SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

THEODORE LEVITON,

Plaintiff,

INDEX No.07129/07

MOTION DATE: Sept. 6, 2007
Motion Sequence # 001

-against-

SCOTT UNGER and EAST ATLANTIC PROPERTIES, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation X

This motion, by defendants, for an order:

(a) dismissing the above entitled action pursuant to CPLR Rule 3211(a)5 and 8 because the Court does not have jurisdiction over the persons of the defendants and because the action is barred by res judicata; and

(b) staying the above entitled action pursuant to CPLR §2201 if the action is not dismissed, and if it is dismissed, enjoining the plaintiff from commencing a new action against the defendants for the same relief

that plaintiff seeks in this action, because the plaintiff has not satisfied a judgment for costs entered against him in a prior action in which the plaintiff pleaded the same claims against the defendants that he pleads in this action; and

(c) ordering the plaintiff to pay motion costs and the defendants' attorneys fees and expenses of this motion; and

(d) granting such other and further relief which to this Court may seem just and proper,

is determined as hereinafter set forth.

FACTS

This is the second action that the plaintiff has commenced against these defendants. The first action was dismissed by an Order entered April 6, 2007 (AJSC Martin) because the plaintiff failed to serve a complaint in a timely fashion.

In this second action, the plaintiff is seeking damages due to a breach of an agreement between the plaintiff and the defendants. In commencing this second action, plaintiff properly served East Atlantic Properties, LLC.

DEFENDANT'S CONTENTIONS

The defendants contend that this court lacks jurisdiction over the defendants because plaintiff has not served the summons and complaint upon the defendant, Scott Unger, in a manner permitted by law. In Mr. Unger's affidavit, he states that the plaintiff attempted to serve him through "affix and mail" method but the process server failed to comply with the statute.

Mr. Unger alleges that the process server did not exert due diligence in attempting to serve Mr. Unger because the two attempts that the process server made before he allegedly affixed the papers to Mr. Unger's residence and mailed a second copy were made on weekdays, during hours when it reasonable could have been expected that Mr. Unger was either working or in transit to or from work. Additionally, Mr. Unger stated

that he found the summons and complaint folded in half and jammed under front door, between the door and the saddle, sticking approximately halfway out of the door. He also found no tape, staples or tacks attached to the papers and none were attached to the door.

Mr. Unger also states that the process server made no attempt to inquire of neighbors as to Unger's work habits or to ascertain his business address for purpose of effectuating personal service. As a result, the defendants contend that service upon Mr. Unger was defective.

The defendants next argue that this second action is barred under res judicata, in that the first action was dismissed because the plaintiff failed to serve a complaint when demanded. The defendants argue that plaintiff had the opportunity and the obligation to show that his causes of action had merit in that first action and because plaintiff did not make such a showing, he did not argue that his cause of action had merit. Therefore, the first action, according to the defendants, was dismissed on the merits.

Alternatively, the defendants made a motion to stay the proceedings because the plaintiff never paid the amount in the first action. The defendants also want the plaintiff to be enjoined from commencing any other actions for identical relief.

PLAINTIFF'S CONTENTIONS

In the opposition to the defendants' motion to dismiss, the plaintiff's claim that their suit is not barred by res judicata, that they properly served the defendants, and that a stay is improper in this situation.

The plaintiff claims that they are not barred by res judicata because the dismissal in the first action was on procedural grounds and not on the merit of the case.

The plaintiff next contends that service was proper and the attached an affidavit of the process server in support. The process server stated that he went to Mr. Unger's residence on three separate occasions: May 1, 2007 at 3:00 p.m.; May 9, 2007 at 6:00 p.m; and May 10, 2007 at 9:00 a.m. He further notes that he spoke with neighbors, all of whom did not know how to contact Mr. Unger. After the third occasion of going to the residence, he securely taped the summons and complaint to Mr. Unger's front door. Afterwards, he mailed a true copy of the summons and complaint by first class mail to the

subject address.

The plaintiff then states that there is no basis for a stay of this action. The plaintiff insists that a motion to stay proceedings is a discretionary power that should not be utilized in this instance because neither judicial economy nor equity would be served by a stay of this action. Instead , this dispute should be resolved on its merits.

DECISION

A case may be dismissed under CPLR § 3211(5) and (8) for lack of jurisdiction or by reason of res judicata. Under § 3211(5), "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of...res judicata..." Under CPLR § 3211(8), "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the court has not jurisdiction of the person of the defendant..." After reviewing the statutory provisions, pertinent case law, and the record, the motion to dismiss must be denied because of factual differences as to whether service was proper and because the res judicata does not apply.

The rule in motions to dismiss due to lack of personal jurisdiction is stated in CPLR § 3211. The rule provides that:

> "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ...(8)the court has not jurisdiction of the person of the defendant."

CPLR § 3211 (a)(8). Additionally, "a defect in [service] can render the service void, and if it does, the court is deprived of personal jurisdiction..." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:30, p 49).

According to CPLR § 3211 as well as numerous appellate courts' decisions, service was not proper.

When proving that service of the summons and complaint upon the defendants were proper, the court accepts "a proper affidavit of a process server attesting to personal delivery of a summons to a defendant [as] sufficient to support a finding of jurisdiction." (**Bank of America Nat'l Trust & Savings Assoc. v. Herrick**, 233 A.D.2d 351, 351-52, 650 NYS2d 754, 2nd Dept., 196). Where, as here, there is a "sworn denial of receipt by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing." (**Herrick**, 233 A.D.2d at 352). As a result, dismissal is improper if there are disputes as to the efficacy of service.

In a factually similar case, the defendant submitted an affidavit that he had found two copies of the summons and complaint wedged in the front door of his residence. The defendant believed that this was defective personal service. This fact rebutted the affidavit of the service processor submitted by the plaintiff. Because of this conflict in facts, the court found that "there exists a conflict with respect to whether service was properly made, and that the appellants are, therefore, entitled to a hearing on this issue" (**Herrick**, 233 A.D.2d at 352) (citing, **Frankel v. Schilling**, 149 A.D.2d 657, 540 NYS2d 469, 2nd Dept., 1989; **Skyline Agency v. Ambrose Coppotelli, Inc.**, 117 A.D.2d 135, 502 NYS2d 479, 2nd Dept., 1986) .

The plaintiff is also incorrect in assuming that the defendants and acknowledgment that he received the summons and complaint at his home on in the early morning on or about May 12, 2007 when he arrived home shows that Mr. Unger was properly served in this action. Instead, "actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service (**Herrick**, 233 A.D.2d at 352)(citing, **Frankel v. Schilling**, **supra**; **Skyline Agency v. Ambrose Coppotelli, Inc.**, **supra**) .

The general rule in dismissing a second action by the application of res judicata requires that the earlier judgment be on the "merits" in order to invoke the preclusion doctrine. (**Parker v. Blauvelt Volunteer Fire Co., Inc.**, 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478,1999; see also New York Practice: 4th Ed., David D. Siegel, p. 752-753). It is inequitable, though, to "preclude a party from asserting a claim under the principle of res judicata, where... "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." (**Parker**, 93 NY2d at 349, citing Restatement [Second] of Judgments § 26[1][b]).

A dismissal in a prior action based on CPLR § 3012(b) is "obviously not on the merits and, if it were possible to commence a new action, it could not be met with the defense of res judicata." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3012:13, p 591). Because the dismissal in a first action for improper service of the summons "was not adjudicated upon the merits but rather was dismissed solely on jurisdictional grounds." (**Dutcher v. Town of Shandaken**, 97 A.D.2d 922, 924, 470 NYS2d 767, 3rd Dept., 1983; citing, **Weissman v. Euker**, 1 AD2d 30, 147 NYS2d 101, 3rd Dept., 1955), the present action is not barred by the previous order "and thus plaintiff is entitled to institute a second action based on the same facts for identical relief. (**Sotirakis v United Services Automobile Assoc.**, 100 A.D.2d 931, 931, 474 NYS2d 843, 2nd Dept., 1984) (citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3012:13, p 591; see also, **Samuels v. Rosenberg**, 178 AD2d 639, 577 NYS2d 880, 2nd Dept., 1991).

The defendants also moved for a stay of this second action because the plaintiff has not satisfied a judgment for costs entered against him in a prior action in which the plaintiff pleaded the same claims against the defendants that he pleads in this action. " 'The rule is well established that non-payment of costs in an action entitles a defendant in whose favor they are awarded to stay all proceedings in a subsequent action brought by the same plaintiff upon the same cause of action.'"(**Prudential Oil Corp. v. Phillips Petroleum Co.**, 83 A.D.2d 453, 445 NYS2d 438, 1st Dept., 1981, cited with approval in **Sardanis v. Sumitomo Corp.**, 279 A.D.2d 225, 231, 718 NYS2d 66, 1st Dept., 2001. The rule that the "trial will be stayed until plaintiff pays the costs of a prior action involving the same claim" has been the "settled law in this State since at least 1800 and has been routinely recognized and applied over the years". (**Prudential**, **supra** at 456)(citations omitted). The reasoning behind this rule is that a party who has already succeeded on a prior action "ought not to be put to the trouble and expense of defending another action predicated upon the same cause of action until he has been paid the costs awarded to him by the court in the action first commenced." (**Prudential**, **supra** at 456-57). Because the plaintiff has not demonstrated "extraordinary circumstances to merit withholding of a stay," the stay should be granted. (**Prudential**, **supra** at 457). As a result, a stay of the second action is proper until payment in the first action is received.

That part of the defendants' motion to dismiss for lack of personal jurisdiction cannot be determined on this record; a hearing is necessary. The defendant's motion for dismissal due to lack of personal jurisdiction and res judicata is **denied**. The defendant's motion for stay is **granted**.

LEVITON v UNGER, et al **Index no. 07129/07**

The hearing on the issue of jurisdiction to be held in this Part on December 4, 2007 at 9:30 a.m.. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated OCT 17 2007

Stephen A. Bucaria
J.S.C.

ENTERED

OCT 19 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE