

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY, J.S.C.

PART 23

LINDA KIRSCH

Plaintiff

INDEX NO. 155451/2017

MOT. DATE March 8, 2018

- v -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,
AMERICAN BALLET THEATRE, METROPOLITAN OPERA
HOUSE, "JOHN DOE", as further described in annexed complaint,
and Brian McCalister.

Defendants

MOT. SEQ. NO. 002

The following papers were read on this motion to Extend Time

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through E

Notice of Cross-Motion to Dismiss/Answering Affidavits — Exhibits A through E

Replying Affidavits

ECFS DOC No(s). 1

ECFS DOC No(s). 2

ECFS DOC No(s). 3

In this action, plaintiff alleges that she sustained injuries as a result of an incident on June 15, 2016 at Lincoln Center during a performance of Swan Lake. Plaintiff alleges that a Caucasian male individual assaulted and battered her from behind her seat with a karate chop to both shoulders. In Motion Sequence No. 002 plaintiff seeks an order pursuant to CPLR §306-b, granting an extension of time to identify and serve an additional "JOHN DOE" defendant. Defendant, Brian McCalister (formerly JOHN DOE), cross-moves seeking to dismiss the action pursuant to CPLR 3211(a)(5) and (8) and 1024.

FACTUAL BACKGROUND and CONTENTIONS

The relevant facts are largely undisputed. The incident giving rise to the complaint occurred on June 15, 2016. On June 14, 2017, one day prior to the expiration of the one year statute of limitations applicable to intentional torts, plaintiff filed a summons and complaint, which included as a defendant, John Doe, as further described in the complaint. All parties agree that pursuant to CPLR 306-b, the 120-day deadline for service to be effectuated expired on October 12, 2017.

On October 2, 2017, Defendant, American Ballet Theatre ("ABT"), filed its Answer to the Summons and Complaint. (NYSCEF Doc. No. 38). On October 9, 2017, plaintiff filed a Supplemental Summons and Amended Complaint, identifying Brian McCalister as a former "JOHN DOE" defendant. (NYSCEF Doc. No. 22).¹ Additionally, all parties agree that on October 10, 2017 plaintiff caused the Supplemental Summons and Amended Complaint to be served upon McCalister. (NYSCEF Doc. No. 23).

On October 25, 2017, attorneys for McCalister wrote to plaintiff's counsel purporting to reject the Supplemental Summons and Amended Complaint served on October 10, 2017, because plaintiff had not "obtained leave of Court as required to name Mr. McCalister as a defendant in this case" and as such,

McCalister claimed that the “Supplemental Summons and Amended Complaint are nullities.” (NYSCEF Doc. No. 41).

On October 10, 2018 plaintiff filed the instant motion, seeking an extension of time to identify and serve an additional “John Doe” defendant, claiming that additional discovery is needed to ascertain whether McCalister, in fact, attended the presentation of Swan Lake wherein plaintiff alleges she was “karate chopped” from behind and to determine whether McCalister resold or gave away the two subject tickets to another individual. Plaintiff is seeking an extension of time to identify and serve the remaining John Doe defendant, in the interest of justice.

Defendant McCalister opposes plaintiff’s motion and cross moves seeking to dismiss the action pursuant to CPLR 3211(a)(5) and (8), on the basis of statute of limitations and lack of personal jurisdiction. Defendant contends that because the amended complaint is a nullity, the court lacks personal jurisdiction over McCalister and now that the statute of limitations has expired, the cross motion should be granted.

Plaintiff, in opposition to defendant’s cross motion, argues that the Supplemental Summons and Amended Complaint were filed and served “as of right”, and that she exercised diligent efforts seeking the identity of “John Doe” and immediately substituted McCalister in place of the “John Doe” defendant, as soon as his identity became known. Plaintiff argues that she is not required to and is not seeking leave to amend pursuant to CPLR §1024, as she has already supplemented her summons and amended her complaint as to McCalister, as of right and as such, defendant’s argument lacks merit. Additionally, plaintiff argues that there is no lack of due diligence in identifying “John Doe” and that the cases cited by defendant are inapposite and factually distinguishable.

Finally, plaintiff contends that the claims asserted against McCalister are timely and meritorious. Plaintiff alleges that her cause of action arises from an intentional assault and battery by a Caucasian male who “karate chopped” plaintiff to both shoulders from behind her seat, and that she has demonstrated that McCalister was the individual who purchased the seat located behind her on the date and time the incident is alleged to have occurred.

Defendant, in Reply, contends that even if the court accepts plaintiff’s “late arguments” relative to her compliance with CPLR 1024, plaintiff has not made an adequate showing of diligent efforts to identify “John Doe” prior to the expiration of the statute of limitations to warrant relief under the section and thus, dismissal is appropriate under CPLR 3211(a)(8). For the reasons that follow, defendant’s cross-motion is denied and plaintiff’s motion is granted.

STANDARD OF REVIEW and ANALYSIS

1. Defendant’s cross motion to dismiss.

C.P.L.R. 1024, entitled “Unknown Parties,” provides as follows:

A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be

FILED: NEW YORK COUNTY CLERK 03/07/2018 09:02 AM

NYSCEF DOC. NO. 50

RECEIVED NYSCEF: 03/07/2018

Where amendment is sought under CPLR 1024, no formal motion is necessary. *Woodburn Court Assocs. I v. Wingate Mgmt. Co.*, 243 A.D.2d 1043, 1045 (3d Dept. 1997) (no motion was required under CPLR 1024 to add Hartford Fire Insurance Company as a defendant after its identity was ascertained); see also Siegel, NY Prac § 188 (4th ed.); see also, *Voto v. Sutphen*, 2011 NY Misc. LEXIS 4423 (Sup. Ct. Nassau County, 2011) (once the party's complete identity is ascertained, the plaintiffs are not required to seek court approval so as to amend the caption and insert the proper name). New York courts have interpreted this section to permit John Doe substitutions nunc pro tunc. See *Hogan v Fischer*, 738 F.3d 509, 518 (2d Cir. 2013), citing, *Bumpus v. N.Y.C. Transit Auth.*, 66 A.D.3d 26 (2d Dep't 2009); *Victor Auto Parts, Inc. v. Cuva*, 148 Misc. 2d 349 (Sup. Ct. Monroe Cnty. 1990); *Wilson v. 30 Broad St. Assocs., L.P.*, 178 Misc. 2d 257, (Civ. Ct. N.Y. County. 1998).

Contrary to defendant's contention, plaintiff was not required to seek leave of court to substitute McCalister in place of "John Doe", as the record demonstrates that plaintiff made a genuine effort to ascertain, in a timely manner, the identity of defendant McCalister prior to the expiration of the statute of limitations. *Opiela v May Indus. Corp.*, 10 AD3d 340 (1st Dept. 2004) (plaintiff may amend a complaint to reflect the true names of defendants in question, where such parties were fairly apprised that they are the intended defendants and are not prejudiced thereby).

Defendant's contention that plaintiff has not demonstrated diligent efforts to identify McCalister prior to the expiration of the statute of limitations, is simply not borne out by the record. Indeed, on November 14, 2016, a full seven months before the expiration of the one-year statute of limitations, plaintiff's counsel sent a letter to Lincoln Center requesting the identity of the patron who purchased the ticket for seat N#11; in that letter, it was also noted that the incident had been reported to Metropolitan Opera security. (NYSCEF Doc. No. 45). Thereafter, on November 16, 2016, plaintiff's counsel sent a letter to ABT, indicating that she had learned that the ticket for the performance in question was given to ABT. (NYSCEF Doc. No. 46).

In addition, after the action was timely commenced naming a "John Doe" defendant, on August 23, 2017, plaintiff served discovery notices upon the corporate defendants; on October 9, 2017, corporate defendants responded to plaintiff's discovery notice and identified Brian McCalister as the individual who purchased seats N9-N11 located behind plaintiff. (NYSCEF Doc. No. 20). Immediately thereafter, on October 9, 2017, before the expiration of the statute of limitations, in accordance with CPLR §1024, plaintiff filed a supplemental summons and amended complaint substituting Brian McCalister as a defendant. (NYSCEF Doc. No. 22). In addition, on October 9, 2017, plaintiff also amended the complaint, as of right, pursuant to CPLR 3025(a), less than twenty days after ABT served and filed its Answer on October 2, 2017, to assert an additional allegation that McCalister "assaulted and battered" her. (NYSCEF Doc. No. 22, ¶7).

CPLR §1024 allows a party to amend a pleading to replace an unknown party, designated as such at the time an action is commenced, with the party's name once such party is identified. Notably, the proponent of such an amendment must establish that the defendant, who at the time an action was commenced could not be identified, was "named or described in such form as [would] properly identify the defendant and give notice of opportunity to defend". *Rivera v. City of New York*, 56 Misc. 3d 1215(A) (Sup. Ct. Bronx County, 2017), citing, *Goldberg v. Boatmax://, Inc.*, 41 AD3d 255, 256 (1st Dept. 2007). Finally, the proponent of a CPLR §1024 amendment must also establish that diligent efforts to identify an unknown defendant were made prior to commencement of the action to no avail. *Rivera v. City of*

FILED: NEW YORK COUNTY CLERK 05/00/2018 09:02 AM

NYSCEF DOC. NO. 60

RECEIVED NYSCEF: 05/00/2018

Here, there can be no doubt that plaintiff has satisfied the requirements of CPLR §1024. Plaintiff has established that at the time the action was commenced she could not identify the persons seated behind her at the Swan Lake performance and as such availed herself of CPLR §1024, naming “John Doe” as further described in the annexed complaint. It is obvious that plaintiff’s efforts to identify McCalister were diligent as she successfully identified him prior to the expiration of the statute of limitations and upon identifying him, immediately substituted McCalister for the “John Doe” defendant described in the complaint as “a Caucasian male individual, who on June 15, 2016 at approximately 3:30 p.m., assaulted and battered the plaintiff from her seat #M11 behind with a ‘karate chop’ to both shoulders at the premises located at 30 Lincoln Center Plaza, New York, New York as set forth below, during a performance of ‘Swan Lake’”. (NYSCEF Doc. No. 18).

In accordance with the plain language of §1024, once “the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.” N.Y. C.P.L.R. 1024 (McKinney 2017). While one can argue that plaintiff’s amendment “as of right” pursuant to CPLR 3025(a), to assert an additional allegation that McCalister “assaulted and battered” her was unnecessary, given the procedural mechanism afforded under CPLR §1024, it does not vitiate the fact that McCalister was properly substituted in place of the “John Doe” defendant, prior to the expiration of the applicable statute of limitations.

Based on this record, plaintiff did not need to seek leave of court to substitute McCalister in place of the previously described “John Doe” defendant. *Woodburn Court Assocs. I v. Wingate Mgmt. Co.*, 243 A.D.2d at 1045. Defendant’s attempt to obfuscate the issue by citing legal authority that is plainly distinguishable from the present case, does not alter the plain language of CPLR §1024. Moreover, because plaintiff had adequately described “so much of his. . . identity as [was] known” at the time the initial summons and complaint was filed on June 14, 2017, one day prior to the expiration of the statute of limitations, defendant cannot demonstrate prejudice. *ICD Group Int’l Ltd. v. Achidov*, 284 AD2d 244 (1st Dept. 2001) (Where Court held that a party could properly amend a caption from “John Doe” to the name of the defendant, where the defendant was fairly apprised that it was the party the action was intended to affect, and where no prejudice to the defendant was shown.); *Mia Terra Realty Corp. v Sloan*, 57 Misc. 3d 141(A) (App. Term, First Department, 2017).

Here, plaintiff properly substituted McCalister in place of the “John Doe” defendant, immediately upon learning of his identity and prior to the expiration of the statute of limitations. Her diligent efforts, in the form of letters and inquiry to the named corporate defendants, a full seven months prior to the statute of limitations expiring, obviously were successful, as the efforts resulted in her identification of McCalister as the patron who purchased the seats behind her for the June 15, 2016, afternoon performance of Swan Lake at Lincoln Center. As noted, defendant is unable to establish any prejudice resulting from the timely amendment of the complaint to substitute McCalister, in place of the “John Doe” defendant. Plaintiff properly amended the complaint in accordance with the requirements of CPLR §1024. Accordingly, McCalister’s motion to dismiss the complaint is denied.

2. Plaintiff’s motion to extend time to serve additional “John Doe” defendant.

Plaintiff seeks an extension of time to serve the additional “John Doe” defendant, in the interest of justice. Plaintiff contends that additional time is needed in order for plaintiff to determine whether McCalister attended the Swan Lake performance or whether he gave his tickets to somebody else or

good cause shown or in the interest of justice, extend the time for service." N.Y. C.P.L.R. 306-b (McKinney 2012).

It is well settled that the determination to grant "[a]n extension of time for service is a matter within the court's discretion". *Leader v Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 101, (2001). The Court of Appeals has explained that 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," including "diligence [in attempting to effect service], or lack thereof, . . . expiration of the Statute of Limitations, 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 defendant." *Leader v Maroney, Ponzini & Spencer*, 97 N.Y.2d at 105-106. Here, the court has determined that plaintiff employed diligent efforts that led to the identification and substitution of McCalister, in place of the "John Doe" defendant. Similarly, plaintiff promptly filed a motion, prior to the expiration of the statute of limitations, to extend her time to identify and substitute the additional "John Doe" defendant.

Here, plaintiff alleges that she was assaulted from behind, during a performance of Swan Lake at Lincoln Center. As set forth above, plaintiff's diligent efforts led to the identification and substitution of defendant McCalister, prior to the expiration of the one-year statute of limitations. Certainly, it is in the "interest of justice" to allow plaintiff an extension of time to determine whether McCalister can identify the additional person who sat behind plaintiff during the performance, and/or additional relevant information to allow plaintiff to substitute a named defendant in place of the "John Doe" defendant.

Plaintiff filed her motion to extend the time to identify and serve the additional "John Doe" defendant, immediately upon learning of McCalister's identity and prior to the expiration of the statute of limitations, as such, plaintiff has met her burden to obtain an "interest of justice" extension. *Chan v Zoubarev*, 157 AD3d 8511 (2nd Dept. 2018); *Deutsche Bank, AG v Vik*, 149 A.D.3d 600 (1st Dept. 2017); *Redmond v. Jamaica Hosp. Med. Ctr.*, 29 AD3d 768 (2nd Dept. 2006) (Generally, where a plaintiff has made diligent efforts to discover the identities of the unknown defendants within 120 days, an extension of time to serve those defendants is appropriate, where there is no prejudice to defendants).

As the court has found no prejudice to McCalister, it would be an improvident exercise of this court's discretion to deny plaintiff's motion to extend her time for the service of the summons and complaint upon the additional "John Doe" defendant; to do so would deprive plaintiff the opportunity to prove her causes of action against both defendants. *Gabbar v. Flatlands Commons, LLC*, 150 AD3d 1084 (2nd Dept. 2017).

CONCLUSION

Plaintiff's motion to extend the time for service upon the additional "John Doe" defendant is granted, in the interest of justice. Accordingly, it is hereby,

ORDERED that defendant McCalister's Cross Motion to Dismiss is denied in its entirety; and it is further

ORDERED that defendant McCalister is directed to serve an answer to the complaint within 20

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.