

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. KENNETH A. DAVIS,**

**Justice**

TRIAL/IAS, PART 10  
NASSAU COUNTY

SUBURBAN RESTORATION CO., INC.,

Plaintiff,

SUBMISSION DATE: 06/06/03

INDEX No.: 11651/02

-against-

VALLEY STREAM UNION FREE SCHOOL DISTRICT  
#30 and THE VALLEY STREAM BOARD OF  
EDUCATION,

MOTION SEQUENCE #1, 2, 3

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendant's motion to dismiss the action is granted. Plaintiff's motion for an order granting leave to file a notice of claim *nunc pro tunc* and for an extension of time to serve a summons and complaint is denied.

The instant action involves a claims for money allegedly due and owing plaintiff from an asbestos abatement project at one of defendant's schools. Plaintiff claims that they sustained injuries commencing on July 13, 2001. Plaintiff allegedly served a secretary at the defendant's office with a Notice of Claim on or about October 11, 2001. Plaintiff commenced the action by the filing of a summons and complaint on or about July 15, 2002. Plaintiff served a secretary at defendant's offices on or about March 10, 2003.

The court finds that plaintiff failed to commence the action in a timely fashion and that the plaintiff failed to serve the defendant pursuant to CPLR § 306-b. The statute provides that:

Service of the summons and complaint, summons with notice, or of the third-party summons and complaint shall be made within one hundred

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twenty days after their filing, provided that in an action or proceeding where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If 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, extend the time for service.

The burden is on the defendant to move to dismiss the complaint for a plaintiff's failure to effectuate timely service. Furthermore, the statute provides that service can be effectuated after the 120 days upon the showing of good cause or in the interest of justice. The statute grants the court absolute discretion in granting an extension since the legislature never specified the criteria the court should look at when deciding a motion pursuant to this section. Generally, good cause is viewed as extreme difficulty in effectuating service after due diligent attempts to serve, while the in the interest of justice is entirely discretionary.

The Second Department rendered three decisions in which this section of the statute was examined, which were subsequently affirmed by the Court of Appeals in one decision. Leader v. Maroney; et. al., 97 N.Y.2d 95, 761 N.E.2d 1018, 736 N.Y.S.2d 291 (2001). The decision in Leader v. Maroney, et al, related to an attorney who failed to effectuate timely service and then followed the procedures in the old section 306-b. Defendant moved to dismiss and plaintiff claimed counsel's ignorance of the new law was sufficient to grant the extension. The court found that law office failure was not sufficient to warrant an extension for good cause however, they granted an extension in the interest of justice on the basis that the statute of limitations had expired, there was a meritorious cause of action and there was no prejudice to the defendant. The court in Hafkin v. North Shore University Hospital held that an extension of time would not be granted in the interest of justice if the plaintiff failed to set forth any diligent efforts to serve the defendant. In Scarabaggio v. Olympia & York Estates Co., the court affirmed the trial court in its granting of an extension in the interests of justice claiming that the statute

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of limitations had expired, that the plaintiff moved promptly for an extension *nunc pro tunc* and that the defendant was not prejudiced. The factors that a court should review in determining a motion to dismiss or in granting an extension in the interest of justice include but are not limited to "expiration of the statute of limitations, actual notice to defendant that litigation was imminent or had been commenced, potential merit of plaintiff's cause of action, length in delay of service, prejudice to the defendant as a result of untimely service, promptness of plaintiff's request for an extension." Alexander, Extensions of Time to Serve Process Under CPLR § 306-b, NYLJ Jan. 16, 2001.

In the instant matter, Plaintiff commenced the action in July 15, 2002 and finally served defendant on March 10, 2003. The statute of limitations expired on July 13, 2002. Plaintiff has failed to set forth any attempts to serve the defendant nor has he set forth any reasons to substantiate an extension based on good cause. Defendant has and continues to maintain an office within the jurisdiction of this court and is apparently readily available to be served properly. It must be noted that plaintiff served a secretary in defendant's district office. Said service was not in compliance with the Education Law and the CPLR. Furthermore, the Notice of Claim was served in a similar fashion. Neither the Clerk of the District, the Superintendent or the Board of Education were served with process. As to the interest of justice claim, although the statute of limitations has expired and defendant will not be prejudiced, this court is not satisfied that alone warrants the granting of an extension. Plaintiff's excuse as to why service was not effectuated during the 120 day period does not warrant an extension of time. See, Leader, *supra*. Plaintiff did not move for an extension of time to effectuate service until almost a year after service was attempted and over a year and a half after the commencement of the action. Plaintiff's motion for an extension was entirely in response to defendant's motion to dismiss. See, Ludemann v. Maisel, 292 A.D.2d 428, 739 N.Y.S.2d 418 (2d Dep't 2002). This court would have viewed the instant motion in a more favorable light had plaintiff moved for the extension on or about the time service was finally made.

It is hereby ordered that as plaintiff has failed to show any diligence in attempting to serve a readily available defendant within the 120 days as provided for in CPLR § 306-b, and that the interests of justice standard has not been met by plaintiff, that the defendant's motion is granted and the complaint as to this defendant is dismissed. Furthermore, plaintiff's cross motion for

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an order granting an extension of time to serve *nunc pro tunc* is denied, as is plaintiff's cross motion for an extension of time to serve.

This decision constitutes the order of the court.

Dated:           **AUG - 1 2003**          

  
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**HON. KENNETH A. DAVIS**                      J.S.C.

**ENTERED**

**AUG 05 2003**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**