Materials Testing Lab, Inc. v Agosto
2007 NY Slip Op 32477(U)
August 3, 2007
Supreme Court, Suffolk County
Docket Number: 0007331/2007
Judge: Sandra L. Sgroi
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

7331-07
INDEX NO:~~9578-2007~~

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001 MotD
Adj'd Date: 7-26-07
Return Date: 5-29-07

Present:
Hon. SANDRA L. SGROI

MATERIALS TESTING LAB, INC.,
Plaintiff,

-against-

ALBERT AGOSTO and FERNANDO GONZALES,
Defendants.

PECKAR & ABRAMSON, P.C.
Attorney for the Plaintiff
546 Fifth Aenue, 17th Floor
New York, New York 10036

Upon the following papers numbered 1 to 10 read on this Motion: Notice of Motion and supporting papers 1-10; it is,

ORDERED that the motion by the Plaintiff for an order pursuant to CPLR 308(5) to direct the manner of service of the summons and complaint and for other relief is granted; and it is further

ORDERED that the Plaintiff is granted an additional 120 days to properly serve all Defendants; and it is further

ORDERED that the summons in the above entitled action be served upon Fernando Gonzales, the Defendant herein, by publication to wit: that the summons together with the notice to the Defendant Fernando Gonzales, containing a brief statement of the nature of the action and the relief sought, and the sum of money for which judgment may be taken in a case of a default in answering, be published in two newspapers, at least one in the English language viz: in the New York Daily News published in the City of New York, Borough of Brooklyn, State of New York and in Newsday, published in the entire County of Suffolk, State of New York both most likely to give notice to the Defendant Fernando Gonzales, once in each of four successive weeks, and it is further

ORDERED, that the summons, complaint, order, and papers on which this order is based shall be filed on or

before the first day of publication and that the first publication shall be made within thirty days after this order is granted; and it is further

ORDERED that the Plaintiff is also directed to serve a copy of the summons and complaint by regular mail on Hilma Gonzalez, 1035 45th St. Apt. 4A, Brooklyn, New York 11219-1941 and Jesus M. DeGonzalez 1035 45th St. Apt. 2F, Brooklyn, New York 11219-1940, possible relatives of the Defendant Gonzales and to serve a copy of the summons and complaint together with this order on Fernando Gonzales by regular mail at 145 Franklin Avenue, Apt. 19, Brooklyn, New York 11222 within twenty days of the commencement of publication in the newspapers and prior to the completion of publication of the notice in the two Newspapers; and it is further

ORDERED that proof of publication and service by mail shall be properly and duly filed with the Clerk of the Court by the Plaintiff thirty days after service is complete; and it is further

ORDERED that any motion for a default judgment against the Defendant Fernando Gonzales shall include a copy of this order, proof of service pursuant to this order and all other required attachments.

The attorney for the Plaintiff has submitted an affirmation and an affidavit from the process server Anthony McCreath alleging that the Plaintiff has been unable to serve the Defendant Fernando Gonzales despite due diligent attempts to serve pursuant to CPLR 308 (1),(2) and (4). The process server alleges that he made two attempts at the address that he had for this Defendant, five attempts at a barbershop location and three attempts at another location. In addition the attorney for the Plaintiff has mailed a copy of the summons and complaint to the address that his most recent unemployment checks were sent and to five other possible addresses for this Defendant.

In addition to these efforts, the Plaintiff has hired a private investigation firm known as New York Investigation Specialists, LLC and this company conducted surveillance activities at different addresses on at least six different days in an attempt to serve the Defendant Gonzales with process. The investigative report prepared by the agency is attached as Exhibit "D" and it indicates that the Defendant does not have a driver's license and does not own a motor vehicle. The search revealed no addresses that could be verified as a current address although several prior addresses were found.

The affidavit of the process server submitted in support of the Plaintiff's proof of attempted service shows inquiry of neighbors or others regarding Gonzales' habits and employment, and many attempts at different times and on different days to serve Gonzales at his possible places of residence or places that he may have frequented(see, ***Fulton Savings Bank v. Rebeor***, 175 A.D.2d 580, 572 N.Y.S.2d 245; see als***Lowinger v. State University of New York Health Science Center of Brooklyn***, 180 A.D.2d 606, 580 N.Y.S.2d 316, leave to appeal den'd 80 N.Y.2d 753, 587 N.Y.S.2d 904, 600 N.E.2d 631). In addition to these physical attempts to serve the Defendant Gonzales, in May of this year the attorney for the Plaintiff has sent the summons and complaint in a plain envelope marked "personal and confidential" addressed to Gonzales bearing no indication that it was from a law firm or otherwise related to litigation to five separate residential addresses indicated in the report as prior residences. These envelopes have not been returned as undeliverable.

CPLR 308 (5) provides that the service may be directed upon motion without notice as this Court may direct "if service is impracticable under paragraphs one, two and four of this section." When, as here, the Plaintiff's effort to obtain information regarding the Defendant's current residence or place of abode through ordinary means are ineffectual and the Plaintiff has submitted proof that demonstrates that service under other methods

would be "'impracticable," the required showing for the Court to act under ***CPLR*** 308 (5) is met. The motion and the supporting documents submitted by the Plaintiff show that not only has the Plaintiff met the standard in ***CPLR*** 308 (5), it has satisfied the more rigorous requirement of due diligence contained in paragraph 4 of ***CPLR*** 308.

This Court recognizes that "[a]lthough the impracticability standard 'is not capable of easy definition' (***Markoff v. South Nassau Community Hosp.***, 91 A.D.2d 1064, 1065, 458 N.Y.S.2d 672, *affd.* 61 N.Y.2d 283, 473 N.Y.S.2d 766, 461 N.E.2d 1253), and it does not require the Plaintiff either to satisfy the more stringent standard of 'due diligence' contained in ***CPLR*** 308(4), or to make a showing that 'actual prior attempts to serve a party under each and every method provided in the statute have been undertaken'" (***Astrologo v. Serra,*** 240 A.D.2d 606, 659 N.Y.S.2d 481, quoting ***Kelly v. Lewis,*** 220 A.D.2d 485, 632 N.Y.S.2d 186) (see also, ***State Street Bank and Trust Co. v. Coakley,*** 16 A.D.3d 403, 790 N.Y.S.2d 412, leave to appeal dismissed 5 N.Y.3d 746, 800 N.Y.S.2d 375, 833 N.E.2d 710).

A showing of impracticability under ***CPLR*** 308(5) does not require proof of actual prior attempts to serve a party under the methods of service outlined in ***CPLR*** 308 (1), (2), or (4),although the Plaintiff has made that showing herein(see, ***Franklin v. Winard***, 189 A.D.2d 717, 592 N.Y.S.2d 726). Therefore, where the Plaintiff has made three or more unsuccessful attempts at three different times on three or more different weekdays to serve the Defendant, it is reasonable to conclude that service is impracticable and to direct alternative service pursuant to ***CPLR*** 308(5) (see, ***Kelly v. Lewis,*** supra). Since the Plaintiff has shown that service pursuant to CPLR 308 (1), (2) and (4) is impracticable at this time, the motion for service pursuant to ***CPLR*** 308(5) will be granted (see, ***Sanders v. Elie,*** 29 A.D.3d 773, 816 N.Y.S.2d 509; ***Staton v. Omwukeme***, 277 A.D.2d 443, 715 N.Y.S.2d 908; ***Corbo v. Stephens***, 177 Misc.2d 338, 677 N.Y.S.2d 211 *affirmed* 272 A.D.2d 502, 709 N.Y.S.2d 99; ***Coffey v. Russo***, 231 A.D.2d 546, 647 N.Y.S.2d 276).

The Court is then faced with the task of fashioning a method of service that will be calculated to provide the Defendant Gonzales with notice of this action. The Plaintiff, Material Testing Lab, Inc., designated Suffolk as the place for trial because it maintains it principal office at 145 Sherwood Avenue, Farmingdale, New York. Both Defendants however reside outside of Suffolk and appear to reside in New York City and most of his contacts are in Brooklyn. It further appears that the persons identified as relatives of the Defendant Gonzales also reside in New York City. Therefore, this Court has ordered publication of notice in two New York City newspapers and mailing of the summons and complaint to the addresses of probable relatives and the address where the Defendant Gonzales received his most recent unemployment benefits.

This Court has not ordered that service be only by publication, because although publication alone may meet due process standards, it is "the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings"(***Boddie v. Connecticut***, 401 U.S. 371, 382, 91 S.Ct. 780, 788, 28 L.Ed.2d 113). Clearly, service by publication should be used only as a method of last resort (see generally, ***Caban v. Caban***, 116 A.D.2d 783, 497 N.Y.S.2d 175) and for that reason, the Court has ordered that additional mail service upon probable relatives and at the last address that the Defendant Gonzales received checks for government benefits (see generally, ***Dobkin v. Chapman***, 21 N.Y.2d 490, 289 N.Y.S.2d 161, 236 N.E.2d 451).

The motion for an extension of time to serve the Defendants is granted. An extension of time pursuant to ***CPLR*** 306-b may be granted in the interest of justice even without a showing of "reasonably diligent efforts at service as a threshold matter" (***Leader v. Maroney, Ponzini & Spencer,*** 97 N.Y.2d 95, 105, 736 N.Y.S.2d 291, 761 N.E.2d 1018). While the Plaintiff is not required to show diligent efforts to serve to obtain an extension of time,

the motion herein has unequivocally provided the Court with a situation where the Plaintiff has acted diligently in its attempt to obtain jurisdiction over the Defendants. The meritorious nature of the Plaintiff's cause of action, the short delay in effectuating service, the promptness of the Plaintiff's request for the extension of time to serve and the lack of prejudice to the Defendants require that, in the interest of justice, the Court grant the motion of the Plaintiff for an extension of time to serve process(see, ***Leader v. Maroney, Ponzini & Spencer,*** supra; ***Rosenzweig v. 600 North Street, LLC,*** 35 A.D.3d 705, 826 N.Y.S.2d 680).

Dated: 8/3/07

SANDRA L. SGROI, J. S. C.