

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019

527765

OMAR FADLALLA,
Respondent,

v

YANKEE TRAILS WORLD TOURS,
INC.,
Appellant.

MEMORANDUM AND ORDER

Calendar Date: March 28, 2019

Before: Garry, P.J., Egan Jr., Lynch, Clark and Aarons, JJ.

Maynard, O'Connor, Smith & Catalinotto, LLP, Albany (Edwin Tobin of counsel), for appellant.

Girvin & Ferlazzo, PC, Albany (Christopher P. Langlois of counsel), for respondent.

Garry, P.J.

Appeals (1) from an order of the Supreme Court (Hartman, J.), entered August 3, 2018 in Albany County, which, among other things, granted plaintiff's cross motion to extend the time to serve the complaint, and (2) from an amended order of said court, entered September 6, 2018 in Albany County, which, among other things, granted plaintiff's cross motion to amend the complaint.

In September 2014, plaintiff was a passenger in a vehicle that was struck from behind by a bus owned and operated by Yankee Trails, Inc. (hereinafter Yankee Trails). In September

2017, five days before the statute of limitations expired, plaintiff commenced this action to recover for his injuries by filing a summons and complaint against defendant, Yankee Trails World Tours, Inc., and served the Secretary of State. Five months later, plaintiff advised defendant's insurance carrier, which also insures Yankee Trails, that there had been no answer or appearance in the action, and the carrier contacted Yankee Trails.

In February 2018, Yankee Trails answered and asserted affirmative defenses, including that plaintiff – by naming and serving the incorrect defendant – had failed to secure personal jurisdiction, and that the action was time-barred. Yankee Trails later moved for dismissal of the complaint upon these two grounds. Plaintiff cross-moved, pursuant to CPLR 306-b, to extend time for service on Yankee Trails and, pursuant to CPLR 305 (c), to amend the summons and complaint to substitute Yankee Trails as the defendant. In August 2018, Supreme Court granted that part of plaintiff's cross motion pursuant to CPLR 306-b. In September 2018, following service on Yankee Trails, the court issued an amended order further granting that portion of plaintiff's cross motion to amend the summons and complaint, substituting Yankee Trails as defendant, and denying Yankee Trails' motion for dismissal. These appeals ensued.

The essential facts are undisputed. Plaintiff incorrectly named defendant in the original summons and complaint. The bus involved in the underlying accident was owned and operated by Yankee Trails, and defendant had no part in the incident. Defendant and Yankee Trails are separate and distinct corporate entities, with different addresses and chief executive officers. Plaintiff failed to serve Yankee Trails within the applicable statute of limitations.

Contrary to the dissent's suggestion, whether relief pursuant to CPLR 306-b and 305 (c) is available is not merely a matter of discretion. Significantly, "CPLR 306-b cannot be used to extend the time for service against a defendant as to which the action was never validly commenced" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR

306-b; see Maldonado v Maryland Rail Commuter Serv. Admin., 91 NY2d 467, 472 [1998]; Henriquez v Inserra Supermarkets, Inc., 68 AD3d 927, 928 [2009]). Similarly, although a court may allow amendment of a summons to correct the name of a defendant pursuant to CPLR 305 (c), such remedy is not available where a plaintiff seeks to substitute a defendant who has not been properly served (see Smith v Garo Enters., Inc., 60 AD3d 751, 752 [2009], lv dismissed 13 NY3d 756 [2009]; Sanders v Tim Hortons, 57 AD3d 1419, 1420 [2008]; Hart v Marriott Intl., 304 AD2d 1057, 1059 [2003]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 305:4).

The fact that defendant and Yankee Trails use the same insurance carrier is of no significance in the circumstances presented; notably, the record reflects that the insurance carrier did not contact Yankee Trails until after the statute of limitations had expired. Nor may we consider plaintiff's error a mere misnomer that would allow relief to be granted pursuant to CPLR 305 (c) and CPLR 306-b (see Maldonado v Maryland Rail Commuter Serv. Admin., 91 NY2d at 472). Upon this record, plaintiff's attempt to "proceed against [Yankee Trails as] an unserved and entirely new defendant" after the statute of limitations had run should have been denied, as he failed to obtain jurisdiction over Yankee Trails for relief pursuant CPLR 306-b and, thus, to later amend the complaint pursuant to CPLR 305 (c) (Security Mut. Ins. Co. v Black & Decker Corp., 255 AD2d 771, 773 [1998]; see Kinder v Braunius, 63 AD3d 885, 887 [2009]; Achtziger v Fuji Copian Corp., 299 AD2d 946, 947 [2002], lv dismissed 100 NY2d 548 [2003]; Jordan v Lehigh Constr. Group, 259 AD2d 962, 962 [1999]). Accordingly, Yankee Trails' dismissal motion should have been granted.

Lynch, Clark and Aarons, JJ., concur.

Egan Jr., J. (dissenting).

I respectfully dissent. Unlike the majority, I find that CPLR 306-b is applicable here. This provision was implemented to provide courts with greater flexibility when confronted with

service mistakes and permits a court to grant a plaintiff an extension of time for service to avoid, among other things, the "unnecessarily harsh consequences of a peremptory dismissal" (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 100-101, 105 [2001] [internal quotation marks and citation omitted]; see generally Chan v Zoubarev, 157 AD3d 851, 851-852 [2018]; Heath v Normile, 131 AD3d 754, 755-756 [2015]; Dhuler v ELRAC, Inc., 118 AD3d 937, 939 [2014]; Dujany v Gould, 63 AD3d 1496, 1497-1498 [2009]). CPLR 306-b confers broad discretion on a court to extend time for service, "upon good cause shown or in the interest of justice" (see Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105-106; Heath v Normile, 131 AD3d at 755-756; Wishni v Taylor, 75 AD3d 747, 749 [2010]; Mead v Singleman, 24 AD3d 1142, 1143-1144 [2005]). 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" (Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105; see Chan v Zoubarev, 157 AD3d at 852; Komanicky v Contractor, 146 AD3d 1042, 1043-1044 [2017]; Deep v Boies, 121 AD3d 1316, 1323-1324 [2014], lv denied 25 NY3d 903 [2015]). No single factor is dispositive and relevant considerations include, among other things, "diligence, or lack thereof, . . . expiration of the [s]tatute of [l]imitations, 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 the defendant" (Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105-106; see Heath v Normile, 131 AD3d at 755-756; Pierce v Village of Horseheads Police Dept., 107 AD3d 1354, 1356-1357 [2013]; Dujany v Gould, 63 AD3d at 1498).

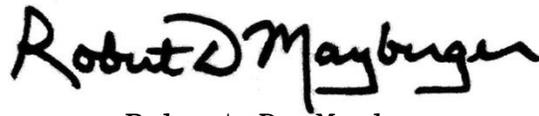
Upon review, I find that Supreme Court weighed the appropriate factors and discern no abuse of discretion in its decision to grant plaintiff an extension of time for service (see Chan v Zoubarev, 157 AD3d at 851-852; Heath v Normile, 131 AD3d at 755-756; Dhuler v ELRAC, Inc., 118 AD3d at 939; Dujany v Gould, 63 AD3d at 1498). As the motion court aptly observed, after learning of his mistake, plaintiff promptly moved for an extension of time to serve Yankee Trails, Inc. (hereinafter Yankee Trails) and exhibited some level of diligence in

attempting service by locating and properly serving defendant – an entity whose name is similar to Yankee Trails and is admittedly used by Yankee Trails in certain branding activities. In addition, his cause of action is potentially meritorious, and public policy favors resolution on the merits (see Heath v Normile, 131 AD3d at 755-756; Wishni v Taylor, 75 AD3d at 749; Mead v Singleman, 24 AD3d at 1144-1145; compare Komanicky v Contractor, 146 AD3d at 1043-1044; Deep v Boies, 121 AD3d at 1323-1324; Matter of Anonymous v New York State Off. of Children & Family Servs., 53 AD3d 810, 811-812 [2008], lv denied 11 NY3d 709 [2008]). Although it is undisputed that the statute of limitations expired before plaintiff discovered his mistake and moved for relief, this factor alone is not determinative (see Chan v Zoubarev, 157 AD3d at 852; Heath v Normille, 131 AD3d at 755-756). Notably, the record evinces no prejudice to Yankee Trails. I find it significant that Yankee Trails had actual notice that litigation was forthcoming as defendant and Yankee Trails share an insurance carrier, and plaintiff had communications with the insurer several months before the statute of limitations expired (see Chan v Zoubarev, 157 AD3d at 852; Heath v Normille, 131 AD3d at 755; Dhuler v ELRAC, Inc., 118 AD3d at 939; Pierce v Village of Horseheads Police Dept., 107 AD3d at 1357; Wishni v Taylor, 75 AD3d at 749). Yankee Trails also knew that it was the intended defendant as it, rather than defendant, answered and moved to dismiss, tellingly identifying itself in its papers as "defendant Yankee Trails, Inc., sued herein as Yankee Trails World Tours, Inc." (see Dhuler v ELRAC, Inc., 118 AD3d at 938-939; Pierce v Village of Horseheads Police Dept., 107 AD3d at 1357). Accordingly, given the lack of any demonstrable prejudice and the strength of the other relevant factors weighing in favor of granting the extension of time for service, I would affirm both orders (see Heath v Normille, 131 AD3d at 755-756; Dhuler v ELRAC, Inc., 118 AD3d at 939; Dujany v Gould, 63 AD3d at 1498; compare Pierce v Village of Horseheads Police Dept., 107 AD3d at 1357-1358).

ORDERED that the order is reversed, on the law, with costs, and plaintiff's cross motion to extend the time to serve the complaint denied.

ORDERED that the amended order is reversed, with costs, plaintiff's cross motion to amend the complaint denied and motion for dismissal by Yankee Trails, Inc. granted.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court