

Estate of Waterman v Jones

2006 NY Slip Op 30213(U)

April 24, 2006

Supreme Court, Queens County

Docket Number: 0018964/2004

Judge: Joseph P. Dorsa

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

ESTATE OF EDWARD S. WATERMAN, by its
Administrator, C.T.A., JEFFREY TAYLOR,

Plaintiff,

- against -

ANDREW P. JONES, ESQ.,

Defendant.

- - - - - x

Index No.: 18964/04

Motion Date: 3/8/06

Motion No. 35

The following papers numbered 1 to 10 on this motion:

	<u>Papers Numbered</u>
Defendant's order to Show Cause-Affirmation- Exhibit(s)-Service	1-4
Plaintiff's Affirmation in Opposition- Affidavit()-Exhibit(s)	5-6
Defendant's Reply Affirmation-Exhibit(s)	7-8

By order to show cause, defendant seeks an order of the Court, pursuant to CPLR §5015 and §308(1), (2) and (4), vacating the default judgment entered against him in the above captioned matter.

Plaintiff files an affirmation in opposition and defendant replies.

By judgment entered December 30, 2005, plaintiff was awarded the sum of \$18,929.58, representing an award of \$14,000, with interest of \$3,738.58 (from January 11, 2003) and costs and disbursement of \$1,191.00 against defendant, Andrew P. Jones.

Defendant Jones, now seeks to vacate said judgment, claiming he was never served, that the proof of service provided by plaintiff pursuant to CPLR §308(4), was ineffective in that no due diligence was shown, and that he has a meritorious defense.

Examination of the affidavit of service by plaintiff's process server in this action, indicates that service was attempted on two dates, not merely one as claimed by defendant, namely August 23, 2004 at 10:00 a.m. at defendant's place of business and again

on August 24, 2004 at 9:00 a.m., when the process server found the same conditions at defendant's place of business as the day before. It is worth noting that defendant uses the same place of business address on his motion papers submitted herein as was used for "nail and mail" service on August 23 and August 24, 2004.

Thus, no legitimate claim can be made on defendant's part that such address was not his actual place of business.

Although defendant maintains that plaintiff failed to exercise due diligence in attempting to effect service, it has been held that two attempts at a place where defendant could reasonably have been expected to be can suffice to permit substituted service (Brunson v. Hill, 191 AD2d 334, 335 [1st Dep't. 1993] (attempted service on two occasions when a working person could reasonably be expected to be at home). In this instance, plaintiff's process server went to defendant's place of business, both his law office and where he and/or his wife collected rents and issued leases during business hours (Security Mutual Life Ins. Co. v. DiPasquale, 302 AD2d 267 [1st Dep't. 2000])).

Accordingly, defendant's motion to vacate the judgment against him on the grounds that the substituted service upon him filed by plaintiff was ineffective pursuant to CPLR §308(4) is denied.

The determination of what constitutes a reasonable excuse for having failed to serve a required pleading lies within the sound discretion of the court" (Thelma Sanders & Associates, Inc. v. Hague Development Corp, 100 AD2d 964 [2nd Dep't. 1984])).

In this instance, defendant's claim for having failed to answer the complaint was that he was not served. Such excuse, as noted above, has been rejected by the Court. Accordingly, upon all of the foregoing, defendant's motion is denied.

Dated: Jamaica, New York
April 24, 2006

JOSEPH P. DORSA
J.S.C.