

FCS Group, LLC v Chica
2018 NY Slip Op 33433(U)
November 5, 2018
Supreme Court, Queens County
Docket Number: 702752/18
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

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FCS Group, LLC, Index No: 702752/18
Plaintiff,
-- against -- Motion Date:8/21/18
Marco Chica, Anamul Haque, and Mavi, Seq. No: 3
INC.,
Defendants.
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The following papers numbered 1 to 8 read on this motion for an order pursuant to CPLR §§ 3211(a)(8) and CPLR § 306-b dismissing the complaint for lack of personal jurisdiction and improper service of process, and this cross-motion pursuant to CPLR § 306-b deeming plaintiff's service of Mavi, Inc. ("MAVI"), as timely, nunc pro tunc, and extending plaintiff's time to serve defendant Chica based upon a showing of good cause or in the interest of justice, denying defendant Mavi's July 30th, 2018 Motion to Dismiss the Complaint for Failure to Timely Serve, and for other such relief as the Court deems just and proper.

PAPERS
NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits..... 1 - 4
Answering Affirmations, Affidavits and Exhibits..... 5 - 6
Reply Affirmations, Affidavits and Exhibits..... 7 - 8
Other.....

Upon the foregoing papers, defendants' motion to dismiss is denied and plaintiff's cross-motion to deem its service of defendant MAVI as timely, nunc pro tunc, and to extend its time to serve defendant Chica is granted based upon the discussion below.

Plaintiff commenced this action for breach of contract on February 22, 2018. It effectuated service upon defendant Haque on February 23, 2018. Plaintiff attempted to effectuate service on

defendants MAVI and Chica, but failed to do so within 120 days after commencement of this action. Plaintiff did serve a copy of the summons and complaint on defendant MAVI by serving the same upon the secretary of state 127 days after the commencement of this action.

CPLR 3211(a)(8) provides that a party may move the court to dismiss a cause of action against him where the court lacks personal jurisdiction over that defendant (CPLR 3211 [a] [8]). For a Court to have personal jurisdiction over a corporate defendant, service of process must be made upon "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (CPLR 311 [1] [a]). Section 306 (b) of the Business Corporation Law provides that service of process upon a corporate defendant may be completed by personally serving the secretary of state as agent for that defendant (*Konig v Hermitage Ins. Co.*, 93 A.D.3d 643 [2d Dept. 2012]); (see N.Y. Bus. Corp. Law § 306 [b] [1]).

CPLR 306-b states in pertinent part 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, or upon good cause shown or in the interest of justice, extend the time for service."

(CPLR 306-b). The "time provided" to effectuate service upon a defendant after commencement of an action is "one hundred twenty days" (*Id.*).

" To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service [G]ood cause may [also] be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (*Bumpus v. City of New York Tr. Auth.*, 66 AD3d 26, 31-32 [2d Dept 2009]). However, "[g]ood cause will not exist where a plaintiff fails to make any effort at service, . . . or fails to make at least a reasonably diligent effort at service" (*id.*).

In the absence of good cause shown "courts must consider the 'interest of justice' standard of CPLR 306-b. The interest of justice standard does not require reasonably diligent efforts at service, but courts, . . . may consider the presence or absence of diligence, along with other factors" (*Bumpus v. City of New York Tr. Auth.*, 66 AD3d 26, 32 [2009], citation omitted).

Additional factors to be considered "include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant" (*Bumpus*, 66 AD3d at 32 [2009]).

Here, plaintiff has failed to demonstrate good cause for failing to serve defendant MAVI within 120 days after commencement of this action. While plaintiff has shown diligence in its attempts to serve defendant MAVI, as evidenced by the affidavit of plaintiff's process server, plaintiff has failed to explain why it did not serve process on the secretary of state as agent for MAVI (*See* N.Y. Bus. Corp. Law § 306 [b] [1]) (providing that service upon a corporation may be effectuated by serving the secretary of state "as agent of a domestic . . . corporation"). Thus, plaintiff has failed to show good cause in its failure to serve defendant MAVI by serving process on the secretary of state within 120 days after commencement of this action.

Regarding the attempted service of defendant Chica, plaintiff explains, in its papers, that it attempted to serve defendant Chica by visiting the defendant's last known address, but received no answer after ringing the doorbell. Plaintiff's process server then conducted a database search and found a "David Chica" listed at 62-82 60th Drive; the same address listed on the New York State Department of State Division of Corporations website for MAVI. Plaintiff made several more attempts to serve defendant Chica at this 60th Drive address, but was unsuccessful. Plaintiff's process server was unable to locate a forwarding address for defendant Chica. Accordingly, plaintiff has demonstrated good cause for its failure to serve defendant Chica through its diligence in attempting to effectuate service, which was unsuccessful due to circumstances outside the plaintiff's control.

Although plaintiff has not demonstrated good cause in its attempts to serve defendant MAVI, it has demonstrated that, in the interest of justice, its service of defendant MAVI should be considered timely, *nunc pro tunc*.

To extend time of service in the interest of justice under CPLR 306-B, the court may weigh several factors (*see Bumpus*, 66 AD3d at 32 [2009]). Here, the length in delay of service outside the 120-day time frame was minimal (seven days) and plaintiff has shown, in its papers, that defendant MAVI had actual notice of the suit according to defendant Hague's deposition testimony. There is also an indication that defendant MAVI sought to avoid service by plaintiff because plaintiff's process server called

the number listed for MAVI, where a female answered the phone by saying "MAVI" and immediately hung up after the process server asked for MAVI's location. This is not disputed in defendants' reply. Furthermore, defendants have failed to demonstrate that they would be prejudiced by granting of plaintiff's cross-motion because defendants had notice of the underlying action, as evidenced by defendant Haque's testimony explaining that he not only told defendants MAVI and Chica about the lawsuit, but also that defendant MAVI is paying for defendant Haque's legal representation.

Accordingly, the defendants' motion to dismiss is denied, and the plaintiff's cross-motion is granted; and it is,

Ordered, that plaintiff's service of defendant MAVI is deemed timely, *nunc pro tunc*; and it is further,

Ordered, that plaintiff's time to serve defendant Chica is extended for an additional 60 days from the date of service of this Order with notice of entry.

This constitutes the Order of the Court.

Dated: November 5, 2018

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Leonard Jivote, A.J.S.C.

FILED
NOV 28 2018
COUNTY CLERK
QUEENS COUNTY