

Hill v Solomon

2007 NY Slip Op 30320(U)

March 12, 2007

Supreme Court, New York County

Docket Number: 0108103

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA
Justice

PART 31

Index Number : 108103/2006

INDEX NO. _____

HILL, PATRICIA

MOTION DATE _____

vs

SOLOMON, MONA

MOTION SEQ. NO. _____

Sequence Number : 001

MOTION CAL. NO. _____

DISMISS

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

see attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
MAR 26 2007
NEW YORK COUNTY CLERK'S OFFICE

SO ORDERED

Dated: 3/12/07

[Signature]
J.S.C.

ROLANDO T. ACOSTA

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

[* 1]

Check if appropriate: DO NOT POST

DO NOT POST

DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Patricia Hill,

Plaintiff,

– against –

Mona Solomon, Allen Fishbein and Oliver King
Enterprises d/b/a Empire Szechuan Village, and
Consolidated Edison Company of New York,

Defendants.

DECISION/ORDER

Index No. 108103/06

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant Solomon's motion for an order dismissing the complaint pursuant to CPLR 3211(a)(8), alleging that she had not been properly served, and for attorneys fees for defending the action, plaintiff's cross-motion for an order nunc pro tunc pursuant to CPLR 308(5) sustaining the service made or an order granting an extension of the time to serve pursuant to CPLR 306-b:

Papers	Numbered
Notice of Motion, Affirmation & Affidavit	1 (Exhibits A-B)
Notice of Cross-Motion, Affirmation & Affidavit	2 (Exhibits A-L)
Reply Affirmation	3

On April 3, 2005, plaintiff tripped and fell in front of Empire Szechuan Village, a restaurant in a property owned by defendants Mona Solomon and Allen Fishbein in New York County. On June 17, 2005, prior to commencing the instant action, plaintiff attempted to contact Solomon at an address in Greenbelt, Maryland. Exhibit H. Plaintiff had obtained that address from the deed to the property where the restaurant was located. Having received no answer, plaintiff forwarded a "Request for Change of Address or Boxholder Information Needed for Service of Legal Process" to the Postmaster in Greenbelt, Maryland, but the request was returned stating "Not Deliverable as Addressed, Unable to Forward." Exhibit I. Plaintiff then contacted the restaurant to ascertain Solomon's address. According to plaintiff, the owner would not divulge Solomon's address, but agreed to deliver a letter to

her. Plaintiff then sent letters to Solomon dated October 24, 2005 and January 6, 2006 in care of Empire Szechuan Village, see Exhibit J, including the certified receipt card for the January 6th letter, but failed to ascertain Solomon's address.

Plaintiff ultimately served Solomon on June 27, 2006, at 75 West End Avenue, Apt. C-20B in New York County, an address listed in the lease agreement between defendants Solomon and Fishbein and defendant Oliver King Enterprises d/b/a Empire Szechuan Village. According to Solomon, she learned of the lawsuit from a conversation with Fishbein in July 2006. Solomon Affidavit at ¶ 3 & 4. On July 14, 2006, the parties agreed by stipulation to extend Solomon's and Fishbein's time to answer the complaint. Exhibit E. Thereafter, on August 9, 2006, a Notice of Appearance was served on plaintiff by counsel for Solomon and Fishbein and on September 19, 2006, Solomon and Fishbein interposed their answer, where they interposed as their fifth affirmative defense that they were not legally served with process. Exhibits F & G.

Solomon now seeks to dismiss the complaint pursuant to CPLR 3211(a)(8) and plaintiff, by cross-motion, seeks a nunc pro tunc order permitting alternative service pursuant to CPLR 308(5) or for an extension of time to serve pursuant to CPLR 306-b.

The Appellate Division, First Department, sanctioned an order nunc pro tunc under CPLR 308(5) where plaintiff attempted to serve the defendant pursuant to CPLR 308(2), and communications from defendant's counsel immediately after the attempted service established that defendant received actual notice. Morgan Guaranty Trust Co. of New York v. Hauser, 183 A.D.2d 683 (1st Dept. 1992). The plaintiff in Morgan Guaranty sought the nunc pro tunc order by notice of cross-motion in response to defendant's motion to dismiss. The facts in Morgan Guaranty are instructive in the disposition of the instant case:

Plaintiff, in September 1988, obtained leave to add defendant-appellant, an Austrian citizen, as a party-defendant in this action. On November 26, 1990, acting upon information provided by the original defendant, an attempt was made to serve appellant at a Dutchess County farm. The process server was advised by a 50-year old male with the same last name as appellant, that appellant was not in at that time, whereupon the supplemental summons and complaint was left with him as a person of suitable age and discretion. While the farm has not been shown to be appellant's dwelling place, usual place of abode, or residence within the meaning of CPLR 308 (2), and while appellant claims an unidentified Austrian residence, affidavits sworn to by her in 1987 and 1991 were executed in San Moritz, Switzerland, and her residence has remained unknown at all times since the 1988 order. However, communications from her counsel immediately after the November 26, 1990 delivery established that she received actual notice of the action.

Id. at 683. On these facts, the IAS court correctly held that service upon the defendant pursuant to CPLR 308 (1)(2) and/or (4) was impracticable, warranting the grant of a nunc pro tunc order for alternative service pursuant to CPLR 308(5). Id. Ten years later, the Court in DeCarvalho v. Adler, 298 A.D.2d 293 (1st Dept. 2002), held that the request for a nunc pro tunc order under CPLR 308(5) must be made by notice of motion, such as in Morgan Guaranty.

Here, plaintiff unsuccessfully attempted to ascertain Solomon's address by writing to Solomon at her last known address, filing a request for change of address with the Postmaster, and seeking the assistance of the owner of Empire Szechuan Village, Solomon's tenant, who agree to forward plaintiff's letter to Solomon. Plaintiff finally attempted service pursuant to CPLR 308(2) by delivering the summons and complaint at 75 West End Avenue, Apt. C-20B in New York County and leaving it with defendant Fishbein, and mailing a copy to Salomon at that same address. As in Morgan Guaranty, Solomon received actual knowledge of the lawsuit; indeed, she received notice shortly after the attempted service from a telephone conversation with Fishbein. Accordingly, based on these facts, plaintiff's motion for a nunc pro tunc order as of June 27, 2006, for alternative service pursuant to CPLR 308(5) is granted, allowing service in the manner effectuated by plaintiff.

Had the Court not granted plaintiff relief by a nunc pro tunc order, it would have granted her an extension to serve pursuant to CPLR 306-b in the interest of justice inasmuch as plaintiff attempted to ascertain Solomon's address, the instant relief was sought by cross-motion within a few months of Solomon's answer, Solomon received actual notice immediately after plaintiff's attempted service, and Solomon suffered no prejudice. See Leader v. Maroney, Ponzinin & Spencer, 97 N.Y.2d 95 (2001).

That portion of Solomon's motion which seeks attorneys fees is also denied inasmuch as the American rule states that each party pay its own attorneys fees unless otherwise agreed to, and there are no grounds for sanctioning plaintiff warranting the imposition of costs.

Accordingly, it is

ORDERED that defendant Solomon's motion to dismiss pursuant to CPL:R 3211(8) and for attorneys fees is DENIED; and it is further

ORDERED that plaintiff's cross motion is GRANTED to the extent that a nunc pro

tunc order as of June 27, 2006, for alternative service pursuant to CPLR 308(5) is GRANTED, allowing service to Solomon by delivering a copy of the summons and complaint to defendant Fishbein at 75 West End Avenue, Apt. C-20B in New York County, and subsequently mailing a copy to Solomon at that same address.

This constitutes the Decision and Order of the Court.

Dated March 12, 2007

ENTER

SO ORDERED



Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

Jill A. Daniel, Esq.
Menagh & falcone, P.C.
386 Park Avenue South
New York, NY 10016
Attorneys for Plaintiff

Michael Andrew Fischer, Esq.
Fischer Law Firm, PLLC
Woolworth Building
233 Broadway, Suite 2201
New York, NY 10279
Attorneys for Defendant Solomon

FILED

MAR 26 2007

**NEW YORK
COUNTY CLERK'S OFFICE**