

Brown v Coder

2007 NY Slip Op 32817(U)

August 27, 2007

Supreme Court, Suffolk County

Docket Number: 0025169/2006

Judge: Paul J. Baisley

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

PRESENT:**Hon. Paul J. Baisley, Jr.**

 ANDY BROWN and MARCUS BROWN,

Plaintiffs,

-against-

KENNETH R. CODER,

Defendant.

 KENNETH R. CODER,

Third-Party Plaintiff,

-against-

LAURA FIELDS and J.L.W. DAVENDER, JR.,

Third-Party Defendants.

[Third-Party Index No. 26-348]

RETURN DATE: August 21, 2007**MTN. SEQ. #:** 001-MG**PLTFS' ATTORNEY:**

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3d PARTY DEFTS' ATTORNEYS:

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 201 North Service Road
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Upon the following papers numbered 1 to 9 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 5; Affirmation in Opposition and supporting papers 6 - 9; it is,

ORDERED that this motion (001) by the defendant Kenneth R. Coder to dismiss the complaint pursuant to CPLR 3211, previously converted to a motion for summary judgement in accordance with CPLR 3211(c), is granted and the complaint and amended complaint are dismissed in their entireties; and it is further

ORDERED that the third-party action shall continue independently with the parties thereto to appear at the preliminary conference previously scheduled for August 30, 2007 at 10:00 a.m. at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York,

By a decision and order of this court, dated July 10, 2007, a motion and cross motion were decided resulting in the dismissal of the main action as to the then defendants/third-party defendants, Laura Fields and J.L.W. Davender, Jr., the denial of a dismissal on statute of limitations grounds as to the defendant Kenneth R. Coder (hereinafter Coder) in view of his waiver of such a defense and the converting to a summary

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judgment motion of the remaining issue of dismissal as to Coder on the ground of lack of personal jurisdiction due to improper service. The parties were provided with notice of the conversion to a summary judgment motion and the opportunity to make additional submissions by the new return date.

This converted motion for summary judgement has now been submitted with neither party providing any additional submissions.

As stated in the order and decision of July 10, 2007: This is a personal injury action arising out of a two-car motor vehicle accident on September 13, 2003. The original complaint was brought on behalf of two passengers (hereinafter the Browns) in car number one against Coder, the owner/driver of car number two.

Subsequently, Coder brought a third-party action against the owner (hereinafter Fields) and the driver (hereinafter Davender) of car number one. The Browns then amended their complaint to add as defendants Fields and Davender.

The statute of limitations on this action is three years (*see* CPLR 214[5]) which, in this case, would have ended on September 13, 2006.

On September 7, 2006 - one week before the statute was to run - the plaintiffs filed their original summons and complaint. Service upon the defendant Coder was not done pursuant to CPLR 308 but pursuant to CPLR 312-a. CPLR 312-a allows for service by first-class mail upon a defendant along with copies of a "Statement of Service by Mail" and an "Acknowledgment of Receipt by Mail." This section provides that the defendant is to return the completed executed "Acknowledgment of Receipt by Mail" - with service then being complete upon mailing or delivery - or, in the absence of such cooperation, service will then be undertaken in this case under CPLR 308, but with the defendant being liable for the reasonable costs of serving process under the alternative method.

The risk to a plaintiff in using the provisions of CPLR 312-a is that if the defendant does not timely return the executed acknowledgment, the plaintiff will only have whatever is left of the 120 day period to make service and to satisfy the statute of limitations. As pointed out in the Practice Commentaries (McKinney's) under CPLR 312-a:

"Because the effectiveness of service [pursuant to CPLR 312-a] is entirely dependent on defendant's willingness to return an acknowledgement form, the use of CPLR 312-a is a risky enterprise if the expiration of a service-related time limit is near when the mailing is made" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book7B, CPLR 312-a).

In this case, the mailing to the defendant pursuant to CPLR 312-a was on September 26, 2006 (19 days after filing and 13 days after the statute of limitations had run) and the defendant never returned the executed acknowledgment. And while the defendant Coder did answer (on October 9, 2006), an answer is not the equivalent of an executed acknowledgment, especially if it alleges, as here, that the defendant had not been properly served (*see Kostelanetz & Fink, L.L.P. v Hui Qun Zhao*, 180 Misc 2d 847, 694 NYS2d 285 [Civ

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Ct, New York County 1999]). It thus appears that as to the original summons and complaint proper service was not effectuated upon Coder and, accordingly, no jurisdiction was acquired of the person of Coder.

Thereafter, on October 25, 2006 - about a month and a half after the statute of limitations had run - Coder served his third-party complaint upon Fields and Davender. This third-party action was for contribution from these third-party defendants in the event that Coder was found liable on the main action. There is no statute of limitations issue as to the third-party action in this case because the initiating event for such purpose would not occur until, and if, there was an adverse decision against Coder.

The plaintiffs, however, then amended their complaint, allegedly "as of right" pursuant to CPLR 1009, and served the amended complaint upon Coder and the third-party defendants, Fields and Davender. The method of service of the amended complaint was pursuant to CPLR 2103(b) which allows service upon counsel for parties in a pending action. While this section has been held to apply only to "interlocutory" papers and not to "initiatory" papers (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2103:1), it has been held that service of an amended complaint may be effectuated pursuant to CPLR 2103(b) (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1009).

Coder's answer to the amended complaint also contained the affirmative defense of lack of personal jurisdiction/improper service.

As to the service upon Coder of the original complaint pursuant to CPLR 312-a, there is no question that jurisdiction was not obtained over the person of Coder. First of all, Coder did not return to the plaintiffs, as is his right, a completed and executed Acknowledgment of Receipt by Mail which is required in order for service to be complete (*see* CPLR 312-a[b]). Secondly, after not receiving this acknowledgment from Coder, the plaintiffs did not then serve Coder pursuant to the provisions of CPLR 308 within 120 days of the filing of the original complaint. Accordingly, jurisdiction was never obtained over Coder as to the original complaint.

The plaintiffs argue, however, that the service methods and requirements regarding the original complaint were made academic upon Coder bringing his third-party action and, thus, allowing the plaintiffs to amend their complaint as of right and to "serve" Coder by mailing the supplemental summons and amended complaint to his attorney in accordance with CPLR 2103. The court notes that the plaintiffs cite no authority for this proposition.

The problem with this argument is that the jurisdictional foundation of this action is based upon jurisdiction over the person of Coder being obtained in the first instance. Since such jurisdiction was never obtained, any of the subsequent actions and proceedings in this case cannot be sustained. Accordingly, the original complaint and the amended complaint are both nullities as to Coder and the action must be dismissed as to him.

In view of this holding, the only remaining action is the third-party action which is presently scheduled for a preliminary conference. The court notes that the third-party action is apparently an action for

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contribution and, thus, may have no viability upon this dismissal of the underlying action. The preliminary conference scheduled for the third-party action, however, shall proceed subject to the filing of a stipulation of discontinuance among the parties or further order of the court.

This decision constitutes the order of the court.

Dated: August 27, 2007

HON. PAUL J. BAISLEY, JR.

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