

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32810
O/prt

_____AD3d_____

Submitted - October 19, 2011

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-11061

DECISION & ORDER

Michael Goralski, respondent, v
John C. Nadzan, Jr., appellant.

(Index No. 5472/08)

Salenger Sack Kimmel & Bavaro, LLP, New York, N.Y. (Michael Schwartz of counsel), for appellant.

Davis & Ferber, LLP, Islandia, N.Y. (Ian M. Sack of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Suffolk County (Spinner, J.), dated October 12, 2010, which denied his motion to vacate a judgment of the same court entered July 6, 2009, upon his default in appearing or answering the complaint, and to dismiss the complaint for lack of proper service upon him.

ORDERED that the order is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Suffolk County, for a hearing to determine whether the defendant was properly served and, thereafter, for a new determination of his motion to vacate the judgment entered upon his default in appearing or answering the complaint and to dismiss the complaint for lack of proper service upon him.

The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff (*see Anderson v GHI Auto Serv., Inc.*, 45 AD3d 512, 512-513; *Kearney v Neurosurgeons of N.Y.*, 31 AD3d 390; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343). Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service (*see Wells Fargo*

November 9, 2011

GORALSKI v NADZAN

Page 1.

Bank, NA v Chaplin, 65 AD3d 588, 589; *Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d at 344). However, where there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence (see *Wells Fargo Bank, NA v Chaplin*, 65 AD3d at 589; *Mortgage Access Corp. v Webb*, 11 AD3d 592, 593; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d at 344).

The defendant's sworn, detailed, and specific statements that he no longer resided at the address recited in the process server's affidavit of service when service of the summons and complaint was purportedly made pursuant to CPLR 308(2) were sufficient to rebut the process server's affidavit of service. In opposition, the plaintiff failed to submit documentary evidence sufficient to establish that the address where the process was served was the defendant's dwelling place, usual place of abode, or last known residence. Under these circumstances, the defendant is entitled to a hearing on the issue of whether service was properly effected pursuant to CPLR 308(2) (see *Zion v Peters*, 50 AD3d 894; *Mortgage Access Corp. v Webb*, 11 AD3d at 593; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d at 344). Thus, we remit the matter to the Supreme Court, Suffolk County, for a hearing to determine whether the defendant was properly served and, thereafter, for a new determination of his motion to vacate his default and to dismiss the complaint for lack of proper service on him.

MASTRO, J.P., BALKIN, CHAMBERS and SGROI, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court