

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Bayview Loan Servicing, LLC v. Tanvir H. Chaudhury

2020 NY Slip Op 07021 (App. Div. 2020) · No. 2019-01907 · Decided November 25, 2020

SUMMARY

The New York Appellate Division, Second Department, reversed an order denying a mortgage foreclosure plaintiff's motion to extend the time for service under CPLR 306-b. The court held that the action remained pending because no judgment dismissing the complaint had been entered and granted an extension in the interest of justice, citing the potentially meritorious claim, expiration of the statute of limitations, lack of demonstrated prejudice, and difficulties involving the process server's testimony.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Alan D. Scheinkman, P.J.; Ruth C. Balkin, J.; Jeffrey A. Cohen, J.; Hector D. LaSalle, J.
JURISDICTION	New York
DECIDED	November 25, 2020
DOCKET	2019-01907
DISPOSITION	reversed
PROCEDURAL POSTURE	The plaintiff appealed from an order of the Supreme Court, Queens County, denying its motion under CPLR 306-b to extend the time to serve the summons and complaint on Tanvir H. Chaudhury and Farhana Azam in a mortgage-foreclosure action.
STANDARD OF REVIEW	Abuse-of-discretion review of a CPLR 306-b extension request, together with review of the legal issue whether the action remained pending because no judgment dismissing the complaint had been entered.
PRECEDENTIAL VALUE	Published intermediate appellate opinion
PARTIES	Bayview Loan Servicing, LLC v. Tanvir H. Chaudhury, Farhana Azam

TOPICS

service of process

personal jurisdiction

foreclosure

appellate procedure

civil procedure

PRACTICE AREAS

civil procedure

mortgage foreclosure

personal jurisdiction

QUESTIONS PRESENTED

1. Whether a plaintiff may move under CPLR 306-b for an extension of time to serve process when an order has granted a motion to dismiss for lack of personal jurisdiction but no judgment dismissing the action has been entered.
2. Whether an extension of time to serve the summons and complaint was warranted under CPLR 306-b's interest-of-justice standard.

HOLDINGS

1. Because no judgment dismissing the action had been entered, the action remained pending when Bayview moved under CPLR 306-b, and Bayview was not foreclosed from seeking an extension of time to serve process.
2. An extension of time to serve the summons and complaint was warranted in the interest of justice.

KEY QUOTATIONS

"Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice" (*2)

"courts must consider the broader interest of justice standard of CPLR 306-b" (*2)

FACTUAL BACKGROUND

Bayview brought an action to foreclose a mortgage on real property in Queens. Chaudhury and Azam did not answer or appear, and default-related foreclosure orders were entered. Following a hearing concerning the validity of service, the Supreme Court granted their motion to vacate the default orders and dismiss for lack of personal jurisdiction. Bayview sought additional time to serve them, relying in part on the process server's failure to comply with a subpoena to testify at the service hearing and asserting that the defendants suffered no demonstrable prejudice from the delay.

PROCEDURAL HISTORY

Bayview commenced a mortgage-foreclosure action against, among others, Chaudhury and Azam. The defendants failed to answer or appear, and an order of reference and judgment of foreclosure and sale were entered on default. After a service-of-process hearing, the Supreme Court granted the defendants' motion to vacate the default order and judgment and to dismiss for lack of personal jurisdiction, although no judgment of dismissal was entered. The Supreme Court then denied Bayview's CPLR 306-b motion to extend the service period, and the Appellate Division reversed.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The plaintiff's CPLR 306-b motion was granted; the time to serve the summons and complaint on Chaudhury and Azam was extended until 120 days after service on the plaintiff of a copy of the decision and order. The portion of the March 5, 2018 order granting dismissal for lack of personal jurisdiction was vacated, and one bill of costs was awarded to the plaintiff.

CASES CITED

- State of New York Mtge. Agency v. Braun, 182 A.D.3d 63, 66-67
- U.S. Bank N.A. v. Saintus, 153 A.D.3d 1380, 1382
- Cooke-Garrett v. Hoque, 109 A.D.3d 457
- Modugno v. Bovis Lend Lease Interiors, Inc., 184 A.D.3d 820, 822
- Chandler v. Osadln, Inc., 181 A.D.3d 897
- Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106
- BAC Home Loans Servicing, L.P. v. Herbst, 180 A.D.3d 980, 981-982
- JPMorgan Chase Bank, N.A. v. Kothary, 178 A.D.3d 791, 793

OPINION

PER CURIAM.

Bayview Loan Servicing, LLC v Tanvir H. Chaudhury (2020 NY Slip Op 07021) Bayview Loan Servicing, LLC v Tanvir H. Chaudhury 2020 NY Slip Op 07021 Decided on November 25, 2020 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on November 25, 2020 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department ALAN D. SCHEINKMAN, P.J. RUTH C. BALKIN JEFFREY A. COHEN HECTOR D. LASALLE, JJ. 2019-01907 (Index No. 24521/09) [*1]Bayview Loan Servicing, LLC, appellant, vTanvir H. Chaudhury, et al., respondents, et al., defendants. Akerman LLP, New York, NY (Ashley S. Miller and Jordan M. Smith of counsel), for appellant.

DECISION & ORDER In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Janice A. Taylor, J.), entered January 14, 2019. The order denied the plaintiff's motion pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendants Tanvir H. Chaudhury and Farhana Azam. ORDERED that the order is reversed, on the law and in the exercise of discretion, the plaintiff's motion pursuant to CPLR

306-b to extend the time to serve the summons and complaint upon the defendants Tanvir H. Chaudhury and Farhana Azam is granted, and so much of an order entered March 5, 2018, as granted that branch of the motion of the defendants Tanvir H. Chaudhury and Farhana Azam which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction is vacated; and it is further, ORDERED that the plaintiff's time to serve the summons and complaint upon the defendants Tanvir H. Chaudhury and Farhana Azam is extended until 120 days after the date of service upon the plaintiff of a copy of this decision and order; and it is further, ORDERED that one bill of costs is awarded to the plaintiff.

The plaintiff commenced this action against, among others, the defendants Tanvir H. Chaudhury and Farhana Azam (hereinafter together the defendants) to foreclose a mortgage on real property located in Queens. The defendants did not answer or appear in the action. An order of reference, entered October 15, 2010, and a judgment of foreclosure and sale, entered June 15, 2016, were issued on default.

The defendants thereafter moved, inter alia, pursuant to CPLR 5015(a) to vacate the order and judgment entered upon their default, and pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction.

After a hearing to determine the validity of service of process, the Supreme Court, by order entered March 5, 2018, granted those branches of the defendants' motion. However, no judgment dismissing the complaint on the ground of lack of personal jurisdiction was entered.

The plaintiff thereafter moved pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendants. By [*2]order entered January 14, 2019, the court denied the motion. The plaintiff appeals. Contrary to the Supreme Court's conclusion, since no judgment had been entered dismissing the action, the action was still pending at the time the plaintiff moved pursuant to CPLR 306-b to extend the time for service, and the plaintiff was not foreclosed from seeking that relief (see *State of New York Mtge.*

Agency v Braun, 182 AD3d 63; *US Bank N.A. v Saintus*, 153 AD3d 1380, 1382; *Cooke-Garrett v Hoque*, 109 AD3d 457). Although the court did not address the merits of the plaintiff's motion, we deem it appropriate to do so in the interest of judicial economy (see *Modugno v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820, 822). "Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice" (*State of New York Mtge.*

Agency v Braun, 182 AD3d at 66; see CPLR 306-b). Where, as here, a plaintiff does not establish "good cause" (see *Chandler v Osadln, Inc.*, 181 AD3d 897), "courts must consider the broader interest of justice standard of CPLR 306-b" (*State of New York Mtge. Agency v Braun*, 182 AD3d at 66).

In applying that standard, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including 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 the defendant" (id. at 66-67, quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106).

In the present case, an extension of time was warranted in the interest of justice. The plaintiff demonstrated that a potentially meritorious cause of action existed, that while it timely commenced this action, the statute of limitations had expired by the time it moved to extend the time for service, and that there was no demonstrable prejudice to the defendants as a consequence of the delay in service (see *State of New York Mtge.*

Agency v Braun, 182 AD3d at 67; *BAC Home Loans Servicing, L.P. v Herbst*, 180 AD3d 980, 981-982; *JPMorgan Chase Bank, N.A. v Kothary*, 178 AD3d 791, 793). Moreover, as the interest of justice standard permits consideration of "any other relevant factor" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105), this Court may consider the fact that the process server failed to comply with a subpoena to appear and give testimony at the hearing to determine the validity of service of process, thereby hampering the plaintiff's ability to meet its burden of proof at that hearing (see *State of New York Mtge.*

Agency v Braun, 182 AD3d at 67). Accordingly, the Supreme Court should have granted the plaintiff's motion and vacated so much of the order entered March 5, 2018, as granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction. SCHEINKMAN, P.J., BALKIN, COHEN and LASALLE, JJ., concur.

ENTER: Aprilanne Agostino Clerk of the Court