

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

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JERRY CADIGAN and NANCY CATON CADIGAN, :
as the Proposed Administrators of the Estate of :
TREVOR NORRIS CADIGAN, Deceased, :
: :
Plaintiffs, : Index No. 152286/2018
: :
-against- :
: :
LIBERTY HELICOPTERS, INC., a New York :
Corporation; NYONAIR LLC, a New Jersey Limited :
Liability Company; FLYNYON LLC, a New Jersey :
Limited Liability Company; MERIDIAN CONSULTING :
I CORPORATION, INC., a Delaware Corporation; :
RICHARD ZEMKE VANCE, a Connecticut resident; :
AIRBUS HELICOPTERS, S.A.S., a French Corporation; :
AIRBUS HELICOPTERS, INC., a Delaware Corporation; :
and APICAL INDUSTRIES, INC. d/b/a DART :
AEROSPACE, a California Corporation, :
: :
Defendants. :
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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
TO EXTEND THE TIME TO SERVE DEFENDANTS PURSUANT TO CPLR § 306-B**

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Preliminary Statement

Plaintiffs Jerry Cadigan and Nancy Caton Cadigan, as the Proposed Administrators of the Estate of Trevor Norris Cadigan, deceased, respectfully submit this Memorandum of Law in support of their motion to extend the time to serve process pursuant to CPLR § 306-b. Plaintiffs have served all defendants except for Airbus Helicopters, S.A.S., a French company which is being served in accordance with Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, TIAS #10072 (U.S. Treaties and other International Acts) and 20 UST 361 (U.S. Treaties and other International Agreements) (hereinafter referred to as “Hague Convention”). Plaintiffs have started the Hague Convention service protocol but require additional time to complete service under CPLR § 306-b.

Statement of Facts

The relevant facts are set forth in the Affirmation of Matthew F. Schwartz sworn to on July 11, 2018, the First Amended Complaint, annexed thereto as Exhibit B, and the affidavits of service annexed as Exhibits C-H and are as follows:

A. The Fatal Helicopter Crash

This lawsuit arises out of a fatal crash on March 11, 2018 in New York City involving a Eurocopter AS350 B2 helicopter. The helicopter lost altitude during a sightseeing tour and descended into the East River. The helicopter rolled to its side into the waters and sunk. The pilot, who was not wearing a harness, only manufacturer-installed lap and shoulder belts, escaped from the helicopter but all five passengers who wore the harnesses in addition to the safety belts were unable to escape the helicopter and drowned.

One of those passengers was Trevor Norris Cadigan and Plaintiffs are his parents and the Co-Administrators of his Estate. They have brought this lawsuit against the owner and operator

of the helicopter, the helicopter tour companies, the pilot, and the manufacturers of the helicopter and the emergency flotation devices.

B. Commencement of the Action and Service on the Defendants

The Summons and Complaint were electronically filed on March 13, 2018. *Schwartz Aff.*, ¶ 6, Exh. A. Plaintiffs filed a Supplemental Summons and First Amended Complaint on March 28, 2018 naming additional defendants. *Schwartz Aff.*, ¶ 7, Exh. B. Plaintiffs have served all of the domestic defendants and have filed the requisite proof of service. *Schwartz Aff.*, ¶¶ 8-14, Exhs. C-H. The following chart sets forth the date each of the domestic defendants were served and identifies the docket entries of the proofs of service that have been electronically filed with the court:

Defendant	Date Served	Docket Entry	Exhibit
LIBERTY HELICOPTERS, INC.	4/26/2018	Docket No. 12	C
NYONAIR LLC	5/1/2018	Docket No. 13	D
FLYNYON LLC	5/1/2018	Docket No. 13	D
MERIDIAN CONSULTING I CORPORATION, INC.	5/2/2018	Docket No. 15	E
APICAL INDUSTRIES, INC. d/b/a DART AEROSPACE	5/4/2018	Docket No. 16	F
AIRBUS HELICOPTERS, INC.	5/10/2018	Docket No. 17	G
RICHARD ZEMKE VANCE	5/19/2018	Docket No. 19	H

C. Service on Airbus Helicopters, S.A.S.

Defendant Airbus Helicopters, S.A.S. is the manufacturer of the helicopter involved in the crash. *Amended Compl.*, ¶ 29. It is a French company so service is being made in accordance with the Hague Convention. The Hague Convention requires that the pleadings be translated and delivered to a Central Authority in France from which service is arranged on the defendant. Plaintiffs have completed the first two steps and a translation of the pleadings were sent to the relevant French Central Authority on May 14, 2018. *Schwartz Aff.*, ¶ 16. Plaintiffs estimate that, once delivered to the Central Authority, it will take 12-16 weeks to complete service. *Schwartz*

Aff., ¶ 17. Airbus Helicopters, S.A.S. has notice of the case because its foreign counterpart Airbus Helicopters, Inc. has been served and has requested that its time to answer be extended until after the French company is served. *Schwartz Aff.*, ¶ 18, Exh. I.

ARGUMENT

THE COURT SHOULD EXTEND PLAINTIFFS' TIME TO COMPLETE SERVICE OF PROCESS ON THE DEFENDANTS

CPLR § 306-b requires that service of a summons and complaint, or a summons with notice, be made within 120 days after the filing of the summons and complaint under CPLR 304. Section 306-b further states 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.” (emphasis added)

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. *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105, 736 N.Y.S.2d 291 (2001). The ‘interest of justice,’ to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant. *Id.*

The Practice Commentaries to the CPLR explain that, while no list can be considered definitive or exhaustive, the factors to be considered in an extension of time for good cause include: plaintiff’s diligence in attempting service, length of delay in service, prejudice to the defendant as a result of untimely service, and the promptness of plaintiff’s request for an extension. The factors to be considered in the interests of justice include: expiration of the statute of limitations, actual notice to defendants that litigation was imminent or had been commenced, potential merit of plaintiff’s cause of action, length of delay of service, prejudice to the defendant

as a result of untimely service, promptness of plaintiff's request for an extension. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y. (2001), Book 7B, C306-b:3, at 483.

As discussed below, application of these principles requires that the motion for an extension of time be granted because plaintiffs are able to demonstrate both that they have met the standard for "good cause" and that an extension of time to serve defendants would be in the "interest of justice."

A. There is Good Cause to Extend the Time for Service

As the First Department has noted, the CPLR was rewritten to add CPLR 306-b, "which merely requires a showing of 'good cause' why service was not made within the time provided in the section..." and that such extensions "should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service" (Memorandum in support of ch 476 of McKinney's 1997 Session Laws of New York; see, 1997 New York State Legislative annual p. 319). *Campbell v Starre Realty Co.*, 283 A.D.2d 161, 161-62, 724 N.Y.S.2d 584, 585 (1st Dep't 2001). To meet the standard for an extension of time under the "good cause" standard of CPLR § 306-b, a plaintiff must demonstrate that "reasonable diligence was employed to effectuate service or that the plaintiff was somehow unable to serve defendant." *Lonuzzi v. Koch, Geringer & Co., LLP*, 2009 WL 1492817, at *4 (Sup. Ct. Kings Cnty. May 28, 2009).

Courts have found the "good cause" standard to be met where the plaintiffs have taken reasonable steps to locate and serve the defendant within the requisite 120-day period but have failed to timely serve process as "the result of circumstances beyond plaintiff's control." *Frank v Garcia*, 84 A.D.3d 654, 655, 923 N.Y.S.2d 529, 530 (1st Dep't 2011); *Sanchez v. Garden*, 6 A.D.3d 267, 775 N.Y.S.2d 39 (1st Dep't 2004)(defendant appeared to be avoiding service").

A "good cause" extension requires a showing of reasonable diligence in attempting to effect service upon a defendant. *Henneberry v Borstein*, 91 A.D.3d 493, 496, 937 N.Y.S.2d 177,

180 (1st Dep't 2012). The First Department has held that good cause is likely to be found where “the plaintiff's failure to timely serve process is a result of circumstances beyond [its] control.”

Bumpus v. New York City Tr. Auth., 66 A.D.3d 26, 32, 883 N.Y.S.2d 99 (2nd Dep't 2009).

Difficulties associated with service abroad through the Hague Convention is a relevant factor in determining whether to enlarge a plaintiff's time for service of process. *Green 333 Corp. v RNL Life Science, Inc.*, 2017 WL 3449274 (Sup. Ct. NY Co. 2017); *Kulpa v. Jackson*, 3 Misc.3d 227, 235, 773 N.Y.S.2d 235 (Sup. Ct. Oneida Co. 2004)(difficulties associated with service abroad through the Hague Convention).

Here, plaintiffs have acted diligently to serve defendants. All the domestic defendants have been served. *Schwartz Aff.*, ¶ 8, Exh. C-H. In the case of defendant Airbus Helicopters, S.A.S., the manufacturer of the helicopter involved in the crash, service is being made in accordance with the Hague Convention which requires that translated pleadings be delivered to the Central Authority in France. Plaintiffs have completed the first two steps and a translation of the pleadings were sent to the relevant French Central Authority on May 14, 2018 from which they will be served on the defendant within 12-16 weeks. *Schwartz Aff.*, ¶ 15-17.

Accordingly, plaintiffs have met the standard for “good cause” because they have shown that they made diligent efforts to serve Defendant Airbus Helicopter, S.A.S. and that their failed attempts at service within 120 days are a result of circumstances outside of their control.

B. The Court Should Extend the Time in the Interests of Justice

Even if there were not good cause for an extension, plaintiffs should nevertheless be granted an extension of time under the “interest of justice” standard. Courts have interpreted the “interest of justice” prong of 306-b as “an additional and broader standard... to accommodate late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant.” *Brooklyn Housing & Family Services, Inc. v. Lynch*, 191 Misc.2d 341, 740

N.Y.S.2d 753, 758 (Sup. Ct. Kings Co. 2002) (quoting *Leader*, 97 N.Y.S.2d at 105). The absence of prejudice is the key factor in the analysis. *Jordan v City of New York*, 38 A.D.3d 336, 833 N.Y.S.2d 8 (1st Dep't 2007).

In applying the broader “interest of justice” standard to determine whether to grant a motion for extension of time to serve process under CPLR 306-b, courts have considered factors such as (1) whether dismissal of the action would bar a new action because of expiration of the applicable statute of limitations, (2) the explanation given for the late service, (3) the promptness with which plaintiff sought judicial extension of the time to serve, (4) whether the delay was within the reasonable control of the movant, (5) whether the movant acted in good faith, and (6) any prejudice would result to the defendant if the motion to extend time to serve process was granted. See, e.g., *Hafkin v. North Shore University Hosp.*, 279 A.D.2d 86, 718 N.Y.S.2d 379 (2nd Dep't 2000).

Each of the factors to be considered by the courts is “merely a factor to be weighed with other factors,” and the listed factors “are not intended to be exhaustive, but are...to be considered in determining whether the facts and circumstances as a whole warrant discretionary relief pursuant to CPLR 306-b.” *Hafkin*, 718 N.Y.S.2d at 382. Unlike the “good cause” standard, plaintiffs seeking an extension under the “interest of justice” standard need not establish reasonable diligence. See *Scarabaggio v. Olympia & York Estates Co.*, 278 A.D.2d 476, 718 N.Y.S.2d 392 (2nd Dep't 2000).

In this case, the “interests of justice” factors weigh in favor of granting the extension. The statute of limitations has not expired on plaintiffs’ claims. The crash occurred on March 11, 2018 and the statute still has over two and a half years. Second, plaintiffs have an explanation for delay in service because of the requirements of the Hague Convention. Third, this litigation has only just been started and there has been no discovery. Plaintiffs have diligently worked to effect

service on defendants and only the French defendant remains to be served. Finally, the delay in service has not been caused by inaction on the part of plaintiffs who have acted in good faith and there is no prejudice to defendant Airbus Helicopters, S.A.S.

We note that Airbus Helicopters, S.A.S. has notice of the case because its foreign counterpart, Airbus Helicopters, Inc., has been served and has requested that its time to answer be extended until the French company is served. *Schwartz Aff.*, ¶ 18, Exh. I. Courts have found that evidence that a defendant had actual notice of the action will belie a claim that such defendant would be prejudiced by an extension of time for service. See *L& L Developers of Greater Rochester, Inc. v. NYNA Electric Corp.*, 52 A.D.3d 1242, 860 N.Y.S.2d 342, 344 (4th Dep't 2008).

Conclusion

For these reasons, plaintiffs respectfully request that the Court issue an Order granting their motion to extend the time for service for an additional 120 days from the date of the Order granting such relief, and that the Court grant such other and further relief as it deems just and proper.

Dated: New York, New York
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