

**Peguero v Finnie**

2006 NY Slip Op 30447(U)

July 13, 2006

Supreme Court, Queens County

Docket Number: 20920/01

Judge: Patricia P. Satterfield

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**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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SONIA PEGUERO,

Index No: 20920/01

Plaintiff ,

Hearing Date: 6/21/06

Final Submission Date:7/5/06

-against-

DECISION AND ORDER ON  
MOTION AFTER TRAVERSE

DOUGLAS FINNIE and HERMANA FINNIE,

Defendant Douglas Finnie.

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By order of this Court dated May 3, 2005 (Satterfield, J.), the motion by defendant Douglas Finnie (“defendant”), the owner, together with his former wife defendant Hermana Finnie, of premises located at 30-03 92<sup>nd</sup> Street, for an order dismissing this personal injury action on the ground that this Court lacks personal jurisdiction, was set down for a Traverse Hearing to determine whether this Court has personal jurisdiction. Plaintiff Sonia Peguero (“plaintiff”) commenced this action to recover damages for injuries allegedly sustained by her when she slip and fell at defendant’s premises due to snow and ice on the steps on January 9, 2001; plaintiff lived on the premises as a tenant. The Traverse was held June 21, 2006, at which time plaintiff’s process server, Ronald Mallilo (“Mallilo”), plaintiff’s investigator, Steve Simon, and defendant testified. The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received, as well as the legal arguments asserted by counsel in the underlying motion papers. The Court has further had an opportunity to observe the demeanor of the parties and witnesses called to testify and has made determinations on issues of credibility with respect to those witnesses. After Traverse, defendant’s motion, inter alia, to vacate the judgment entered against him, and plaintiff’s cross motion for leave to extend the time to serve the answer are granted for the reasons set forth below.

Where the validity of service of the summons and complaint is challenged, the plaintiff has the burden of establishing personal jurisdiction by a preponderance of the evidence at a hearing. Bankers Trust Co. of California, N.A. v. Tsoukas, 303 A.D.2d 343 (2<sup>nd</sup> Dept. 2003); Schwerner v. Sagonas, 28 A.D.3d 468 (2<sup>nd</sup> Dept. 2006); Spangenberg v. Chaloupka, 229 A.D.2d 482 (2<sup>nd</sup> Dept. 1996); Kanner v. Gerber, 197 A.D.2d 673 (2<sup>nd</sup> Dept. 1993). It is beyond dispute that “[s]ervice is only effective . . . when it is made pursuant to the appropriate method authorized by the CPLR.” Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 288 (1984); Feinstein v. Bergner, 48 N.Y.2d 234, 241 (1979); Foy v. 1120 Ave. of Americas Associates, 223 A.D.2d 232 (2<sup>nd</sup> Dept. 1996). Here, plaintiff contends that service was effected by service upon a person of suitable age and discretion.

CPLR 308(2) authorizes service, *inter alia*, by delivery of the summons and complaint within the State to “a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served.” At the traverse hearing, Mallilo, without benefit of a log book or any written memoranda other than the affidavits of service, testified that on October 16, 2001, he served a summons and complaint upon both defendants at 30-03 92<sup>nd</sup> Street, East Elmhurst, New York, by service upon “John Doe (Victor).” Mallilo could not recall if he asked “Victor” if defendant Douglas Finnie lived at that address; however, he stated that his usual practice was to leave the summons and complaint only after verifying that the person or persons lived at the address. Upon cross-examination, Mallilo conceded that he did not indicate on the affidavit of service whether service was made at either the actual place of business, dwelling place or usual place of abode. A perusal of the affidavit of service also shows that Mallilo did not ascertain whether either defendant was in the military. Mallilo also conceded that he had no independent recollection of having served the summons and complaint, and that his testimony was based solely upon the contents of affidavit of service.

Steve Simon, who is employed by Mallilo and Grossman, plaintiff’s attorneys, as an investigator, testified that his “main job with the office is to ascertain the addresses of the defendant Douglas Finnie prior to serving summons and complaints;” however, he could not recall if he did so with respect to defendant Douglas Finnie. Nor could he recall if he obtained a copy of the deed of the property, which was offered into evidence and showed defendants to be owners of the property in 1988. He further testified that on January 19, 2006, he conducted a search to locate defendant Douglas Finnie; however, the results of the search were not admitted into evidence.

Defendant Douglas Finnie testified that although he and his wife owned the property on the day of attempted service, he resided at that location only until 1990, and that on October 16, 2001, he resided at 158-09 Linden Boulevard. He further testified that his ex-wife, defendant Hermana Finnie, from whom he was divorced in 1996 or 1997, last lived at the premises in 1992, having relocated first to New Jersey and then to Las Vegas in 1998. He also testified that he filed tax returns for the years 2000 and 2001 from his Linden Boulevard address, and that his driver’s license on October 16, 2001, listed the Linden Boulevard address as his residence. He testified that on October 16, 2001, he still owned the East Elmhurst property, which was later sold in February 2002; however, he was never served with the summons and complaint and first became aware of the instant action when he “went to the bank and my account was seized back in January of 2006.” He further testified that the East Elmhurst property was a two-family house that he rented to tenants, and that plaintiff was the daughter of one of the tenants. He also testified that he went to the premises to collect the rent between the 1<sup>st</sup> and the 10<sup>th</sup> of the month, and to make repairs.

The conflicting testimony of the witnesses raises the issue of credibility. It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor. See, Cirami v. Taromina, 243 A.D.2d 437 (2<sup>nd</sup> Dept. 1997)[stating that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor]; Darmetta v. Ginsburg, 256 A.D.2d 498 (2<sup>nd</sup>

Dept.1998)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses]; Vega v. City of New York, 194 A.D.2d 537 (2<sup>nd</sup> Dept.1993). Where, as here, there is sworn denial of service by defendant, the affidavit of service is rebutted and plaintiff must establish jurisdiction by preponderance of evidence at hearing. Rox Riv 83 Partners v. Ettinger, 276 A.D.2d 782 (2<sup>nd</sup> Dept. 2000). Here, the testimony of the process server at the hearing, which was based solely upon the challenged affidavit of service, lacks sufficient credibility to establish, by a preponderance of the evidence that service was effected. See, Holtzer v. Stepper, 268 A.D.2d 372 (1<sup>st</sup> Dept. 2000); Avakian v. De Los Santos 183 A.D.2d 687 (2<sup>nd</sup> Dept. 1992); Frankel v. Schilling, 149 A.D.2d 657 (2<sup>nd</sup> Dept.1989). Hence, plaintiff failed to meet her burden of establishing that personal service upon defendant was made.

Moreover, the evidence at the hearing established the requirements of CPLR 308(2) were not met, as it was not shown that service was effected at either the "actual dwelling place," "usual place of abode" or "actual place of business." Neither defendant resided at the premises on the purported date of service nor had that location been their usual place of abode. Moreover, as the premises was a two-family residence, it was not defendant's actual place of business; defendant worked for the Department of Sanitation. Hence, the purported personal service upon defendant by service upon a person of suitable age and discretion at defendant's alleged residence must fail.

Plaintiff clearly failed to meet her overall burden of establishing that personal jurisdiction over defendant Douglas Finnie was obtained. As this Court lacked personal jurisdiction over him, defendant's motion thus is granted in its entirety, and the judgment entered and recorded in this action by the Queens County Clerk on July 27, 2005, hereby is vacated, plaintiff is permanently enjoined from levying or otherwise collecting on that judgment, and all stays and restraints are hereby lifted. Moreover, upon a search of the record, this Court further determines that this Court lacked jurisdiction over defendant Hermana Finnie as well, based upon the same reasoning set forth above with respect to the moving defendant.

Plaintiff cross moves for an order extending her time to serve the summons and complaint, pursuant to CPLR 306(b), for good cause and in the interest of justice. Inasmuch as defendant Douglas Finnie neither oppose this application nor sought dismissal on jurisdictional grounds, the application is granted. The result, however, would be the same had opposition been interposed. An order granting an extension of time to serve is warranted upon a showing either that plaintiff has made reasonably diligent efforts to make timely service or a demonstration that application of the "interest of justice" standard is warranted. See, Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106 (2001).

Since the purported service of the summons and complaint on October 16, 2001, plaintiff has diligently pursued this action, and has sought court intervention on several occasions, including a 1992 motion for a default judgment; a 1993 motion to compel defendant Douglas Finnie's mortgage company to produce the name of his homeowners insurance carrier; and her participation in an Inquest on October 23, 2003, at which subpoenaed medical records and certified hospital records were introduced into evidence. At each instance in which court intervention was sought, defendants were noticed at the East Elmhurst address previously owned

by them. The instant application seeking to vacate the judgment entered after Inquest was made in January 2006, almost five years after the purported service and five years after the accident at issue. Clearly, good cause was shown for the delay in seeking an extension of time to serve the summons and complaint; in cross moving, plaintiff acted as soon as the issue of service was raised.

With respect to the interest of justice, the Court of Appeals, in Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106 (2001), clearly set forth the standard to be applied, stating:

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. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with 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

Cf., Slate v. Schiavone Constr Co, 4 N.Y.3d 816 (2005); Wilkins v. Burgess, 25 A.D.3d 794(2<sup>nd</sup> Dept. 2006); Kazimierski v. New York Univ., 18 A.D.3d 820 (2<sup>nd</sup> Dept. 2005).

Plaintiff's proof was sufficient to show that both good cause and the interest of justice warranted the granting of an extension of time to serve the summons and complaint. Notwithstanding that the application for an extension was made well after the expiration of the statute of limitations, plaintiff has demonstrated that it was not until defendant Douglas Finnie's instant motion to vacate the default judgment that she first learned that the purported service upon defendant Douglas Finnie at the residence owned by defendants allegedly was defective and thus placed at issue whether defendant in fact was personally served with the summons and complaint. Moreover, the evidence presented at Inquest sufficiently demonstrated to this Court that plaintiff not only had a meritorious claim but was entitled to recover damages for the personal injuries sustained by her when she fell down the exterior steps of defendants' property.

Accordingly, plaintiff's cross motion for an extension of time to serve the summons and complaint is granted. The service of the summons and complaint shall be deemed complete ten days from the date of service of a copy of this order with notice of entry by plaintiff upon defendants Douglas Finnie and Hermana Finnie, who shall have twenty day thereafter to interpose responsive papers. Based upon the foregoing, it hereby is

**ORDERED AND ADJUDGED**, that the branch of defendant Douglas Finnie's motion seeking an order vacating the July 27, 2005 judgment of this Court, which awarded \$125,000.00 to plaintiff for past and future pain and suffering, is granted and the July 27, 2005 judgment hereby is vacated; and it is further

**ORDERED AND ADJUDGED**, that the branch of defendant Douglas Finnie's motion

seeking an order permanently enjoining plaintiff from levying or otherwise collecting on the July 27, 2005 judgment, hereby is granted, and it is further

**ORDERED AND ADJUDGED**, that all stays and restraints imposed on defendant's bank accounts based upon the July 27, 2005 judgment, hereby are lifted; and it is further

**ORDERED AND ADJUDGED**, that the order of this Court dated December 11, 2002, which granted a default judgment in favor of plaintiff and against both defendants hereby is vacated and set aside; and it is further

**ORDERED AND ADJUDGED**, that defendants Douglas Finnie and Hermana Finnie shall have twenty days from the date of service of a copy of this decision and order, with notice of entry, to interpose responsive papers.

This constitutes the decision and order of this Court.

Dated: July 13, 2006

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J.S.C.