

Gervasi v Zlochower

2023 NY Slip Op 33236(U)

September 14, 2023

Supreme Court, New York County

Docket Number: Index No. 805354/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M

Justice

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MICHELLE GERVASI as the administrator of the
Estate of JOHN GERVASI, deceased, and individually,

Plaintiff,

INDEX NO. 805354/2022

MOTION DATE 06/12/2023

MOTION SEQ. NO. 001

- v -

AVRAHAM B. ZLOCHOWER and LENOX HILL HOSPITAL

Defendants.

**DECISION + ORDER ON
MOTION**

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

were read on this motion to/for EXTEND - TIME.

In this action to recover damages for medical malpractice and wrongful death, the plaintiff moves pursuant to CPLR 306-b for leave to extend her time to serve a copy of the summons and complaint upon the defendants. No party opposes the motion. The motion is granted, and the plaintiff shall have until November 30, 2023 to serve the defendants with copies of the summons and complaint.

The plaintiff commenced this action on November 4, 2022. She thus had 120 days from that date, or until February 22, 2023, to serve the defendants with process (see CPLR 306-b). In two affidavits of service, both sworn to February 6, 2023 and filed February 7, 2023, the plaintiff's process server asserted that, on February 2, 2023, he personally delivered two copies of the summons and complaint---one addressed to each of the two defendants---to a woman who identified herself as "Jamilla S." in the lobby of the defendant Lenox Hill Hospital (Lenox Hill) on East 77th Street in Manhattan. He further averred that, on February 2, 2023, he mailed an additional copy to the Lenox Hill business address of the individual defendant, Avraham B. Zlochower, and that "Jamilla S." represented to him that she was authorized to accept service of

process on behalf of Lenox Hill. Neither Zlochower nor Lenox Hill answered the complaint. Inasmuch as the plaintiff filed the affidavit of service referable to service upon Zlochower on February 7, 2023, service upon him was deemed “complete” 10 days later (see CPLR 308[2]), or on February 17, 2023. On April 4, 2023, after the defendants’ time to answer the complaint purportedly had lapsed, the plaintiff’s attorney mailed default letters to the defendants, informing them that the action had been commenced against them and that they had been served with process. The plaintiff’s attorney also enclosed the affidavits of service. Counsel for the defendants responded on their behalf, and informed the plaintiff’s attorney that that they had not received copies of the summons and complaint, and that no one by the name of “Jamilla S.” worked for Lenox Hill at the time when service allegedly was attempted.

Inasmuch as the 120-day period for proper service has now lapsed, the plaintiff seeks leave to extend her time properly to serve the summons and complaint upon the defendants.

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.” “In deciding such a motion, the express language of CPLR 306-b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action. . . . In these circumstances, the court’s options were limited to either dismissing the action outright, or extending the time for plaintiff to properly effect service”

(*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]; see *Sottile v Islandia Home for Adults*, 278 AD2d 482, 484 [2d Dept 2000] [“The statute gives a court the option of extending the time to serve *instead of* dismissing the action”] [emphasis in original]). CPLR 306-b provides that a court may only dismiss a complaint for failure to effect timely service of process “upon motion,” not on its own initiative (see *Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345, 345 [2d Dept 2006]; see also *Vanyo v Buffalo Police Benevolent Assn.*, 159 AD3d 1448, 1452 [4th Dept 2018]). Since the defendants have not made such a motion, dismissal here is not an option. Moreover, a court is only precluded from entertaining a request to extend the time for service pursuant to CPLR 306-b where the action has been dismissed by virtue of the entry of a

judgment of dismissal (see *State of N.Y. Mortgage Agency v Braun*, 182 AD3d 63, 70 [2d Dept 2020]), which has not occurred here.

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).

This action does not qualify for an extension of time under the “good cause” exception, as the plaintiff made only one attempt to serve the defendants within the statutory 120-day period, which she now fears was improper. Nonetheless, 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 at 495-496). With respect to the medical malpractice

cause of action asserted against the defendants, the applicable limitations period is two years and six months from the last date of treatment, which the plaintiff here alleges was November 20, 2021 (see CPLR 214-a). The limitations period applicable to the wrongful death cause of action is two years from the date of the death of the plaintiff's decedent (see EPTL 5-4.1), which also was November 20, 2021. Consideration of this factor militates in favor of an extension of time to serve process because, were this court to decline the plaintiff's application, the limitations period applicable to the claim would expire only a few months after the entry of this order, which might not provide the plaintiff with sufficient time to recommence the action. Moreover, the allegations in the complaint are not facially non-meritorious, the request for the extension of time was made within a reasonable time after the plaintiff learned that service may not have been properly effectuated, and considerations of judicial economy warrant granting the extension of time.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, and she shall have until November 20, 2023 to serve the defendants with copies of the summons and complaint.

This constitutes the Decision and Order of the court.

9/14/2023

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