

Borja v Moshouris

2007 NY Slip Op 32534(U)

August 8, 2007

Supreme Court, Queens County

Docket Number: 0006736/2006

Judge: Patricia P. Satterfield

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NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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SONIA BORJA and CARLOS LENIS,

Index No: 6736/06

Plaintiffs,

Hearing Date: 5/24/07

Final Submission Date: 6/25/07

-against-

IONANNIS MOSHOURIS and ABC CORP.,

DECISION AND ORDER ON
MOTION AFTER TRAVERSE

Defendants.

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This is an action to recover damages for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on May 16, 2002. By order dated October 5, 2006 (Satterfield, J.), the motion by defendant Ioannis Moshouris (“defendant”) to dismiss the action upon the ground of lack of personal jurisdiction was granted to the extent that the matter was set down for a hearing on the traverse to determine whether this Court acquired personal jurisdiction over defendants. The Traverse was held May 24, 2007, at which time plaintiff’s process server, Alan Feldman (“Feldman”), defendant and Sophia Moshouris, his wife, testified. This Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received, as well as the legal arguments asserted by counsel in the underlying motion papers. The Court has further had an opportunity to observe the demeanor of the parties and witnesses called to testify and has made determinations on issues of credibility with respect to those witnesses. After Traverse, defendant’s motion, inter alia, to vacate the judgment entered against him, is denied.

Where the validity of service of the summons and complaint is challenged, plaintiffs have the burden of establishing personal jurisdiction by a preponderance of the evidence at a hearing. Schwerner v. Sagonas, 28 A.D.3d 468 (2d Dept. 2006); Mortgage Access Corp. v. Webb, 11 A.D.3d 592 (2d Dept. 2004); Bankers Trust Co. of California, N.A. v. Tsoukas, 303 A.D.2d 343 (2d Dept. 2003). It is beyond dispute that “[s]ervice is only effective . . . when it is made pursuant to the appropriate method authorized by the CPLR.” Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 288 (1984); Feinstein v. Bergner, 48 N.Y.2d 234, 241 (1979); Foy v. 1120 Ave. of Americas Associates, 223 A.D.2d 232 (2nd Dept. 1996). Here, plaintiff contends that service was effected property by “nail and mail.”

Section 308(1) of the CPLR specifies that personal service upon a natural person may be made by “delivering the summons within the state to the person to be served;” subdivision (2) of section 308 authorizes service “by delivering the summons within the state to a person of suitable age and

discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence. . .” Subdivision (4), the “nail and mail” provision provides:

where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend . . .

Defendant challenges the purported service on the grounds that no “nail and mail” occurred, and that even if so, the process server did not exercise due diligence prior to the alleged “nail and mail.”

In the first instance, the resolution of whether, as claimed, substitute service was effectuated properly depends upon the credibility of the witnesses who testified. It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor. See, Cirami v. Taromina, 243 A.D.2d 437 (1997)[stating that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor]; Darmetta v. Ginsburg, 256 A.D.2d 498 (1998) [stating that determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses]; Vega v. City of New York, 194 A.D.2d 537 (1993)[stating that issues of credibility are properly determined by the hearing court]. Here, the testimony of the process server was credible.

Feldman testified that he attempted unsuccessfully to effect personal service at defendant’s home at 27-01 Utopia Parkway, Flushing, New York, which he described as being “like a fort,” adding that “it was a huge house with a huge fence around it.” He further testified:

It was a corner house. It had an iron gate. It had a mailbox slot and behind the mailbox slot was a big black box behind it and it was concrete walls, like 6 feet high, like something you just couldn’t forget.

He added:

I affixed the two copies on the gate on my fourth attempt to go there, one on the left side and one on the right side, I believe it was on both sides of the slot where the mail thing was, using a tape like this because it was very hard to stick, so I use this sometimes to stick. You can get a good taping on it (indicating). . . It was no way of getting in. The house was unbelievably secure. It was so high. I had to knock

and bang on the gates. I screamed 'hello.' Stayed there for 10 minutes.

He also testified that he confirmed with a neighbor that he had the correct address, ascertained from that neighbor that defendant was not in the military service, affixed the summons and complaint, and thereafter mailed the summons and complaint to defendant's residence.

By contrast, defendant's testimony and that of his wife were less than probative. Mrs. Moshouri's testimony was elicited after defendant's poor vision and irascibility rendered it difficult, if not impossible, for him to testify credibly. She confirmed that the photographs admitted into evidence as proof of the process server's description of the house were of her home. She further testified that the gate had no doorbell, that visitors usually will telephone them and she will open the gate, which is "always locked." She further testified that she is a freelance artist and works at home. She denied seeing any papers taped to the wall or seeing the summons and complaint prior to receiving it "this month from Mr. Magee," and reiterated that the papers were first seen by she and her husband in May 2007. The testimony proffered was incredible.

This action, which initially was commenced in Kings County by counsel for defendants, was transferred to Queens County by order of the Supreme Court, Kings County, on March 9, 2006, as a result of defendants' motion to dismiss and for a change of venue. Defendant executed an affidavit, which was notarized on November 14, 2005, in support of the motion to dismiss, which was refiled in this Court in July 2006. Not only was there a motion to reargue this Court's order setting this matter down for a traverse, but there was a notice of appeal filed from this Court's initial decision setting the matter down for a traverse. It is difficult to fathom that the extensive motion practice was undertaken without defendant's knowledge, and without him first advising his counsel that there was a lawsuit pending.

This Court thus finds that the process server effected service by "nail and mail," and that the due diligence requirement was met. It is well established in the Second Department, that "nail and mail" service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence. "The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (Gurevitch v. Goodman, 269 A.D.2d 355, 702 N.Y.S.2d 634). Lemberger v. Khan, 18 A.D.3d 447 (2005); Simonovskaya v. Olivo, 304 A.D.2d 553 (2003); Moran v. Harting, 212 A.D.2d 517 (1995); Walker v. Manning, 209 A.D.2d 691 (1994); McNeely v. Harrison, 208 A.D.2d 909 (1994); Scott v. Knoblock, 204 A.D.2d 299 (1994). Prior to his nailing on July 26, 2005, at 6:00 a.m., Feldman unsuccessfully attempted service on July 20, 2005, at 3:15 p.m., on July 23, 2005 at 8:25 a.m. and on July 25, 2005 at 7:10 p.m. The facts of this case are strikingly similar to those in Singh v. Gold Coin Laundry Equipment, Inc. 234 A.D.2d 358 (2d Dept.1996), in which the Appellate Division, Second Department, held:

The defendant Jung admitted that the address at which the process server attempted service was his correct home address, and that he would normally have been at home when the process server made two attempts at service. He further admitted that his wife was at home during each of the attempts at service. Moreover, on his third attempt, the process server verified the correct address with a next door neighbor before effecting service pursuant to CPLR 308(4). Under the facts of this case, the attempts were sufficient to establish "due diligence" so as to permit the use of substituted service (see, Rodriguez v. Khamis, 201 A.D.2d 715, 608 N.Y.S.2d 486; see also, Hochhauser v. Bungeroth, 179 A.D.2d 431, 578 N.Y.S.2d 170).

The same result obtains here. See, Rodriguez v. Khamis, 201 A.D.2d 715, 116 (1994)[“We find that the attempted personal service at the defendants’ actual home address on three occasions when a working person might reasonably have been expected to be at home was a sufficient showing of due diligence permitting substituted service (citations omitted).”]

Conclusion

Based upon the foregoing, this Court determines that personal jurisdiction over defendant was obtained, and that this Court thus has jurisdiction over defendant. Accordingly, defendant’s motion for an order dismissing the complaint upon the ground that the Court lacks jurisdiction is denied, and defendant is granted twenty (20) days from service upon him of a copy of this order with notice of entry to interpose an answer.

Dated: August 8, 2007

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J.S.C.