

Gupta v Gupta

2024 NY Slip Op 34411(U)

December 14, 2024

Supreme Court, New York County

Docket Number: Index No. 653304/2024

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON **PART** **61M**

Justice

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ASHOK GUPTA,
Plaintiff,

- v -

INDEX NO. 653304/2024

MOTION DATE 11/22/2024

MOTION SEQ. NO. 005

AMIT GUPTA, AMIT GUPTA AS EXECUTOR OF THE
ESTATE OF GOVIND SAHAI GUPTA, AMIT GUPTA AS
TRUSTEE OF THE SAHAI TRUST, SUSHILA GUPTA,
ASHA KHATORIA, RADHA GOVIND KHATORIA, RAM
KHATORIA, RARE MULTI COLOR GEMS, INC., VIKRAM
SAHAI GUPTA

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63
were read on this motion to/for EXTEND - TIME.

In this declaratory judgment action arising from a dispute over a family business, the plaintiff, Ashok Gupta, moves pursuant to CPLR 306-b to extend the time within which to serve the summons and complaint upon defendant family members Amit Gupta and Sushila Gupta and pursuant to CPLR 308(5) for leave to serve those defendants by means of alternative service. The motion is granted.

The plaintiff commenced this action on June 28, 2024, alleging that the defendants, certain family members and their business entities, failed to properly distribute the assets and proceeds of the family business, Getax Partnership. The plaintiff alleges that the family business of trading in phosphates was operated without a formal agreement, as is customary in Indian families, by him, his father and his younger brother Amit in Dubai. The plaintiff avers that he contributed his skill, ambition and money to build the business into an international partnership over many years and was now being excluded from its assets and proceeds by Amit, who managed the finances. In 2013, as Australian authorities commenced a bribery investigation into Getax Australia, Getax Partnership ceased business to be replaced by newly formed

companies, with the understanding that the trust arrangements concerning Getax Partnership would be maintained. According to the plaintiff, upon their father's death in 2018, the two brothers were to have a 50% share of the Getax assets, but Amit has refused to turn over the plaintiff's 50% share or provide the company's books and records for inspection and has instructed the other defendants to do the same. Not unexpectedly, this has led to family strife and alienation.

The plaintiff successfully served all defendants located in New York and counsel for his brother, Vikram, accepted service on his behalf.¹ The plaintiff had difficulty effecting service in the remaining two defendants, Amit Gupta and their mother, Sushila Gupta, who are currently residents of the Emirate of Dubai in the United Arab Emirates (UAE). UAE is not a signatory to the Hague Convention and is not a party to any agreement with the United States in regard to service abroad. Per statute, the plaintiff initially had 120 days from June 28, 2024, or about until October 28, 2024, to serve the defendants. See CPLR 306-b. After filing the complaint, the plaintiff consulted with two Dubai law firms for guidance on the proper method of service of the summons and complaint in Dubai. After a delay due to extensive research, Dubai counsel advised that the plaintiff could commence a proceeding in Dubai to obtain the appointment and authorization or a process server to serve the two remaining defendants residing there, but the process server would not sign an affidavit of service, which is required by CPLR 308(2) or 308(4). On October 14, 2024, after consulting with another international law firm, the plaintiff commenced the process to apply for an order in a Notary Public in Dubai to direct a server to serve the summons and complaint. Those attorneys could prepare an affidavit of service based on a report from the server. However, the ultimate success of that process is uncertain.

The plaintiff filed this motion two weeks later on October 28, 2024, seeking a 60-day extension of time to serve the two remaining defendants (CPLR 306-b) and leave to serve them by alternate means on the ground that service under the other sections of CPLR 308 would be impracticable. Notably, in support of this motion, the plaintiff includes his own affidavit, in which he states the basis of his knowledge of the home and email addresses of his brother Amit and

¹ The plaintiff represents in his affidavit that Vikram is a student at Emory University but he had difficulty locating him there. The plaintiff hired two process servers who attempted service several times at multiple locations but were unsuccessful. A private investigator interviewed persons who might have information on his whereabouts and eventually obtained Vikram's telephone number. In response to a voicemail left by the investigator, Vikram texted the investigator on October 23, 2024, with his attorney's name and number and advised that all communications should go to the attorney. That attorney agreed to accept service on behalf of his client.

mother Sushila, their home addresses, the name and address of his brother's separate business in Dubai, Agrifields DMCC, and his brother's business email address and telephone number. He states that his brother and mother reside in a combined apartment, Nos. 3903 and 3923, at Laguna Towers. Cluster A, Jumeirah Lakes Towers, Dubai, UAE. His knowledge comes from a visit he made to that residence in 2023, conversations with other relatives and a copy of his father's will which lists that address for them. The plaintiff further avers that Amit is the managing director of Agrifields, DMCC, which is located at Unit No: 3201, JBC4, Cluster N, Jumeirah Lakes Towers, Dubai, UAE. The plaintiff also submits the affirmation of international counsel with experience in service in Dubai who explains the difficulties in serving process there and the uncertainty of any service method satisfying New York's requirements.

CPLR 306-b provides, in relevant part, that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall ... upon good cause shown or in the interest of justice, extend the time for service." Although a showing of due diligence in attempting to serve a defendant by the initial 120-day deadline must be made in order to establish "good cause" for an enlargement of time to effect service, a discretionary basis for such an enlargement of time may be invoked "in the interest of justice" even where there has been no showing of such diligence. See Leader v Maroney, 97 NY2d 95 (2001). Under the interest of justice standard, in addition to issues of diligence, the "court may consider ... 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 defendant." Id. at 105-106; see Bumpus v New York City Tr. Auth., 66 AD3d 26 (1st Dept. 2009). Difficulties associated with service abroad is a relevant factor in determining whether to enlarge a plaintiff's time for service of process. See Bumpus v New York City Tr. Auth., supra.

The plaintiff has demonstrated good cause of an extension of time to serve the summons and complaint for the requested 60 days. The court notes that the motion was made just as the initial 120-day period was expiring, but that was only due the fact that after extensive efforts, the plaintiff was still awaiting word from the last law firm he consulted on whether the notary method was successful and waiting one more day could have precluded the relief sought here. The plaintiff has shown that he was making substantial, and mostly successful, efforts to serve all defendants, including the last two who reside in Dubai. In any event, all factors considered also support a finding that the "interest of justice" standard was met, particularly in

light of the status of the family relationships and the difficulties in serving process in the UAE. Moreover, the plaintiff brought this motion even before the success of the notary method had been determined, demonstrating due diligence in that regard. As to the merits, while the plaintiff may not ultimately prevail on all or any of his claims, as pleaded they are not without merit. Any further delay in the litigation by granting an extension will be minimal because the plaintiff requested only 60 days, not the maximum of 120, and he has proposed expeditious methods of service under CPLR 308(5). Finally, this delay could not cause prejudice to any party.

The plaintiff also moves pursuant to CPLR 308(5) for leave to serve Amit Gupta and Sushil Gupta by alternate means. Specifically, he requests to serve (1) defendant Amit Gupta by email at his work and personal email addresses, as well as his address in Dubai via DHL or Federal Express, and (2) defendant Sushila Gupta by DHL or Federal Express to her address in Dubai, as well as to Amit (her son) via email with a request that he deliver them to her. In the alternative, the plaintiff seeks the alternative relief the notary method commenced by plaintiff's international counsel. The court grants the primary relief requested.

"It is well established that CPLR 308(5) vests a court with the discretion to direct an alternative method of service of process when it has determined that the methods set forth in CPLR 308 (1), (2) and (4) are 'impracticable (CPLR308[5]).'" Home Fed. Sav. Bank v Versace, 252 AD2d 480, 480 (2nd Dept. 1998) (internal quotations omitted); see State St. Bank & Trust Co. v. Coakley, 16 AD3d 403 (2nd Dept. 2005). The impracticability standard does not require the applicant to satisfy the more stringent standard of 'due diligence' under CPLR 308(4)." Astrologo v Serra, 240 AD2d 606, 606 (2nd Dept. 1997), *quoting Kelly v Lewis*, 220 AD2d 485, 485 (2nd Dept. 1995); see Fontanez v PV Holding Corp., 182 AD3d 423 (1st Dept. 2020). It does require that the method approved by the court be "reasonably calculated under the circumstances to apprise the defendant of the action." NMR E-Tailing LLC v Oak Invest. Partners, 216 AD3d at 572 (1st Dept. 2023); see also Henderson-Jones v City of New York, 87 AD3d 498 (1st Dept. 2011). Furthermore, "[t]here is nothing necessarily improper about the use of e-mail service." Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L., 78 AD3d 137, 141-142 (1st Dept. 2010); see NMR E-Tailing LLC v Oak Invest. Partners, *supra*; Kozel v Kozel, 161 AD3d 700 (1st Dept. 2018); Safadjou v Mohammadi, 105 AD3d 1423 (4th Dept. 2013).

In light of these standards and under the circumstances of this case, the proposed methods of service on Amit Gupta - by e-mail at his personal and email addresses, as well as

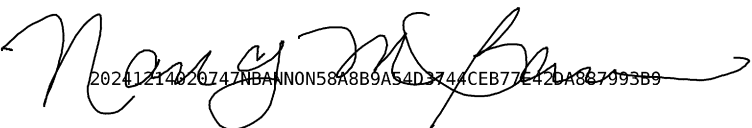
by DHL or Federal Express at the home address, and on Sushila Gupta - by DHL or Federal Express at her home address and by an email message sent to her son with the papers attached and a request to send them to Sushil, are "reasonably calculated to apprise [them] of a pending lawsuit." While generally the probability of a message or papers being passed from one defendant to another upon request of the plaintiff would be low, here the two defendants are son and mother who reside together in a combined apartment, and the plaintiff is not a stranger but is their brother and son. Moreover, service by DHL or Federal Express is also directed as to defendant Sushil Gupta, which alone could be sufficient.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 306-b to extend the time to effectuate service of process upon defendants Amit Gupta and Sushil Gupta for 60 days and to serve them with the summons and complaint by alternate methods pursuant to CPLR 308(5) is granted, without opposition, and it is further,

ORDERED that the plaintiff shall effectuate service of the summons and complaint upon defendants Amit Gupta and Sushil Gupta on or before February 16, 2025, by (1) service on defendant Amit Gupta by email at his personal and business (amit@agrifield.com) email addresses, as well as his home address in Dubai (Apartment Nos. 3903 and 3923, Laguna Towers, Cluster A, Jumeirah Lakes Towers, Dubai, UAE) via DHL or Federal Express, and (2) service on Sushila Gupta by DHL or Federal Express to her home address in Dubai (Apartment Nos. 3903 and 3923, Laguna Towers, Cluster A, Jumeirah Lakes Towers, Dubai, UAE) as well as by email to Amit Gupta's personal email address with a request that he deliver the message and papers to her.

This constitutes the Decision and Order of the court.


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12/14/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE