

Untimely Service of Process Under the New CPLR 306-b; A Dark Cloud with a Silver Lining

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The new CPLR 306-b is the perhaps the most liberal, and pro-plaintiff, statute ever devised regarding the timeliness of service of process. It allows the courts to grant liberal extensions of time for service, even after the original 120 days for service has transpired. Plaintiffs' attorneys will be especially grateful for this new Statute when the time for service has expired and the Statute of limitations has expired so that re-commencing the action is not an option. The new CPLR 306-b reflects the modern view that cases should be decided on their merits rather than on mere technicalities (see, e.g., *Myers v Secretary of the Department of the Treasury*, supra; *Rupert v Metro-North Commuter R.R.*, 1996 WL 447545 [S.D.N.Y. 1996]).

Federal Rule of Civil Procedure Rule 4(m) served as a model for the new CPLR § 306-b. As under the Federal rule, CPLR 306-b gives Courts discretion to grant an extension on the time for service even when the motion is brought after the original 120 days for service has expired (see, Practice Review by Prof. Siegel, issue #61; Alexander, Practice Commentary, McKinney's Cons. Laws of N.Y., Book7B, CPLR 306-b, p. 120-121).

Yet the new CPLR 306-b is far more generous even than its Federal counterpart. Under the Federal rule, the Court may grant the extension for "good cause" shown. Under CPLR 306-b, the Court may grant the extension for "good cause" and additionally may grant it (presumably where there is no "good cause") "in the interest of justice". Arguably, whenever the statute of limitations has run it is "in the interest of justice" to grant plaintiff an extension of his time to serve so as to avoid the "harsh result" of dismissal of the action (see, e.g., *Myers v Secretary of the Department of the Treasury*, 173 F.R.D. 44, 47-48 [E.D.N.Y. 1997] [even though plaintiff failed to show good cause for failure to serve within the 120 days, Court granted extension of time to serve where statute of limitations had expired in order to avoid "harsh result" to plaintiff]).

Case law generated under the Federal Rule has held that, in deciding whether there is "good cause" for an extension of the 120 days for service, the Courts should look at "plaintiff's reasonable efforts to effect service" (*National Union Fire Ins. v Barney Assoc.*, 130 F.R.D. 291, 293 [S.D.N.Y. 1990]). The new CPLR 306-b seems to go further here as well; the Office of Court Administration, which drafted the rule, has supported the law with a Memorandum in which it states that the Courts should consider not only plaintiff's diligence in attempting service, but also plaintiff's diligence in seeking an extension. This double-edged sword within CPLR 306-b may even allow plaintiffs' attorneys to prevail where they have been diligent either in attempting service or in seeking an extension for service. Thus, a plaintiff who was not very diligent in attempting service but was diligent in seeking the extension of time may still argue that the Court should exercise its discretion and grant the extension.

It should be noted that the recent amended version of 306-b is so new that it has generated no case law. A thorough and thoughtful discussion of the new statute is given, however, by Vincent Alexander in his Practice Commentary. Here are some important excerpts:

[The] new statute prescribes no outside time period within which the court may allow late service. . . . Moreover, the legislative memorandum in support of the new statute, drafted by the Office of Court Administration (OCA), explicitly states: “Although the dismissal would be without prejudice, where the statute of limitations has run in the interim the dismissal would obviously be fatal to a plaintiff’s claim. It is for this reason that we believe that extensions of time should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service.” . . .

The OCA memorandum goes on to state, however, that “the court would consider the plaintiff’s diligence in seeking an extension of time in making its decision as to whether the motion should be granted.” . . .

As to “good cause,” cases applying CPLR 2004, which also uses a good cause standard, presumably will be relevant. . . . The OCA memorandum implies that plaintiff’s exercise of diligence should be a factor. . . . It remains to be seen whether “law office failure” (e.g., mistake, miscalculation, misreading of the service provisions of CPLR Article 3) will qualify under CPLR 306-b as good cause (see Practice Commentaries on CPLR 2005). In any event, “the interest of justice” alternative may rescue a plaintiff whose attorney is at fault for the untimely service. Cf. *Myers v. Secretary of the Department of the Treasury*, supra.

Tensions on a motion under CPLR 306-b will be at their highest when the statute of limitations has expired so as to effectively preclude a second action by the plaintiff. It is in such circumstances that the “interests of justice” ground will probably be invoked most often. The potential prejudice to the plaintiff when dismissal occurs after expiration of the statute of limitations is obvious, but plaintiff’s lack of diligence and prejudice to the defendant must also be considered. Nevertheless, courts should take into account the drafters’ intent, described above, that motions for extension be liberally granted after expiration of the statute of limitations. . . .

(Alexander, Practice Commentary, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 306-b, p. 120-121 [emphasis added]).

Obviously, plaintiffs’ attorneys should avoid, wherever possible, being placed in the uncomfortable position of having to move for an extension of the time for service, especially after the statute of limitations has run. But for those who find themselves under the dark cloud of this predicament, CPLR 306-b offers a silver lining.