ANDRE DEJESUS, Plaintiff, v. THE GOVERNING BODY OF JEHOVAH'S WITNESSES, WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA; WATCH TOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and CRESTON KINGDOM HALL OF JEHOVAH'S WITNESSES, Defendants.	SUPREME COURT OF THE STATE OF NEW YORK BRONX COUNTY Index No. 70307/2021E

FORDHAM SPANISH CONGREGATION OF JEHOVAH'S WITNESSES' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Fordham Spanish Congregation of Jehovah's Witnesses, improperly named as Creston Kingdom Hall of Jehovah's Witnesses, brings this motion to dismiss Plaintiff's Complaint ("Motion") pursuant to C.P.L.R. §3211(a) for failure to comply with provisions of C.P.L.R. 312(a) and C.P.L.R. 306-b.

PRELIMINARY STATEMENT

Plaintiff filed his complaint on August 4, 2021. Time to serve any defendant expired on December 2, 2021. Plaintiff did not name the Congregation as a defendant and did not file a motion to extend time to serve the Congregation. Similarly, Plaintiff did not ask the Court to serve the Congregation via alternate means pursuant to the Rules of Court.

The Congregation received Plaintiff's Complaint in the mail on March 11, 2022; 99 days after allowed time to serve defendants; and 209 days after the extended statute of limitations expired. Plaintiff never filed any affidavit of service and has not shown any reasonable diligence in attempting to serve the Congregation or in attempting to name the Congregation as a defendant in this lawsuit. As a result, no justice would be served by rewarding Plaintiff's unexplained and unexcused complete lack of diligence to obtain jurisdiction over the Congregation prior to expiration of the statute of limitations. Plaintiff's defective mailing of the Complaint to the Congregation does not accomplish any jurisdictional purpose because notice of the lawsuit received by means other than those authorized by statutes does not bring a defendant within the jurisdiction of the court. As a result, to this date Plaintiff failed to obtain jurisdiction over the Congregation. In addition, the Congregation would be severely prejudiced by a lawsuit and service outside the statute of limitations as events underlying this action occurred over thirty years ago and evidentiary burdens imposed on the Congregation are daunting under the circumstances of this case.

Since the statute of limitations expired to bring any claim against the Congregation for acts described in Plaintiff's Complaint, Plaintiff should not be allowed to amend his Complaint to add the Congregation as a defendant or to extend time to serve the Congregation and any claim against it should be dismissed with prejudice.

STATEMENT OF FACTS

Plaintiff brought this lawsuit pursuant to the provisions of the Child Victims Act (the "CVA") codified in CPLR 214-g which revived, for a one-year period, all formerly time-barred civil actions that are based on certain enumerated sexual offenses against minors. The one year window to file claims pursuant to CPLR 214-g expired on August 14, 2021.

Plaintiff alleged that he was abused from approximately 1985 through 1986, over 35 years ago, when he was a minor by an unspecified individual whose name was either "John Kennedy or Kenny." See Korgul Affirmation ("Korgul Aff.") Exhibit A Complaint ¶¶35, 50.

Plaintiff filed his Complaint on August 4, 2021. Korgul Aff. ¶3. Time to serve defendants expired on December 2, 2021. Korgul Aff. ¶4. Plaintiff filed no affidavit of service with the Court related to the attempted service on Creston Kingdom Hall of Jehovah's Witnesses ("Creston") or the Congregation. Korgul Aff. ¶5. Neither did Plaintiff file a motion to extend time to serve Creston or the Congregation. Korgul Aff. ¶6. Similarly, Plaintiff did not ask the Court for leave to serve Creston or the Congregation via alternative means. Korgul Aff. ¶7. In fact, the Congregation is not even a defendant in this case. Korgul Aff. ¶8.

On March 11, 2022, 99 days after allowed time to serve defendants and 209 days after the statute of limitations window closed, the Congregation received a copy of Plaintiff's Complaint in the mail. Korgul Aff. ¶9.

ARGUMENT

I. PLAINTIFF FAILED TO DILIGENTLY SERVE THE CONGREGATION, FAILED TO REQUEST AN EXTENSION OF TIME TO SERVE AND FAILED TO ASK FOR LEAVE TO SERVE BY ALTERNATE MEANS

As of July 1992, New York became a "filing state" in which an action is commenced by filing a summons and complaint and the purchase of an index number. C.P.L.R. 304. Pursuant to C.P.L.R. 306-b, the plaintiff then must serve the summons and complaint within 120 days. The court has the power to extend that time period for "good cause shown" or "in the interests of justice". Id. Specifically, C.P.L.R. Section 306-b provides:

> Service of a summons and complaint . . . shall be made within one hundred twenty days after their filing . . . . If 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 interests of justice, extend the time for service.

Id.

The Chief Administrative Judge's memorandum clarified that, in cases where the statute of limitations had otherwise run on a claim, "extensions of time should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service." *Hafkin v North Shore Univ. Hosp.*, 279 A.D.2d at 85, affd. 97 N.Y.2d at 105. Therefore, a plaintiff must show reasonable diligence in attempting service in order to obtain the benefit of the current C.P.L.R. 306-b before the Court may extend the deadline for "good cause" or in the "interests of justice".

Without a "reasonable diligence" requirement, there would be no reason for any plaintiff to attempt to properly obtain jurisdiction over a defendant within the applicable statute of limitations. The statute of limitations would become virtually irrelevant.

As one learned commentator has noted: "[t]he fact that the statute of limitations has expired and that a dismissal for want of service would at this point make it too late for a new action is of course a consideration, but the expiration of the statute can't itself assure that the motion to extend will be granted." David Siegel, New Rule in Effect for Commencing Actions, N.Y.L.J., Jan. 5, 1998.

Clearly, pursuant to the C.P.L.R. 306-b, not all cases warrant an extension of time to serve a defendant. Otherwise, the requirement either to show "good cause" or that the "interests of justice" will be served would not have been incorporated into the C.P.L.R. 306-b.

Therefore, plaintiff is not automatically entitled to an extension of time to serve a defendant just because the plaintiff has not served a defendant and the statute of limitations has expired. *See e.g., Aubin v. State of New York*, A.D.2d , N.Y.S.2d (3d Dep't 2001) 2001 N.Y. App. Div. LEXIS 3937 (even though the cause of action would be extinguished if the extension of time to serve was not granted, Third Department denied plaintiff's motion for an extension since the record did not demonstrate either "good cause" or that the "interests of justice" would be served by granting the extension); *Kassover v. Shapiro*, A.D.2d , 719 N.Y.S.2d 98 (2d Dep't 2001) (plaintiff failed to demonstrate either the existence of good cause, or that the interests of justice would be served; therefore her application for an extension to serve defendants under C.P.L.R. 306-b was denied, even though her claim would be extinguished).
Imposing a "reasonable diligence" requirement comports with the purpose of the statute of limitations as a statute of repose.

The statute of limitations provides citizens with protection from stale and vexatious claims. It insures an end to the possibility of litigation. Therefore, it serves the public interest of all citizens. *Guaranty Trust Co. Of New York v. United States*, 58 S. Ct. 785, 304 U.S. 126 (1938). As the Second Department explained in *Vastola v. Maer*, 48 A.D.2d 561, 370 N.Y.S.2d 955 (2d Dep't 1975), aff'd, 39 N.Y.2d 1019, 387 N.Y.S.2d 246 (1975): The purpose of the statute of limitations is to force the plaintiff to bring his claim within a reasonable time so that a defendant will have timely notice of a claim and stale claims and the uncertainty they create will be prevented. In order to prevent uncertainty on the part of plaintiff or defendant, it is desirable that the date by which a claim must be made, and the manner in which the defendant must be notified of a claim so as to stop the statute, should be certain. *Vastola v. Maer*, 48 A.D.2d 561, 564, 370 N.Y.S.2d 955 (2d Dep't 1975), aff'd., 39 N.Y.2d 1019, 387 N.Y.S.2d 246 (1975). Under these guiding principles, the decision to extend plaintiff's time to obtain effective service should be granted only when it comports with the strong public policy goals of providing certainty to both plaintiff and defendant, preventing stale claims and ultimately, repose to all citizens.

In several cases, the Appellate Divisions have recognized that "reasonable diligence" is a paramount consideration in extending the time pursuant to C.P.L.R. 306-b. For example, in *Hafkin v. North Shore University Hospital*, 279 A.D.2d 86, 718 N.Y.S.2d 379 (2d Dep't December 26, 2000), the plaintiff's complaint was dismissed because "there was no evidence that the interests of justice would be served by rewarding the plaintiff's unexplained and unexcused complete lack of diligence" in attempting to effect service prior to expiration of the statute of limitations. The *Hafkin* Court cited the Memorandum from the Office of Court Administration and based its decision upon the recommendation in the Memorandum that

plaintiff's diligence be considered by courts in determining a motion to extend plaintiff's time to serve defendants pursuant to C.P.L.R. 306-b. Hence, in *Hafkin,* the interests of justice were inextricably connected with plaintiff's reasonable diligence in attempting to serve defendant.

Also illustrative is *Jervis v. Teachers Insurance and Annuity Assoc.,* 181 Misc.2d 971, 696 N.Y.S.2d 378, aff'd, A.D.2d, 720 N.Y.S.2d 21 (1st Dep't 2001). In Jervis, Supreme Court held that the plaintiff had not been diligent in serving defendant. It had been 169 days from the time plaintiff filed the first summons and complaint and plaintiff's second filing of a summons and complaint, under the mistaken impression that former CPLR 306-b (b) still applied. Plaintiff had done nothing during those 169 days to insure that service had been accomplished. The court concluded that the lapse of 49 days between the expiration of the first 120 days and plaintiff's erroneous attempt to file a new summons and complaint was too long to allow an extension of time to serve defendant.

The First Department affirmed, stating that the interests of justice would not be served where there had been a protracted delay from the expiration of the 120-day period. *Jervis v. Teachers Insurance and Annuity Assoc*, A.D.2d, 720 N.Y.S.2d 21 (1st Dep't 2001) In other words, the interests of justice were not served where plaintiff had not been reasonably diligent in attempting service or obtaining an extension of time to serve defendant.

Here, there is no evidence of any attempts to serve the Congregation because Plaintiff failed to file any Affidavit of service with the Court. Plaintiff also failed to make a motion to extend time to serve. Plaintiff made absolutely no steps to serve the Congregation or even name it as a defendant in the Complaint within the proscribed statute of limitations.

The Congregation received Plaintiff's Complaint on March 11, 2022 in the mail. The Complaint was mailed 99 days following the expiration of the 120 days to serve defendants in this action and 209 days after the expiration of the applicable statute of limitations.

In view of the extreme lack of diligence shown by Plaintiff, and the long delay before the Congregation received any notice of the action, the Court should dismiss this action against the Congregation and not allow for any extensions of time to serve the Congregation or amend the Complaint to add the Congregation as a defendant. *Slate v. Schiavone Constr. Co*., 4 N.Y.3d 816, 817, 796 N.Y.S.2d 573, 573, 829 N.E.2d 665, 665 (2005).

II. PLAINTIFF FAILED TO EFFECTUATE PROPER SERVICE

New York (with certain exceptions not relevant here) does not allow general mail service. Mail service under CPLR 312-a is not effective unless the defendant signs and returns the statutorily prescribed acknowledgement of receipt within thirty days after receiving the mailing. See CPLR 312-a(b)(1). It is undisputed that never happened in this case.

The unserved defendant must be dismissed for lack of personal jurisdiction. *See Diaz v. Perez*, 113 A.D.3d 421, 421, 980 N.Y.S.2d 69, 69 (1st Dep't 2014) ("Personal jurisdiction was never obtained over the individual defendant Federico Perez, as Perez was never personally served with the summons and complaint, as required by CPLR 306-b.) This is so even if the defendant would otherwise be subject to the jurisdiction of the court under CPLR 301 or 302 if proper service were made. "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court." *Macchia v. Russo*, 67 N.Y.2d 592, 595, 505 N.Y.S.2d 591, 593 (1986); *see Markoff v. S. Nassau Cmty. Hosp*., 61 N.Y.2d 283, 288, 473 N.Y.S.2d 766, 768 (1984) ("Actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions

of service."); *Czajka v. Dellehunt*, 125 A.D.3d 1177, 1182, 5 N.Y.S.3d 318, 324 (3d Dep't 2015) ("It is well established that actual notice received by other means does not result in jurisdiction upon a failure of service.").

Plaintiff failed to obtain jurisdiction over the Congregation.

III. THE CONGREGATION HAD NO NOTICE OF PLAINTIFF'S LAWSUIT

Here, Plaintiff's misnaming the Creston defendant is the equivalent of a no-naming. Since there is no reasonable diligence, no service upon the Congregation and no notice to the Congregation of a pending lawsuit, Plaintiff's Complaint should be dismissed as to the Congregation and Plaintiff should not be allowed to amend it or serve the Congregation out of time.

Plaintiff named an entity that does not legally exist. Plaintiff made no effort to properly research the proper entity. He made no effort to serve or provide notice of his intent to make a claim against the Congregation.

A decision in *Maldonado v. Maryland Rail Commuter Service Admin*., 239 A.D.2d 740, 657 N.Y.S.2d 510, aff'd 91 N.Y.2d 467, 672 N.Y.S.2d 831 (1998) provides guidance. In Maldonado, plaintiff named Maryland Rail Commuter Service Administration as a defendant in a lawsuit in which that entity was alleged to be the owner of a railway car where plaintiff had her accident. Plaintiff attempted service upon that entity based upon signage which indicated MARC on the side of the car.

However, neither MARC or Maryland Rail Commuter Service Administration were legal entities or the owner of railway car. The summons and complaint was eventually received by the correct owner, Maryland Mass Transit Administration (Maryland MTA) after the statute of limitations had expired. Maryland MTA's motion to dismiss the complaint was granted.

Plaintiff attempted to recommence the action pursuant to former C.P.L.R. 306-b (b), which enabled plaintiffs to file and serve a summons and complaint within 120 days of dismissal of a complaint for failure to effectuate service within the first 120 day period. (See former C.P.L.R. 306-b(b)). Maryland MTA moved to dismiss this complaint as well.

The Appellate Division dismissed plaintiff's complaint because the wrong entity had been named in the original action and therefore, the first action had not been timely commenced against Maryland MTA. The Court of Appeals agreed and dismissed plaintiff's second complaint. Although Maldonado was decided under former C.P.L.R. 306-b(b), the principles under which it was decided are instructive here. The Court refused to apply C.P.L.R. 306-b(b) when the defendant that plaintiff had attempted to serve never legally existed. The Court reached this decision even though the intended defendant, the owner of the railcar, (Maryland MTA) had actually received notice of the lawsuit before the expiration of the second 120 day period calculated from the second filing of a summons and complaint. The Court of Appeals stated: Plaintiff-appellants' suggestion that the intended party only needs to receive notice of the action within the 120 days of the dismissal would go too far in circumstances like those presented here and would contradict the core practical purpose of the remedial statutory device. Thus we hold that where, as occurred here, the misnaming is patently a no naming and no effective service was achieved, the predicate action is not timely commenced as required under CPLR 306-b (b). *Maldonado v. Maryland Rail Commuter Service Admin., supra*, 91 N.Y.2d at 472.

Similarly, in *Bonanno v. City of Rye*, 280 A.D.2d 631, 631, 721 N.Y.S.2d 540, 540-41 (App. Div. 2nd Dept. 2001), plaintiff's motion for leave to serve and file an amended complaint to add Rosemarie Lanne as a defendant was denied, as it was made after the expiration of the one-year Statute of Limitations. The Appellate Division held that causes of action against Rosemarie

Lanne could not relate back to the filing of the original complaint against her husband as he was not properly served.

Plaintiff in this action named Creston Kingdom Hall as a defendant. Creston is not a legal entity. It is merely a building utilized by entities such as Congregation for gatherings and religious practice. The Congregation had no notice of this lawsuit until March 11 2022, when it received the copy of the Complaint in the mail.

Since Plaintiff failed to even name the Congregation within the statute of limitations, failed to serve it within the statute or pursuant to CPLR 306-b and failed to effectuate any kind of proper service altogether under any CPLR provision, the Court has no jurisdiction over the Congregation and Plaintiff should not be allowed to drag the Congregation into this lawsuit now, after the expiry of the statute of limitations.

IV. THE CONGREGATION WILL BE PREJUDICED BY PLAINTIFF'S FAILURE TO TIMELY SERVE HIS COMPLAINT

Plaintiff's delay in service of the Complaint is prejudicial under the facts here, where the claims pertain to alleged child abuse in the 1980s. CPLR 214-g alone poses severe evidentiary problems for the Congregation as it allows to revive claims predicated on events which occurred decades ago. These problems are significantly compounded by Plaintiff's further, unexcused delays in proper notice of this lawsuit at the events underlying it.

Plaintiff here wishes to impute the knowledge of those criminal acts to institutional defendants based upon religious affiliation. But over thirty years have passed since those alleged acts of sexual Plaintiff. It is reasonable to assume that all persons involved are elderly, if not long deceased or missing. The evidentiary barriers here alone are daunting. What now-deceased witnesses were told and the context, how they reacted to what they were told, whether they told police, whether they told parents, whether they told leaders or religious authorities, or any other

actions they may have taken and rationales they may have had – all of those things are now unknowable. The passage of time has destroyed the institutional memory necessary for institutional defendant like this Congregation's defense.

One of the chief purposes of statutes of limitation is to avoid this very result: "(s)tatutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1943); see also United States v. Kubrick, 444 U.S. 111, 117 (1979) (statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"); *Riddlesbarger v. Hartford Ins. Co*., 74 U.S. 386, 389-90 (1868) (statutes of limitation "protect() parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth").

Here, it is likely that witnesses became senile and critical evidence has been lost. Untimely service of process would clearly be prejudicial to the Congregation, especially where the Congregation is an institutional defendant to which Plaintiff seeks to impute knowledge of certain secretive criminal acts committed by a third party.

The Congregation would suffer a separate special hardship because, consistent with the Supreme Court's guidance in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), their "conduct would have been different if the present rule had been known and the change foreseen." 325 U.S. at 316. Had the Congregation known that the applicable limitations might be lifted over

three decades later, and that the claim would be allowed to proceed despite violations of rule 306-b, applicable statute of limitations and applicable service of process rules, they could have changed certain of their document retention policies and the forwarding addresses of persons who might be potential witnesses.

Here, more than a generation has passed since the events in question. To require the Congregation to litigate this case would deprive them of the right to due process of law. This result would have a broader public ramification: no longer could New York's system of justice be considered fair. It would merely be a system imposing the transfer of wealth to any who claim to have been abused as a child and that is certainly not a result contemplated by the New York Constitution.

As a result, the Congregation's ability to defend the action on the merits has been compromised due solely to Plaintiff's delay. Therefore, the interests of justice will be best served by preventing Plaintiff's from naming the Congregation a defendant in this action and prohibiting untimely service on the Congregation.

CONCLUSION

For the foregoing reasons, Congregation's motion to dismiss any claims against it and to prohibit service out of time should be granted.

Dated: May 12, 2022

Respectfully submitted,

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