

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : PART 17

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LINDA PANDOLFI and STEPHEN PANDOLFI,

Plaintiffs,

DECISION AND ORDER

- against -

**DAVID J. LANGER, M.D.; ERIC ELOWITZ,
M.D.; CHRIS LENART, M.D.; MARKUS
CHWAJOL, M.D.; VEDRAN DELETIS, M.D.;
JORGE J. GOMEZ; ST. LUKE'S-ROOSEVELT
HOSPITAL and THE HYMAN INSTITUTE
FOR NEUROLOGY AND NEUROSURGERY
@ ST. LUKE'S-ROOSEVELT HOSPITAL,**

Index No.: 6072/2010

Original Return Dates: 10/25/10
11/08/10

Motion Seq. Nos.: 001-002

Defendants.

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P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 6 were submitted on this Notice of Motion and Notice of Cross-Motion on November 29, 2010:

Papers numbered:

Notice of Motion and Affidavits (2) in Support	1-3
Notice of Cross-Motion and Affirmation	4-5
Reply Affirmation	6

The motion of the Defendant MARKUS CHWAJOL, M.D. for an Order pursuant to C.P.L.R. 3211(a)(8) and C.P.L.R. 306-b, dismissing the action against him for failure to timely serve this Defendant, and the cross-motion of the Plaintiffs for an Order pursuant to C.P.L.R. 3012(d) granting an extension of time to serve such Defendant should the Court find that service was improper or untimely, are decided as follows:

The within medical malpractice action was commenced by filing the Summons and

Complaint with the County Clerk of Nassau County on March 26, 2010. It is alleged that on October 8, 2007, the Defendant doctors located at the Defendant ST. LUKE'S-ROOSEVELT HOSPITAL, negligently performed a suboccipital craniectomy and C1 laminectomy with partial resection on the Plaintiff LINDA PANDOLFI. It is further alleged that the Plaintiff LINDA PANDOLFI sustained permanent and serious injuries as a result thereof.

This motion concerns service of the Summons and Complaint upon the Defendant MARKUS CHWAJOL, M.D. ("CHWAJOL"), a duly licensed physician. At the time of the alleged malpractice, the Defendant CHWAJOL practiced medicine in Manhattan; however, at the time the action was commenced, it is alleged that he practiced medicine in Chicago, Illinois (Complaint paragraph "11").

The Plaintiffs contend the Defendant CHWAJOL was personally served with the Summons and Complaint on May 26, 2010 at 3:45 p.m. at 912 South Wood [Street], Chicago, Illinois. In the Affidavit of Service of Lisa M. Everett, sworn to May 31, 2010, he is described as a white male with black hair, 36-50 years old, 5'9" to 6' 0" tall, and 161 to 200 pounds (Exhibit "B" of motion; Exhibit "B" of cross-motion). An additional copy of the Summons and Complaint was mailed to the Defendant by Certified Mail, return receipt requested, to the 912 South Wood Street address on July 29, 2010 (Exhibit "B" of motion; Exhibit "C" of cross-motion).

Upon receipt of the motion papers seeking dismissal of the action based upon improper service, counsel for the Plaintiff obtained a further Affidavit from the process server, Lisa M. Everett, sworn to October 26, 2010, which details her attempt(s) at service. The process server avers that she attempted to first serve the Defendant CHWAJOL on May 25, 2010 at the address provided, to wit: 1801 West Taylor Street, Chicago, Illinois. After being told that he was unavailable, she returned the next day and was directed to an alternate office in the University of Illinois Medical

Center (in which both 1801 Taylor Street and 912 South Wood Street are located). The process server then states that she followed the “map” given to her by the receptionist and arrived at another office, where she asked to see the Defendant. “A few moments later, a ‘Doctor’ I assumed came out to greet me. He was wearing a dress shirt, tie and slacks and Stethoscope, but I did not see a name badge. I asked him if he was Dr. Markus Chwajol and he said ‘yes’.” She delivered the process to this individual and left the premises (Everett Affidavit, Exhibit “D” of cross-motion). When recently presented with a photograph of the Defendant CHWAJOL, the process server stated that “[u]pon receiving the call that Dr. Chwajol was not served, and after seeing the picture of him, I can state that I am unsure if this was the doctor that I gave the papers to.” *Id.*

In his Affidavit in support of dismissal, the Defendant CHWAJOL states that at 3:45 p.m. on May 26, 2010 (the alleged time of personal service), he was returning to Chicago from a seminar conducted at the University of Pittsburgh. His airline flight left Pittsburgh at approximately 3:50 p.m. central time and arrived in Chicago at approximately 5:10 p.m. central time. Therefore, from the documents attached to the moving papers and the Affidavit (and supporting travel documents) of the Defendant CHWAJOL, it appears that the person served with process on May 26, 2010 in Chicago was not the Defendant CHWAJOL. While an Affidavit of Service is generally considered *prima facie* proof of service, *see e.g.* Cavalry Portfolio Services, LLC v. Reisman, 55 A.D.3d 524 (2nd Dept. 2008); Wieck v. Halpern, 255 A.D.2d 438 (2nd Dept. 1998), the Defendant CHWAJOL has specifically refuted the veracity of and content contained in the Affidavit of Service. *See e.g.*, Matter of Shaune TT, 251 A.D.2d 758 (3rd Dept. 1998). Under these circumstances, however, a traverse hearing is not necessary. “Traverse hearings are typically ordered where questions of fact exist as to the propriety of service,” County of Rockland v. Coakley, 235 A.D.2d 782 (3rd Dept.

1997). As the process server is unsure if the person she served was the same person depicted in the photograph of the Defendant CHWAJOL, the Court finds personal in-hand delivery to the Defendant to be improper.

As C.P.L.R. 313 and C.P.L.R. 308(1) service was not effectuated upon this Defendant, the Court does not have personal jurisdiction over him. *See* Krisilas v. Mount Sinai Hosp., 63 A.D.3d 887, 889 (2nd Dept. 2009) (“It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant ... [.]”). However, based upon the commencement by filing statute presently in effect in New York, the analysis does not end here.

C.P.L.R. 306-b concludes, “[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, **or upon good cause shown or in the interest of justice, extent the time for service[]**” (emphasis supplied). Thus, as no party has alleged that the action was untimely commenced, the question to be considered by the Court is whether the action should be dismissed against the Defendant CHWAJOL for failure to properly serve him within the 120-day period or should the Court afford additional time for proper service pursuant to C.P.L.R. 306-b. *See* Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95 (2001). Even if service was improper, the Court may utilize a C.P.L.R. 306-b extension to cure such defective service. *See* Murphy v. Hoppenstein, 279 A.D.2d 410 (1st Dept. 2001); Griffin v. Our Lady of Mercy Medical Center, 276 A.D.2d 391 (1st Dept. 2000) (“Plaintiff’s time to serve defendant was properly extended nunc pro tunc as of the time that service was made, which was only 19 days after the expiration of the 120-day period that plaintiff had to make service under CPLR 306-b, where the action would be barred by the one-year Statute of Limitations if such extension were not granted, and defendants fail to show any prejudice other

than having to defend the action (citation omitted)").

In this matter, the Plaintiffs forwarded the Summons and Complaint to their process server within 60 days of the filing of such documents with the County Clerk of Nassau County. Service was first attempted on May 25, 2010, and was thought to have been effectuated on May 26, 2010. Only after the expiration of the 120-day service period [to wit: July 24, 2010] and the expiration of the statute of limitations did the Plaintiffs become aware of any problem. Within 32 days of learning of the Defendant's contention, the Plaintiffs moved for leave to extend the time for service, *nunc pro tunc*.

The Affidavit of Service (and the subsequent Affidavit of the process server) demonstrate that a diligent effort was made to properly and timely serve the Defendant CHWAJOL. The process server appeared twice at his place of business and during the second visit, a person claiming to be the Defendant was served. The Defendant does not contest that the place of service was his office. *See e.g. Slate v. Schiavone Construction Co.*, 10 A.D.3d 1 (1st Dept. 2004). While in retrospect it appears that service was not properly made upon the Defendant, it was reasonable under the circumstances for the process server to conclude that the person appearing in response to her specific request to see the Defendant CHWAJOL was the correct individual. Based upon the foregoing, the Court finds good cause shown to permit late service of the Summons and Complaint upon the Defendant CHWAJOL.

Moreover, even if the Court were to find that the "good cause shown" standard was not met, the Court would still find late service appropriate under the "interest of justice" standard. As the New York State Court of Appeals stated in *Leader v. Maroney, Ponzin & Spencer*, *supra*. at 105-106:

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 (citations omitted).

The Plaintiffs allege that the Defendants (including DR. CHWAJOL) committed malpractice, severely injuring LINDA PANDOLFI. If the action were dismissed against this Defendant, the Statute of Limitations would have expired and the Plaintiffs would not have the benefit of C.P.L.R. 205(a) to recommence the action against this doctor. Once the issue of improper service was raised by the Defendant CHWAJOL by motion prior to the joining of issue, the Plaintiffs promptly cross-moved for extension of time to serve said Defendant.

The Defendant relies on Posada v. Pelaez, 37 A.D.3d 168 (1st Dept. 2007) to oppose the extension of time. However, in Posada, it appears as if no service upon the Defendant had been attempted prior to the dismissal motion. Similarly, the good faith attempts made by the Illinois process server distinguishes this case from Braxton v. McMillan, 76 A.D.3d 607 (2nd Dept. 2010), also cited by the moving Defendant.

Finally, the Court notes that neither party has submitted affidavits of merits of the underlying matter. Thus, the Court has deemed the facts alleged in the Verified Complaint to be true for purposes of this motion to dismiss. *See e.g.* Burnett v. Pourgol, 83 A.D.3d 756 (2nd Dept. 2011).

Accordingly, after due deliberation, it is

ORDERED, that the motion by the Defendant MARKUS CHWAJOL, M.D. to dismiss the

Complaint against him for untimely and improper service is **denied** to the extent hereafter set forth;
and it is further

ORDERED, that the cross-motion by the Plaintiffs for leave to re-serve the Defendant
MARKUS CHWAJOL, M.D. *nunc pro tunc* is **granted** *provided that* proper service upon the
Defendant MARKUS CHWAJOL, M.D. is made within SIXTY (60) DAYS from the date hereof.
If proper service is not made, the action against Defendant MARKUS CHWAJOL, M.D. is
dismissed without the need for further motion; and it is further

ORDERED, that all further relief requested in the motion and cross-motion not specifically
addressed or granted herein is **denied**.

The foregoing constitutes the Decision and Order of this Court.

Dated: Mineola, New York
July 6, 2011

ENTER:


JOEL K. ASARCH, J.S.C.

Copies mailed to:

Goldsmith, Ctorides & Rodriguez, LLP
Attorneys for Plaintiffs

Furman Kornfeld & Brennan, LLP
Attorneys for Defendants Lenart and Chwajol

Heidell, Pittoni, Murphy & Bach, LLP
Attorneys for Defendants Langer, Elowitz,
Deletis, Gomez, St. Luke's-Roosevelt Hospital,
and the Hyman Institute for Neurology

ENTERED
JUL 08 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE