

Chaitoff v Vanegas

2007 NY Slip Op 31946(U)

June 29, 2007

Supreme Court, Suffolk County

Docket Number: 0012402/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

KATHLEEN CHAITOFF

Plaintiff(s),

-against-

ANGEL VANEGAS

Defendant(s).

ORIG. RETURN DATE: February 28, 2007
FINAL RETURN DATE: April 26, 2007
MTN. SEQ. #: 001 - MD
XMTN. SEQ.#: 002 - XMG

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Upon the following papers numbered 1 to 19 read on this motion: Notice of Motion and supporting papers 1 - 5; Affirmation in Opposition and supporting papers 6 - 13; Reply/Opposition Affirmation 14 - 19; it is,

ORDERED that this motion (001) by the defendant to dismiss pursuant to CPLR 3211(a)(5) and (8) is denied; and it is further

ORDERED that this cross motion (002) by the plaintiff for an extension of time to serve the summons and complaint is granted; and it is further

ORDERED that the time to serve the defendant in this action is extended, in accordance with CPLR 306-b, to 45 days from the date of this decision and order; and it is further

ORDERED that the plaintiff shall file its proofs of service of the summons and complaint with the clerk of the court within 20 days of said service being made; and it is further

ORDERED that the plaintiff shall serve a copy of this decision and order upon counsel for the defendant in accordance with CPLR 2103(b)(1), (2) or (3); and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on August 14, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

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This action, which arises out of a motor vehicle accident which occurring on June 23, 2003, was purportedly commenced by filing on May 3, 2006¹ with personal service allegedly being effectuated on June 10, 2006 (within the required 120 days after filing) by affixing the papers on the door of the defendant's "last known address" on June 9, 2006 and by mailing to the defendant the next day, June 10, 2006, in accordance with CPLR 308(4).

The affidavit of service indicates three attempts - including the day of the affixing - to serve pursuant to CPLR 308(1) or (2) with no success. The attempts were made on Friday, June 2, 2006 at 7:33 a.m., Monday, June 5, 2006 at 4:07 p.m. and Friday, June 9, 2006 at 7:18 p.m. The affidavit of service also indicates that the process server spoke to a neighbor and ascertained that the defendant was not in the military service.

The affidavit, however, does not reflect that the process server asked that neighbor if the defendant did, in fact, live at that address and does not reflect that the neighbor was asked where the defendant's place of business was located.

In support of this motion for summary judgment to dismiss for lack of personal jurisdiction (pleaded as a defense in the defendant's answer), the defendant submits his affidavit in which he states that he has not resided at that address since November of 2004 - about 19 months before the alleged service upon the defendant - and that, since that time, he has continuously resided at a different address.

While affidavits of service create a presumption of proper service (*see National Heritage Life Ins. Co. v T.J. Pproperties Co.*, 286 AD2d 715, 730 NYS2d 163 [2d Dept 2002]), the defendant's affidavit has sufficiently put into question whether the provisions of CPLR 308(4) were fully complied with (*see McIntyre v Emanuel Church of God in Christ, Inc.*, 37 AD3d 562, 830 NYS2d 261, 2007 NY Slip Op 1270 [2d Dept 2007]).

Under these circumstances, the defendant has made a prima facie showing sufficiently rebutting the presumption of proper service and, thus, the burden is on the plaintiff to establish proper service or, at the very least, to raise questions of fact requiring a hearing to resolve (*see Frankel v Schilling*, 149 AD2d 657, 540 NYS2d 469 [2d Dept 1989]). In this case, the plaintiff has made no such showing, raised no questions of fact regarding the appropriateness of service and offered no evidence refuting the defendant's contention that he no longer lived at the address in question. Accordingly, a hearing is not required to resolve the issue of service (*see Steiner v Steiner*, 81 AD2d 725, 439 NYS2d 499 [3d Dept 1981]) and the court finds that the service upon the defendant was a nullity.

The court also notes that the statute of limitations period for bringing this action expired on June 23, 2006 (*see CPLR 214[5]*) and, in view of this holding, there was no proper service within the statute of limitations period.

¹ About 50 days before the three-year statute of limitation period would have run (*see CPLR 214[5]*). The three year period ended on June 23, 2006.

The plaintiff, however, asks for leave of the court pursuant to CPLR 306-b to extend his time to serve the summons and complaint. This application is granted and, thus, that part of the defendant's motion seeking dismissal of the complaint for lack of personal jurisdiction (CPLR 3211[a][8]) and upon statute of limitations grounds (CPLR 3211[a][5]) is denied.

CPLR 306-b allows the court to grant an extension of time for service upon good cause shown or in the interest of justice. If the basis for granting an extension is in the interest of justice, the Court of Appeals has held that while good cause shown may be a factor to consider, it is not, in itself, required (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104, 736 NYS2d 291, 297 [2001]). In addition, the Court of Appeals held that the court may consider in this regard any other relevant facts including that the statute of limitations has expired, the merits of the action, the length of delay of the service, the promptness of the request for the extension and any prejudice to the defendant (*Id.* at 105-106, 298).

Reasonable diligence, for purposes of CPLR 308(4) requires, in the first instance, a sufficient number of attempts to serve the person of the defendant or a person of suitable age and discretion at his dwelling place at varying times sufficient to maximize the chances of his being home rather than at work or in transit to and from (*see State of New York Higher Education Services Corp. v Upshur*, 252 AD2d 333, 686 NYS2d 233 [3d Dept 1999]; *Rodriguez v Khamis*, 201 AD2d 715, 608 NYS2d 486 [2d Dept 1994]).

In addition, the appellate division for the Second Judicial Department has made it quite clear in a string of recent cases that in order to satisfy due diligence under CPLR 308(4) where the defendant cannot be served personally or by service upon a person of suitable age and discretion, attempts must also be made to locate the defendant's business address in order to effect service at the workplace (*see Sanders v Elie*, 29 AD3d 773, 816 NYS2d 509 [2d Dept 2006]; as followed in *County of Nassau v Yohannan*, 34 AD3d 620, 824 NYS2d 431 [2d Dept 2006]), *County of Nassau v Letosky*, 34 AD3d 414, 824 NYS2d 153 [2d Dept 2006]; *see also Credit Acceptance Corp. v Greve*, ___ Misc 3d ___, ___ NYS2d ___, 2006 NY Slip Op 50657U [Sup Ct, Suffolk County, March 22, 2007]; *Saitta v Dichiaro*, 14 Misc 3d 1221A, ___ NYS2d ___ [Sup Ct, Suffolk County]; *Tsunis & Gasparis, LLP v Dunne*, 14 Misc 3d 1211A, ___ NYS2d ___ [Sup Ct, Suffolk County 2006]).

In this case, without even considering the reasonableness of the actual days and times of attempted service, it is clear that the plaintiff failed to exhibit the proper diligence minimally required for ascertaining and confirming the present address of the defendant and, moreover, there is the absence of any attempts to find out the defendant's place of business.

On the other hand, the court notes that the statute of limitations period has expired, the underlying action is meritorious (alleging a rear-end collision on a parkway), the delay in service and the time in seeking this relief have been minimal and there is no showing of prejudice to the defendant whose insurance company was put on notice as to the incident and its particulars in September of 2005 (15 months after the accident occurred). Moreover, extensions of time for service should be liberally granted after the expiration of the statute of limitations (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104, 736 NYS2d 291, 297 [2001]).

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Under these facts and circumstances, the court finds that the plaintiff meets the interest of justice standard for an extension of time to service his summons and complaint (*see Leader v Maroney, Ponzini & Spencer, supra*).

This decision constitutes the order of the court.

Dated: June 29, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.