

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D54445
C/htr

_____AD3d_____

Argued - December 19, 2017

L. PRISCILLA HALL, J.P.
LEONARD B. AUSTIN
SANDRA L. SGROI
LINDA CHRISTOPHER, JJ.

2016-08899

DECISION & ORDER

Freida Chan, respondent, v Valeri Zoubarev,
appellant.

(Index No. 13743/14)

Rosenbaum & Taylor, P.C., White Plains, NY (Dara L. Rosenbaum of counsel), for
appellant.

Jonathan D'Agostino & Associates, P.C., Staten Island, NY (Glen Devora and
Giovanna Colasanto of counsel), for respondent.

Appeal from an order of the Supreme Court, Kings County (Kathy J. King, J.), dated
January 8, 2016. The order denied the defendant's motion pursuant to CPLR 3211(a)(8) and 306-b
to dismiss the complaint for lack of personal jurisdiction and granted the plaintiff's cross motion
pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant.

ORDERED that the order is affirmed, with costs.

The plaintiff commenced this action against the defendant to recover damages for
personal injuries. The defendant moved pursuant to CPLR 3211(a)(8) and 306-b to dismiss the
complaint for lack of personal jurisdiction, and the plaintiff cross-moved pursuant to CPLR 306-b
to extend the time to serve the summons and complaint upon the defendant. The Supreme Court
denied the defendant's motion and granted the plaintiff's cross motion. The defendant appeals.

The defendant correctly contends that the plaintiff's purported service of the
summons and complaint upon him pursuant to CPLR 308(4) was defective, as the defendant
submitted un rebutted evidence that the place where service was attempted and where the summons
and complaint were affixed was not his dwelling place or usual place of abode at the relevant time

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(see *Commissioners of State Ins. Fund v Khondoker*, 55 AD3d 525, 526; *In Ja Kim v Dong Hee Han*, 37 AD3d 662; *Venerri v Gallo*, 23 AD3d 376).

Nevertheless, the Supreme Court providently exercised its discretion in denying the defendant's motion to dismiss the complaint and granting the plaintiff's cross motion to extend the time to serve the summons and complaint upon the defendant. Generally, service of a summons and complaint must be made within 120 days after the commencement of the action (see CPLR 306-b). If service is not made within the time provided, the court, upon motion, must dismiss the action without prejudice, or "upon good cause shown or in the interest of justice, extend the time for service" (*id.*). "An extension of time for service is a matter within the court's discretion" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101). Here, while the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the timely service of process was subsequently found to have been defective, and the defendant had actual notice of the action within 120 days of commencement of the action (see *Singh v Trahan*, 153 AD3d 961; *Selmani v City of New York*, 100 AD3d 861, 862; *Dhuler v ELRAC, Inc.*, 118 AD3d 937, 939). Moreover, there was no prejudice to the defendant attributable to the delay in service (see *Singh v Trahan*, 153 AD3d at 961; *Selmani v City of New York*, 100 AD3d at 862; *Dhuler v ELRAC, Inc.*, 118 AD3d at 939).

HALL, J.P., AUSTIN, SGROI and CHRISTOPHER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court