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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

COUNTY OF NASSAU,

Plaintiff,

-against-

INDEX NO: 4843/06

JOSEPH J. LAWLESS,

Defendant.

Appearances:
For Plaintiff:

Office of County Attorney
By: Melissa B. Cohn, Esq.
Attorney for Plaintiff
One West Street
Mineola, NY 11501

For Defendant:

Michael A. Montesano, P.C.
Attorney for Defendant
14 Glen Street
Glen Cove, NY 11542

MEMORANDUM DECISION AFTER TRIAL

Introduction

Pursuant to an order of Honorable Justice Antonio Brandveen, Nassau County, Supreme Court, the Court convened a traverse hearing on May 15, 2007, which was completed on the second day of trial, on June 1, 2007. The hearing was to determine whether personal jurisdiction had been obtained over the defendant.

Background

In this forfeiture action, Justice Brandveen granted the plaintiff summary judgment, pursuant to CPLR §3212(b), and found that there were no triable issues of fact except as to the matter of personal jurisdiction. Justice Brandveen also granted summary judgment to the defendant on his application to dismiss the underlying action for lack of jurisdiction, to the extent that the action was set down for a traverse hearing.

The record reflects that defendant, JOSEPH J. LAWLESS (hereinafter referred to as "LAWLESS"), was arrested for violating the VTL Section 1192.3 on November 22, 2005 and, subsequently, on December 6, 2005, pled guilty to a violation of VTL Section 1192.1, operating a vehicle with ability impaired by alcohol.

Thereafter, pursuant to Nassau County Administrative Code § 8-7.0(g)(4), the plaintiff, COUNTY OF NASSAU (hereinafter referred to as "COUNTY") commenced the instant action to obtain a judgment of civil forfeiture with the filing of papers and the purchase of the index number and, on April 17, 2006, a process server, Jonathan Safran (hereinafter referred to as "Safran" or the "process server"), attempted to serve the summons and complaint on LAWLESS. The affidavit of service reflects that, on April 17, 2006, he utilized "nail and mail" service, pursuant to CPLR §308(4), after three (3) prior attempts to personally serve the defendant at 30 Dogwood Avenue, Rockville Centre, New York.

The process server testified as to his attempts to personally serve LAWLESS on Saturday, April 8, 2006 at 3:20 PM; Monday, April 10, 2006 at 7:53 AM; Wednesday, April 12, 2006 at 8:45 PM; and Monday, April 17, 2006 at 2:14PM, at which time he claimed that he affixed the summons to LAWLESS' front door, with followup mailing on April 18, 2006.

During the hearing, a significant issue arose as to the address to which the summons and complaint was mailed. The process server affixed the summons to the door of the LAWLESS home at 30 Dogwood Lane, Rockville Centre and he testified that he knew that address to be LAWLESS' actual dwelling place. However, at the insistence of his employer and notwithstanding his personal knowledge to the contrary, Safran executed the affidavit of service indicating service at 30 Dogwood Avenue, Rockville Centre and then mailed the summons to the incorrect address. Additionally, Safran testified that he spoke to a neighbor, Ellen Nizich at 56 Dogwood Avenue, Rockville Centre (hereinafter referred to as "Nizich") and asked her three (3) question: (1) do you know Mr. Lawless?; (2) does he live at this address?; and (3) is he in the military? He testified that she responded yes, yes and no, respectively.

At the hearing, the neighbor testified and denied ever having been interviewed by the process server. Nizich also testified that she found the pleadings on the ground, some distance from LAWLESS' front door, as she was walking past his home where the summons and complaint was alleged to have been affixed. She stated that her husband delivered the documents to LAWLESS upon his return from vacation, and that he had not been home during the prior attempts of personal service.

The Law

It is well settled that nail and mail service pursuant to CPLR § 308(4) may only be used where service under CPLR § 308(1) and (2) cannot be made with "due diligence". The due diligence requirement of CPLR § 308(4) should be strictly construed given the reduced likelihood that a summons served pursuant to that section will be received. *Moran v Harting*, 212 AD2d 517, 622 NYS2d 121 (2nd Dept. 1995); *Gurevitch v Goodman*, 269

AD2d 355, 702 NYS2d 634 (2nd Dept. 2000); *Walker v Manning*, 209 AD2d 691, 619 NYS2d 137 (2nd Dept. 1994). Service pursuant to CPLR §308(1) shall be made "by delivering the summons within the state to the person to be served". Pursuant to CPLR §308(2), service of process shall be made by delivering the summons 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 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 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other...".

In his post-trial Memoranda of Law, counsel for LAWLESS argued that plaintiff failed to exercise due diligence in effecting service on LAWLESS because the process server did not attempt to locate LAWLESS' business address in order to effectuate service at that location or that he inquired about Lawless' working habits, citing *County of Nassau v Yohannan*, 34 AD3d 620, 824 NYS2d 431(2nd Dept. 2006), *County of Nassau v Letosky*, 34 AD2d 414, 824 NYS2d 153 (2nd Dept. 2006) and *County of Nassau v Long*, 35 AD3d 787, 826 NYS2d 739 (2nd Dept. 2006). However, the Court notes that, where attempts to serve the defendant include an attempt on a late weekday evening and on a Saturday, it is not necessary that the plaintiff attempt to serve the defendant at his workplace. *County of Nassau v Gallagher*, 2007 NY Slip Op. 6819, 2007 NY App.Div/ LEXIS 9822, citing *County of Nassau v Long*, *supra, County of Nassau v Letosky*, *supra,* and *County of*

Nassau v Yohannan, *supra*, wherein all of the attempts to serve the defendants were made on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit to work. *See also*, *Johnson v Waters*, 291 AD2d 481, 738 NYS2d 369 (2nd Dept. 2002); *Matos v Knibbs,* 186 AD2d 725, 588 NYS2d 911 (2nd Dept. 1992). Notwithstanding same, it is clear to the Court the second prong of service under CPLR §308(4) that requires mailing of the summons to the last known residence of the defendant has not been accomplished herein. The testimony at the hearing reflects that, despite knowledge that defendant resided at 30 Dogwood Lane, the summons was mailed to 30 Dogwood Avenue, the wrong address. Said defect is fatal to the COUNTY's case and the Court finds that plaintiff did not effect proper service upon defendant and has not obtained personal jurisdiction over him.

Conclusion

Plaintiff's complaint is dismissed for lack of personal jurisdiction.

This constitutes the decision of the Court. Settle Judgment on Notice.

Dated: October 11, 2007

WILLIAM R. LaMARCA, J.S.C.

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