the plaintiff’s submissions suggest that Hernandez resided at 520 East 82nd Street, where he was employed as a superintendent, and where the plaintiff initially asserted that the assault occurred, rather than 522 East 82nd Street, where his process server attempted to locate Hernandez; further, the police aided report indicated that the assault occurred at yet a third address---510 East 82nd Street. Inasmuch as the plaintiff cannot show that he employed due diligence in attempting to serve Hernandez in a proper manner, he cannot show good cause for the requested extension of time.

Nonetheless, although this action does not qualify for an extension of time under the “good cause” exception, since the plaintiff has not established due diligence in attempting to serve Hernandez (*see Mead v Singleman*, 24 AD3d 1142, 1144 [3d Dept 2005]), the court concludes that, upon consideration of the factors articulated by the Court of Appeals in *Leader*, it qualifies under the “interest of justice” category (*see Henneberry v Borstein*, 91 AD3d 493, 495-496 [1st Dept 2012]). With respect to the causes of action against Hernandez seeking to recover for assault, battery, and other intentional torts related thereto, the applicable limitations period is one year from the date of the occurrence, or one year from the termination of any criminal action arising therefrom, whichever is later (*see CPLR 215[8]; Alford v St. Nicholas Holding Corp.*, 218 AD2d 622, 622 [1st Dept 1995] [applying limitations period both to the wrongdoer and his employer]). This factor militates in favor of an extension of time to serve process because, were this court to decline the plaintiff’s application, and the action against Hernandez were dismissed upon motion, the limitations period applicable to intentional torts would likely have expired. The plaintiff’s affidavit is sufficient to support the meritorious nature of the several causes of action. Moreover, the plaintiff did not evince a significant delay in attempting service upon Hernandez, his request for the extension of time was made within a

reasonable time after he was unable to locate Hernandez, and no party has shown any prejudice to Hernandez if the time to serve him with process is extended.

“CPLR 3025(b) allows a plaintiff to amend his complaint, with leave of court, to add a party defendant” (*Pensabene v City of New York*, 172 AD3d 1396, 1397 [2d Dept 2019]). Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment only to determine whether the proposed amended pleading is “palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]). The court also “should consider how long the amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered” (*Haller v Lopane*, 305 AD2d 370, 371 [2d Dept 2003]).

Inasmuch as the plaintiff has established that his claims against Grossi to recover for negligent hiring, supervision, and retention are potentially meritorious, the three-year limitations period applicable to those claims (see CPLR 214[5]; *Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015]) has yet to expire, and he only recently learned of the facts underlying those claims, the court grants the plaintiff leave to supplement and amend the summons with notice so as to add Grossi as a defendant and assert those claims against her.

The court notes that the limitations period applicable to claims against persons sought to be added as defendants is tolled where, as here, a motion for leave to file and serve a supplemental and amended summons with notice is made prior to the expiration of an applicable limitations period, and includes a copy of the proposed amended pleading (see *Perez*

v Paramount Communications, 92 NY2d 749, 754-756 [1999]; *Abreu v Casey*, 157 AD3d 442 [1st Dept 2018]). The toll encompasses the period from the date that the motion for leave to amend is made, here August 9, 2021 (see CPLR 2211), until the date that the order granting that motion is entered, with the limitations period commencing to run again “after entry of the order” (*Perez v Paramount Communications*, 92 NY2d at 756; see *Schlapa v Consolidated Edison Co. of N.Y., Inc.*, 174 AD3d 934, 935-936 [2d Dept 2019]).

Accordingly, it is

ORDERED that the plaintiff’s motion is granted, without opposition, the plaintiff’s time to serve a copy of the summons with notice upon the defendant Al Hernandez is extended up to and including March 22, 2022, the plaintiff is granted leave to file and serve a supplemental and amended summons with notice in the form designated as docket entry number 13 in the New York State Court Electronic Filing (NYSCEF) system, and the supplemental and amended summons with notice shall be deemed filed as of the date of entry of this order; and it is further,

ORDERED that the caption of this action is amended to read as follows:

-----X

MICHAEL KRISHER,

Plaintiff,

v

522 EAST 82ND STREET, LLC, MARY
LEWIS, JIM LEWIS, also known as
L. JAMES LEWIS, KAMEN MANAGEMENT
CORPORATION, AL HERNANDEZ, and
MARGARET GROSSI,

Index No. 161171/2020

Defendants.

-----X

;and it is further,

ORDERED that, on the court’s own motion, within 15 days of the entry of this order, the plaintiff shall serve a copy of this order upon the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall separately file and upload the notice required by CPLR

8019(c) and a completed Form EF-22, and the Trial Support Office shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

11/22/2021
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE