

Kaufman v Wright

2006 NY Slip Op 30749(U)

April 10, 2006

Supreme Court, New York County

Docket Number: 103185-2005

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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AZUCENA KAUFMAN,

Plaintiff,

Index No. 103185-2005

DECISION/ORDER

-against-

NANETTE WRIGHT, PHILIP CARREON, and
LOLITA GILLBERG,

Defendants.

FILED

APR 19 2006

NEW YORK
COUNTY CLERK'S OFFICE

HON. CAROL EDMEAD, J.S.C.

In this action for defamation, plaintiff Azucena Kaufman moves to reargue three orders which dismissed her case against each of the defendants, Nanette Wright ("defendant Wright"), Philip Carreon ("defendant Carreon") and Lolita Gillberg ("defendant Gillberg").

Procedural and Factual Background

Plaintiff filed her summons and complaint on March 8, 2005. According to the affidavits of service upon defendants Carreon and Wright, these defendants were served with the summons and complaint on March 18, 2005 and April 6, 2005, respectively. According to the affidavit of service upon defendant Gillberg filed on March 28, 2005 (the "Gillberg affidavit of service"), the summons and complaint was affixed to the door of defendant Gillberg's home in New Rochelle, New York on March 22, 2005, at 12:28 P.M. and mailed to defendant Gillberg's home on March 24, 2005. This substituted service followed one unsuccessful attempt at personal service at defendant Gillberg's home on March 15, 2005 (Tuesday), at 6:27 P.M., and a second unsuccessful attempt at personal service at the same address on March 18, 2005 (Saturday), at 7:49 A.M. The affidavit of service also indicates that a Mr. "John" Brindisi, defendant Gillberg's neighbor, had no knowledge of Gillberg's place of employment or work habits.

Shortly after receiving the pleadings affixed to her door, defendant Gillberg served an Answer raising, *inter alia*, the affirmative defense of lack of personal jurisdiction.

On or about April 18, 2005, defendants Carreon and Wright¹ moved to dismiss the claim for defamation for facial insufficiency and lack of particularity. Pursuant to two telephonic conferences between the Court, counsel for the defendants Carreon and Wright, and counsel for plaintiff (Paul Saqqal), the Court issued an order granting plaintiff's oral application to amend the verified complaint, and directing that plaintiff "serve an amended complaint within 20 days of service of this order with notice of entry." The Court also directed that plaintiff serve a copy of the order with notice of entry upon defendants within 20 days of entry. Plaintiff served the amended verified complaint, dated June 6, 2005, upon all counsel for defendants. Thereafter, on June 13, 2005, defendant Gillberg served a motion to dismiss the complaint for lack of jurisdiction. On July 6, 2005 defendant Gillberg served an answer to the amended verified complaint, again raising the defense of lack of personal jurisdiction, which was followed by her amended notice of motion by Gillberg to dismiss for lack of jurisdiction. Thereafter, on July 27, 2005, defendant Carreon served an answer to the amended complaint, alleging lack of jurisdiction. Pursuant to an order of the Court, dated August 26, 2005, Gillberg's motion was withdrawn, without prejudice to renew.

Defendant Gillberg then served another motion to dismiss the complaint for lack of personal jurisdiction on September 13, 2005. While the motion made reference to plaintiff's service of the "Amended Complaint on or about June 6, 2005," the motion sought to dismiss the "plaintiff's complaint" for failure to establish due diligence and comply with the mailing

¹ The action was discontinued as to defendant Wright pursuant to a stipulation dated February 9, 2006.

requirement of nail and mail service (“Gillberg’s jurisdiction motion”).

Defendant Carreon then filed a motion to dismiss the complaint as against him on the ground of improper service of the Amended Complaint, in that no copy of the Amended Summons and Complaint was left at his residence or received by him by mail (“Carreon’s jurisdiction motion”).

While the Gillberg and Carreon jurisdiction motions were pending, plaintiff’s new counsel caused personal service of the summons, verified complaint and amended complaint to be made on October 1, 2005 upon all of the defendants, in New York, New York, and opposed the motions to dismiss.

Defendant Gillberg then filed another motion to dismiss the complaint and amended complaint on statute of limitations grounds, arguing that service of the “Summons and Complaint” on October 1, 2005 could not relate back to the original filing in March 2005, and that in the event the pending jurisdiction motion is granted, plaintiff could not recommence an action against Ms. Gillberg since the action was now time-barred (“Gillberg’s statute of limitations motion”).

The Court granted all of the motions for dismissal.

In support of reargument on all three orders, plaintiff contends that at an in-court conference on December 6, 2005, the Court expressed that the decisions would not be entered for 30 days, in order to permit the plaintiff to provide an affirmation from Mr. Saqqal to address issues which were solely within his knowledge. Therefore, plaintiff’s counsel argues that he had until January 6, 2006 to file such affirmation without the need for a motion to reargue. Yet, the orders were filed on December 15, 2005.

The Order granting Gillberg's jurisdiction motion stated:

... [A]ccording to the [plaintiff's] attorney affirmation, service was attempted only twice, both times in the evening; however, this statement is contradicted by the annexed affidavit of service which states that one service was made at 7:49 a.m. Further, there was no attempt to serve defendant at her place of business. Counsel for plaintiff simply states that the process server did not know defendant's business address; however, there is no explanation why said counsel could not, [and] did not provide such information to the process server. Moreover, there is no affidavit in opposition from the process server attesting to his inability to obtain defendant's work address.

In support of reargument of Gillberg's jurisdiction motion, plaintiff argues that the Court's statement that the affidavit of the process server states that only one attempt was made to serve Gillberg, was incorrect. It is claimed that the Court overlooked the fact that the affidavit of service clearly states that two attempts at service was made: one on March 15, 2005 at 6:27 and on March 18, 2005 at 7:49 a.m.

In opposition, defendant Gillberg argues that plaintiff failed to establish how the Court misapplied the due diligence requirement as mandated by CPLR 308(4). The Court's dismissal as to Gillberg was not solely based on how many attempts were made, but upon plaintiff's failure to attempt to serve Gillberg at her place of employment.

In further opposition, Gillberg argues that "Since the plaintiff failed to properly obtain the requisite personal jurisdiction over [Ms. Gillberg], the action was not properly commenced against [Ms. Gillberg]." Gillberg points out that her objection to personal service was asserted since the inception of this case, and plaintiff could have properly served Ms. Gillberg before the 120 days expired. Upon receipt of Gillberg's Answer on May 4, 2005, plaintiff could have properly served Ms. Gillberg with the pleadings before July 6, 2005. Therefore, dismissal based on plaintiff's failure to demonstrate due diligence in serving Ms. Gillberg was proper.

As to Gillberg's statute of limitations motion, the Court stated:

. . . The record establishes that the publication date of defendant Ms. Gillberg's alleged defamatory audit report was September 16, 2004. Plaintiff's service of the summons and complaint within the required period is of no moment; this Court previously directed plaintiff to serve the an amended summons and complaint since the original was facially insufficient and service of same was improper. Further, plaintiff never filed the amended summons and complaint and plaintiff's service of the amended summons and complaint [on] October 1, 2005 is untimely.

In support of reargument of Gillberg's statute of limitations motion, plaintiff contends that the previous direction of the Court on May 5, 2005, on which this decision was based, never found that service of the amended summons and complaint was improper. The finding that the service of the amended summons and complaint was improper was made later on December 15, 2005, and the statute of limitations was tolled from March until such determination on December 15, 2005. Therefore, it is argued, the service of the amended summons and complaint upon defendant Gillberg on October 1, 2005 during the tolling period was timely.

In opposition, Gillberg contends that plaintiff's conclusory assertion that the statute of limitations stops running from the date of filing to the date he received the notice of entry of the dismissal order is untimely, is raised for the first time on reargument, and without merit. Since the plaintiff never obtained jurisdiction over Ms. Gillberg, the matter was dismissed by the Court, and by such dismissal, the plaintiff is now barred from relying on the filing date of the dismissed action in any new action. Gillberg contends that by his "oral application," plaintiff's counsel essentially withdrew the plaintiff's initial summons and complaint and elected to re-serve an amended summons and complaint; thus, plaintiff was required to purchase a new index number, re-file the amended summons and complaint, and re-serve same within 120 days. Since plaintiff failed to do so, dismissal was warranted.

Furthermore, although Gillberg did not cross move to dismiss for facial insufficiency as did her codefendants, plaintiff was still required to effect personal service of the Amended Complaint upon Gillberg pursuant to the CPLR.

Finally, Gillberg argues that plaintiff never sought time to extend her time to serve, and therefore, the service on October 1, 2005 should be deemed a nullity.

In response to Gillberg's opposition, plaintiff contends that the statute of limitations is tolled, by operation of law, while a motion asserting improper service is pending. Further, since an action is commenced with the filing of the summons with notice, and the summons was filed in March 2005, the action is considered properly commenced against Gillberg until the issue of service was resolved in December 2005. This is not a case, as Gillberg suggests, wherein plaintiff withdrew a petition and failed to refile a complaint and purchase a new index number. Instead, the complaint herein was not withdrawn, and plaintiff was permitted to serve an amended complaint. Plaintiff further requests that in the event the Court does not reinstate the complaint, that the Court extend the time to serve the defendants pursuant to CPLR 306-b in the interest of justice.

As to defendant Carreon's motion, the Court stated:

Plaintiff filed a Summons and Complaint on March 8, 2005 and defendant Phillip Carreon moved to dismiss the complaint for failure to state a cause of action. On May 20, 2005, this Court issued an order permitting plaintiff time to amend the Complaint within 20 days of service of this order with notice of entry. Plaintiff was also directed to serve the order with notice of entry within 20 days of entry.

Plaintiff never serve[d] notice of entry, and never filed the Amended Summons and Complaint or proof of service upon defendants of same. Service of the Amended Summons and Complaint upon defendant on October 1, 2005 was untimely, in all respects.

In support of reargument, and in further opposition of Carreon's motion to dismiss,

plaintiff argues that the May 20, 2005 order never directed plaintiff's counsel to file an "amended summons" and amended complaint. It is argued there can never be an "amended summons" in accordance with CPLR. Further, Paul Saqqal recalls that it was understood among the Court and counsel for Carreon and plaintiff's counsel that plaintiff's counsel was required to serve the amended complaint upon counsel, since counsel had entered the proceedings. Paul Saqqal specifically recalls the Court directing that service of the amended complaint be made upon counsel. Plaintiff points out that the CPLR mandates service upon a party's attorney once an attorney enters the proceeding. Also, plaintiff's counsel complied with the May 20, 2005 order by serving the notice of entry upon defendant within 20 days of entry. The May 20, 2005 order did not require plaintiff's counsel to file proof of service of the notice of entry with the court, and there is no CPLR section which requires the filing of proof of service of a notice of entry or filing of an Amended Summons and Complaint. Furthermore, counsel for defendant Carreon never contested service or personal jurisdiction.

Plaintiff, through Paul Saqqal, also argues that even if Saqqal did not comply with the May 20, 2005 order, dismissal was unwarranted because Carreon's motion was withdrawn on condition that plaintiff's counsel serve Carreon's counsel an amended complaint, and thus, any failure do so would result only in a reinstatement of Carreon's motion. Also, personal jurisdiction was acquired by service of the summons and filing of proof of service, which was done. As such, personal service cannot be divested by failing to serve amended complaints or orders or notices of entry upon individual parties after their attorneys have entered the case when such documents were in fact served upon all counsel of record.

Analysis

A motion to reargue under CPLR 2221, “is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 N.Y.S.2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], lv. denied and dismissed 80 NY2d 1005, 592 NYS2d 665 [1992], rearg. denied 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

As to plaintiff’s motion for leave to reargue Gillberg’s personal jurisdiction motion, the Court grants reargument, and upon reargument, Gillberg’s personal jurisdiction motion is denied.

The alleged discrepancy pointed out by plaintiff as to the times services were attempted upon Gillberg was created by plaintiff’s counsel himself. In plaintiff’s counsel’s opposition to Gillberg’s prior jurisdiction motion, counsel stated that the process server attempted to serve the defendant at her place of residence on two occasions, “March 15, 2005 at 6:27 p.m. and March 18, 2005 at 7:49 p.m.” (emphasis added), and argued that the “evening hours that he attempted to serve the defendant were reasonable and were all after business hours.” The process server affidavit, however, clearly states that service attempted on March 18, 2005 was made at 7:49 a.m.

Thus, it was counsel for plaintiff who overlooked the facts contained in the plaintiff's affidavit of the process server. It was not incumbent upon the court to reconcile the discrepancy created by counsel.

In any event, upon review of plaintiff's process server's affidavit, and the papers submitted, the Court adheres to its December 6, 2005 finding that due diligence was not performed in this case so as to permit nail and mail service of the original summons and complaint. Counsel for plaintiff, and the affidavit of service, simply state that the process server did not know defendant's business address. However it was uncontested that plaintiff herself had visited defendant Gillberg's place of business and knew where defendant Gillberg worked. Thus, as the Court previously stated, there is no explanation as to why said counsel could not, and did not provide such information to the process server and no explanation as to why the process could not serve defendant at her business address (*Steltzer v Eason*, 131 AD2d 833, 517 NYS2d 193 [2d Dept 1987]; *McNeely v Harrison*, 208 AD2d 909, 617 NYS2d 879 [2d Dept 1994] [where it was uncontroverted that defendant had given plaintiff his business card with his office address and telephone number on the date of the accident, and that the plaintiff spoke to the defendant by telephone at his place of business, the process server admittedly never attempted to make service at the defendant's place of business]).

The Court also notes that plaintiff's service of the amended pleadings upon Gillberg's counsel in June 2005 was ineffective to secure personal jurisdiction over defendant Gillberg. Defendant Gillberg was not part of the telephonic conference precipitating the amended complaint, and never agreed that service upon counsel for Gillberg would suffice for personal jurisdiction over defendant Gillberg. Further, Gillberg's counsel never agreed, nor could be

considered to have agreed, to accepting service on behalf of her client, defendant Gillberg.

However, although the nail and mail service of the original pleadings upon Gillberg was improper, and insufficient to obtain personal jurisdiction, plaintiff finally personally served the verified complaint Gillberg on October 1, 2005, approximately seven months after the action was commenced, but during the pendency of Gillberg's jurisdiction motion. Plaintiff's opposition papers included this fact. While the Court acknowledges that the October 1, 2005 service was performed beyond the 120 day period provided in the CPLR, service of the original complaint, to which defendant Gillberg never declared to be facially insufficient, may be extended.

Pursuant to CPLR 306-b, service of the summons and complaint must be made within 120 days after the filing of the summons and complaint. This section further provides that "[i]f 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 interest of justice, extend the time for service." The Court's preexisting Order on the facial sufficiency motion simply directed plaintiff to *serve* the amended complaint, and it was understood that service upon counsel for the moving defendants would suffice. Thus, arguably, it cannot be seriously disputed that plaintiff essentially relied upon the Court's direction and served counsel for defendant Carreon and Wright, the moving parties, as well as defendant Gillberg's counsel (albeit erroneously), since Gillberg's counsel had already appeared in the action. In light of the above set of unique circumstances, the Court determines that Gillberg's jurisdiction motion should not result solely in a dismissal of the original summons and complaint for improper service, but should have considered the application of CPLR 306-b with respect to re-serving the pleadings within 120 days of the court's December 2005 determination (*see*

Gurevitch v Goodman, 269 AD2d 355, 702 NYS2d 634 [2d Dept 2000] [noting that the action was timely commenced by filing the summons and complaint in the office of the Clerk of Kings County. Therefore, despite the dismissal of the complaint insofar as asserted against the appellant on the ground of lack of personal jurisdiction, the plaintiff should be permitted, if he be so advised, to re-serve the appellant within 120 days of the date of this decision and order (*see* CPLR 306-b)). Since the Court is given the discretion to extend the time for plaintiff to serve the complaint or amended complaint in the interest of justice, the branch of the Court's December 2005 order which dismissed the complaint against Gillberg for failure to properly serve is vacated, and plaintiff's personal service upon defendant Gillberg of the original and amended complaint in October 2005 is deemed properly, timely served, *nunc pro tunc*.

As to plaintiff's motion to reargue Gillberg's statute of limitations motion, the Court grants reargument, and upon reargument, Gillberg's motion is denied.

The Court's determination in this regard was in part based upon the fact that plaintiff's service of the summons and original complaint within the required period was of no moment and plaintiff's failure to timely serve the amended summons and complaint as directed. However, the Court acknowledges that in a commencement-by-filing court, CPLR 203(c)(1) provides that the statute of limitations is tolled by filing the summons and complaint with the court clerk.

Defendant Gillberg's argument that the Order granting plaintiff's oral application to serve an amended complaint thereby required plaintiff to purchase a new index number or otherwise recommence the action is unfounded and lacks merit. Once the plaintiff's commenced this action by filing the original summons and complaint within the statute of limitations period, the statute of limitations was satisfied, and, the facial sufficiency motion, which did not result in a

dismissal by Court or *withdrawal* by the plaintiff, did not require a new filing. Nor did the Court's direction on the motion to dismiss for facial insufficiency, that the plaintiff serve an amended complaint, constitute a dismissal of the complaint, thereby warranting recommencement. Thus, it cannot be said that said Order on the facial sufficiency motion was tantamount to plaintiff's withdrawing the action or a dismissal of same. In short, the complaint was not dismissed, necessitating a new filing via the purchase of a new index number. Instead, the motion to dismiss for facial insufficiency was deemed moot, and the Court directed plaintiff to serve an amended complaint, and plaintiff was implicitly permitted to do so under the same index number as the original. Upon the filing of any amended complaint, the amended complaint is said to "supercede" the original, and continue as a timely filed pleading under the original index number. Since commencement of the action occurred upon filing the original summons and complaint in March 2005, any amended complaint served under the same index number need not have been also filed within the statutory period, since the action had already been timely commenced. However, since plaintiff never filed the amended complaint, such failure, while constituting a violation of the Court's directive, renders the amended complaint merely defective. The failure to file the amended complaint does result in dismissal on statute of limitations grounds, since the action, by virtue of the filing of the original complaint, was timely commenced.

As to plaintiff's motion for leave to reargue of defendant Carreon's jurisdiction motion, reargument is granted, and upon reargument, Carreons' motion is denied. In Carreon's previous motion, Carreon argued for dismissal on jurisdictional grounds, contending that plaintiff failed to submit an affidavit of service of process upon Carreon. However, in opposition, plaintiff

submitted an affidavit of service as to Carreon. Next, Carreon argued that no copy of the amended pleadings were properly served by plaintiff as directed by the Court. In response, plaintiff submitted an affidavit indicating that the amended complaint was personally served upon Carreon on October 1, 2005.

However, since Carreons' previous facial sufficiency motion, which did not challenge personal jurisdiction, resulted in an order in directing plaintiff to serve the amended complaint, and it was understood that such pleadings would be accepted by counsel for Carreon, Carreon could not thereafter claim lack of jurisdiction since such claim was not previously raised in his facial sufficiency motion. It was not unreasonable for plaintiff to infer from the telephonic conference, and the resulting order, that service of the amended complaint upon counsel for Carreon would suffice, especially since Carreon's counsel had already appeared in the action and had not, at that time, moved on jurisdictional grounds. Instead, Carreon challenged the original complaint on grounds of facial insufficiency arguing that the original complaint did not set forth the alleged libelous words of Carreon. The motion, however, was deemed moot based on the Court's grant of plaintiff's application to serve an amended complaint. Notwithstanding, plaintiff never filed the amended complaint, or served the amended complaint as directed. Since, at the time Carreon moved to dismiss, plaintiff failed to serve the amended complaint, the action against Carreon defaulted to the original complaint, which Carreon argued was defective on its face. However, plaintiff alerted the Court to plaintiff's then recent service of the amended complaint upon Carreon, thereby complying, albeit late, with the Court's direction. In light of the above, the Court deems service of the amended complaint Carreon timely, *nunc pro tunc*, and directs Carreon to file the amended complaint within 10 days of entry of this order.

Therefore, plaintiff's motion for leave to reargue Carreon's jurisdiction motion is granted, and upon reargument, Carreon's motion is denied.

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Azucena Kaufman to reargue three orders which dismissed her case against each of the defendants, Nanette Wright, Philip Carreon and Lolita Gillberg is granted; and it is further

ORDERED that upon reargument, Gillberg's motion sequence 003 seeking dismissal of the complaint against Gillberg for failure to properly serve is denied, plaintiff's complaint is reinstated as against Gillberg, and plaintiff's personal service upon defendant Gillberg of the original and amended complaint in October 2005 is deemed properly, timely served, *nunc pro tunc*; and it is further

ORDERED that upon reargument, Carreon's motion sequence 004 seeking dismissal of the complaint against him for lack of jurisdiction is denied, the complaint is reinstated as against defendant Carreon, plaintiff's personal service upon defendant Carreon of the original and amended complaint in October 2005 is deemed properly, timely served, *nunc pro tunc*, and plaintiff is directed to file the amended complaint within 10 days of entry of this order; and it is further

ORDERED that upon reargument, Gillberg's motion sequence 005 seeking dismissal of the complaint against Gillberg on statute of limitations grounds is denied; and it is further

ORDERED that the April 18, 2006 status conference is cancelled, and the parties shall appear for a status conference on April 25, 2006, 3:00 p.m., and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: April 10, 2006



Hon. Carol Robinson Edmead, J.S.C.

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