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| Chodkowski v New York Post |
| 2006 NY Slip Op 30783(U) |
| June 16, 2006 |
| Supreme Court, New York County |
| Docket Number: 109825/2005 |
| Judge: Barbara R. Kapnick |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

109825/2005

109826/05

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MICHAEL CHODKOWSKI,

Plaintiff,

DECISION/ORDER
Index No. 109821/05
Motion Seq. No. 001

-against-

NEW YORK POST, MURRAY WEISS,
PRIMROSE SKELTON, MICHAEL WHITE,
JOHN DOYLE and JOHN DOES 1-5,

Defendants.

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BARBARA R. KAPNICK, J.:

Plaintiff seeks in this action to recover compensatory and punitive damages against the New York Post and four of its reporters, for libel, defamation, and intentional infliction of emotional distress based on false and defamatory statements allegedly made about plaintiff by defendants on or before July 20, 2004, including but not limited to the statements contained in articles published by the New York Post on July 20, 2004.¹

Service of process upon the defendants was allegedly effectuated by delivering a Summons with Notice on July 15, 2005 to "Josephine Wong Assistant Controller as per copy of NY State Police" at the offices of the New York Post. The Summons with Notice was also served upon the publisher of the New York Post, NYP Holdings, Inc., on or about November 10, 2005 through the Secretary of State, although NYP Holdings, Inc. was not named as a defendant to this action.

FILED
JUN 26 2006
NEW YORK COUNTY CLERK'S OFFICE

¹ Plaintiff represented himself at the time this action was commenced, but has since retained counsel.

Defendants New York Post, Murray Weiss and John Doyle now move for an order pursuant to CPLR § 3211(a)(8) dismissing this action for lack of personal jurisdiction on the grounds that: (i) Ms. Wong was never served with process in this action;² and (ii) the New York Post is merely a trade name of the paper published by NYP Holdings, Inc., and is thus a non-justiceable entity.³

The issue of whether or not defendants Murray Weiss and John Doyle were properly served with the Summons with Notice in this action is referred to a Special Referee to hear and report with recommendations.

That portion of the motion seeking to dismiss the action against said defendants for lack of jurisdiction is held in abeyance pending the report of the Special Referee and a motion pursuant to CPLR § 4403.

² Ms. Wong has submitted an affidavit denying that she was served, indicating that she does not hold the job title represented on the Affidavit of Service, and asserting that she does not fit the physical description of the person allegedly served.

³ Defendants Primrose Skelton and Michael White have not formally moved to dismiss this action, although the moving defendants contend that this Court lacks personal jurisdiction over them on the same grounds and also because said defendants were not employed at the New York Post on the date of the alleged service.

Plaintiff's counsel is directed to serve a copy of this order with notice of entry upon the Special Referee Clerk (Room 119), who shall place this matter on the Part 50R Calendar for referral to a Special Referee.

With respect to that portion of the motion seeking to dismiss the action against the New York Post, it is well settled that "[t]he purpose of the summons is to notify the defendant named therein that the plaintiff seeks a judgment against him so that he may take such steps as may seem advisable to protect his interest (citations omitted)." Connell v. Hayden, 83 A.D.2d 30, 35-36 (1981)

However,

[a] court may, at any time, exercise its discretion to permit the amendment of a summons "if a substantial right of a party against whom the summons issued is not prejudiced" (CPLR § 305, subd. [c]; emphasis added; see, also, CPLR 2001). As part of this liberal amendment policy, our Courts have often permitted the correction of a misnomer or a misdescription of the legal status or title of a party, provided that the party misnamed or misdescribed was fairly apprised of the fact that he, she or it was intended to be affected by the proceedings. (see, 3 Carmody - Wait 2d, §§ 19:11 -- 19:19).

Connell v. Hayden, *supra* at 36. See also, Anastasiou v. Fulton Street Pub., 133 A.D.2d 796, 798 (2nd Dep't 1987), in which the Court found that a corporate entity "was 'fairly apprised' that it was the party intended to be affected by the instant action", notwithstanding the fact that the Complaint named only its trade name as a defendant.

Accordingly, based on the papers submitted and the oral argument held on the record on April 26, 2006, this Court finds that NYP Holdings, Inc. was fairly apprised that it was the party intended to be affected by the instant action. Therefore, service upon NYP Holdings, Inc. through the Secretary of State constituted valid service, even though it was mistakenly referred to in the caption by its trade name, the New York Post.

The caption of this action is, in the discretion of the Court, amended nunc pro tunc, as of the date of said service to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

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MICHAEL CHODKOWSKI,

Plaintiff, Index No. 109821/05

-against-

NYP HOLDINGS, INC., MURRAY WEISS,
PRIMROSE SKELTON, MICHAEL WHITE,
JOHN DOYLE and JOHN DOES 1-5,

Defendants.


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FILED
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Upon service of a copy of this order with notice of entry, the County Clerk and the Clerk of the Trial Support Office, shall mark their records to reflect the amended caption.

This constitutes the decision and order of this Court.

Dated: June 16, 2006


Barbara R. Kapnick
J.S.C.