Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

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

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CHRISTOPHER VARDAROS, NICK MELLISSINOS, COSTAS KATSIFAS, and KONSTANTINOS TSAHAS,

Plaintiffs,

-against-

JOHN ZAPAS a/k/a JOHN ZAPPAS,

Defendants.

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Index No: 10475/06
Inquest Date: 7/25/07
Final Submission Date: 8/6/07
Decision and Order after Traverse

Plaintiffs Christopher Vardaros, Nick Mellissinos, Costas Katsifas, and Konstantinos Tsahas ("plaintiffs") commenced this action, that apparently involves a real estate transaction, by filing on May 9, 2006, and subsequently served defendant John Zapas ("defendant pro se") on August 1, 2006; defendant pro se interposed his answer to the complaint on or about September 28, 2006. By order dated May 8, 2007 (Satterfield, J.), plaintiffs' motion for an order: (a) striking defendant's pleadings pursuant CPLR § 3126; (b) precluding defendant from offering any evidence in support of his position pursuant CPLR § 3126; (c) compelling defendant to comply with plaintiffs' discovery demands and notices by a date certain and to appear for an examination before trial at a subsequent date, time and location certain pursuant CPLR §3126; was held in abeyance pending a determination after traverse of defendant's cross motion for an order dismissing this action for lack of personal jurisdiction. The Traverse was held July 25, 2007, at which time testimony was given by plaintiffs' process server, David DiCarlo ("DiCarlo "); Martin Joseph Browne ("Browne"), an investigator for Verizon Corporate Security; plaintiffs Christopher Vardaros ("Vardaros") and Nick Melissionos ("Melissionos"); and defendant John Zapas ("Zapas"). 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 dismiss the action for lack of personal jurisdiction is granted.[1]

[1] In their post-hearing memorandum of law, dated August 6, 2007, plaintiffs seek, in effect, to reargue this Court's prior order, dated May 8, 2007, ruling as to the timeliness of the motion to dismiss and this Court's finding of undue hardship. This Court will not consider the issues previously determined, and will address solely the issues of the validity of service.

Where the validity of service of the summons and complaint is challenged, plaintiffs have the burden of establishing by a preponderance of the credible evidence that jurisdiction over the defendant has been obtained. 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, plaintiffs contend 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 ground that he was never served properly with the summon and complaint in accordance with the requirements of the "nail and mail" provision; that the prerequisite "due diligence" requirement was not met, since all attempts at service were made during the weekdays, and three of the attempts were made during normal working hours, and that notwithstanding plaintiffs' knowledge that he is the Vice President of Pacific Plumbing & Heating Corp., located at 378 McGuinness Blvd., Brooklyn, N.Y., no attempts were made to serve him at his work location. He further alleges that the "nail and mail" was not effectuated at his actual residence of 3443 Fulton Street, Brooklyn, N.Y., where he has resided for fifteen years, until the end of September 2006.

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, Tornello v. Gemini Enterprises, Inc., 299 A.D.2d 477 (2nd Dept. 2002)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had an opportunity to see and hear the witnesses]; Cirami v. Taromina, 243 A.D.2d 437 (2nd Dept. 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 (2nd Dept. 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 (2nd Dept. 1993)[stating that issues of credibility are properly determined by the hearing court].

DiCarlo, plaintiffs' process server, testified from his records that on August 1, 2006, he served defendant at 2909 and 2911 40th Road, Long Island City, New York, by posting the summons and complaint on the door at 10:50 a.m. He further testified that he had made prior attempts to serve at that same location on June 20, 2006, at 10:30 a.m.; July 14, 2006, at 8:30 a.m.; July 31, 2006, at 7:00 p.m. and August 1, 2006, at 10:58 a.m. DiCarlo's testimony that he also attempted at 3443 Fulton St., Brooklyn, New York, on May 25, 2006, at 12:30 p.m.; however, that assertion is undermined by the affidavit of service sworn to on August 14, 2006, and filed on June 27, 2007. In his note, DiCarlo wrote "this is a [sic] apt above a store. Store is closed. No bells for apt. & door is locked. We need to verify by paper if this def resides here." Attempted service also was made at two other addresses: 651 South 9th St., New Hyde Park, New York, on July 6, 2006, at 4:40 p.m.; and 3918-3920 150th Place, Flushing, New York on August 1, 2006, at 10:50 a.m. On cross examination DiCarlo testified that he did not know if 2909 and 2911 40th Road, Long Island City, New York, was a residence or business, but that it looked "more commercial." DiCarlo was shown a photograph of the alleged property where the "nail and mail" occurred, which showed a two story building and a one story building, two different steel grate doors, one of which bore the number "2907." In response to questions pertaining to photograph, he testified that it did not refresh his recollection as to where he affixed the summons and complaint, or whether the steel grated doors were open on his prior attempts at service. He further conceded that he made only one attempt to serve at the Fulton Street address because he "went back to the plaintiff and tried to get a better address," and could offer no explanation as to why the affidavit of service purportedly made on May 25, 2006, was sworn to August 14, 2006, and filed on June 27, 2007.

Browne, the investigator for Verizon Corporate Security, testified that two telephone numbers contained in the business records of Verizon were listed in the name of defendant John Zapas at 2911 40th Road, Long Island City, New York, on August 1, 2006, the time of the purported "nail and mail." Plaintiff Vardaros testified that he met with defendant at 2911 40th Road the previous year and "the year before a few times," and "saw Mr. Zapas sitting in an office in the back of the warehouse." He also testified that he had an understanding that defendant lived on Fulton Street in Brooklyn. He further testified that he knew that defendant was a part owner of Pacific Plumbing & Heating, which was located at 144-28 14th Avenue, Whitestone, New York. Plaintiff Mellissionos also testified that he had met with defendant at the 2911 40th Road address several times, "about a year ago." He further testified that defendant "had come to the office and . . . was saying to settle, you know, to try to settle without having to come court. He was telling us, you know, I'm not trying to take, whatever, the properties from you. I want to do the right thing."

Also offered into evidence were certified records that plaintiff contends showed the following:

1. A referee's deed from 2004 to the 3443 Fulton Street, Brooklyn property that "shows that any claims of ownership and tenancies would have been wiped out in 2004 by that referee's deed.

2. An ACRIS printout for the same property showing no further activity in the chain of title for that property, and that defendant had no record connection "to that property where he claims to have been residing at the time of service."

3. A certified copy of the deed to the property located at 3918-3920 150th Place Flushing, New York, which is owned by defendant, but is vacant land, and list as his address 651 South 9th St., New Hyde Park, New York.

4. A certified copy of the deed for 651 South 9th St., New Hyde Park, New York, which "shows Salma Construction Corp. As the grantee and brings you full circle back to 3443 Fulton Street as Salma's address."

The testimony and exhibits submitted to establish that this Court has jurisdiction over defendant clearly shows that plaintiff's process server exercised "due diligence" prior to the "nail and mail." However, the evidence failed to show that the "nail and mail" was effected at "either the actual place of business, dwelling place or usual place of abode."

Defendant testified that during the period from June 2006 through August 2006 he resided at 3443 Fulton Street, Brooklyn, New York, and had resided at that location from 1990 to early September 2006. He described the building as a "five apartment building with a beauty salon in front," with "six mailboxes with the names and the number of the apartment," including that of "John Zapas, apartment 2R." With respect to the photograph of the Long Island City property, defendant testified that:

> One property is identified as 2907. It is a two story frame storage place. Next to it is 2911, a warehouse. Next to it is 2913, a vacant land; and next to that is 2815 a 50 x 115 warehouse.

He testified that the photograph accurately reflected the condition of the property back in August 2006, and that the property is owned by his partner Hatan Ceshmehshahi, who has 50 per cent ownership in Pacific Plumbing & Heating, which is located at 378 McGuiness Boulevard, Brooklyn, New York. He further testified that the Long Island City property was used "temporarily as a favor to a corporation named: DMP Electric Corp.," which is "owned by a friend. . . who works by himself and [who] asked my partner as a favor to use the space since the place is vacant, use only for storage." Defendant also testified that his oldest son, John Zapas, "is very young, aggressive, and he thinks he can make money from the business. He want to use it and run his own business from there."

Here the testimony of the witnesses are not necessarily in conflict. However, the testimony of the process server at the hearing lacked sufficient weight to establish, by a preponderance of the credible evidence, that service was effected at either the "actual dwelling place," "usual place of abode" or "actual place of business." The process server could not identify from the photograph

which door he purportedly affixed the summons and complaint, testifying that he served at "2909 and 2911 40th Road," or whether the buildings were commercial or residential, as they are secured with steel grated doors. Defendant's testimony was unrebutted that the address at which service was made upon him, pursuant to CPLR 308(4), was not his "actual place of business." See, Venneri v. Gallo, 23 A.D.3d 376 (2nd Dept. 2005); see., also, Sottile v. Islandia Home for Adults, 278 A.D.2d 482 (2nd Dept. 2000)[The evidence at the hearing supports the court's determination that service on the individual respondents was not properly effected pursuant to CPLR 308(2) because the location where service was made was not their actual place of business.]. Moreover, service was never made at defendant's actual residence. As was recently stated by the Appellate Division, Second Department, in Estate of Waterman v. Jones, __ A.D. 3d__, __ N.Y.S.2d__, 2007 WL 3026376 (2nd Dept. 2007):

> Service of process must be made in strict compliance with statutory "methods for effecting personal service upon a natural person" pursuant to CPLR 308 (Macchia v. Russo, 67 N.Y.2d 592, 594; see Dorfman v. Leidner, 76 N.Y.2d 956, 958). CPLR 308 requires that service be attempted by personal delivery of the summons "to the person to be served" (CPLR 308 [1]), or by delivery "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode" (CPLR 308[2]). Service pursuant to CPLR 308(4), commonly known as "nail and mail" service, may be used only where service under CPLR 308(1) or 308(2) cannot be made with "due diligence" (see Feinstein v. Bergner, 48 N.Y.2d 234, 239; O'Connell v. Post, 27 AD3d 630; Simonovskaya v. Olivo, 304 A.D.2d 553; Rossetti v. DeLaGarza, 117 A.D.2d 793). Nail and mail service is effected "by affixing the summons to the door of either the actual place of business, dwelling place or ususal 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 ... at his or her actual place of business" (CPLR 308[4]).

Here, the requisite showing to support a finding of proper service pursuant to CPLR 308(4) has not been made. "[W]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" or learned of the lawsuit. County of Nassau v. Letosky, 34 A.D.3d 414 (2nd Dept. 2006). Accordingly, defendant's motion to dismiss the complaint for lack of personal jurisdiction is granted, the complaint hereby is dismissed, and plaintiffs' motion to, inter alia, compel discovery is denied as moot.

Dated: October 23, 2007

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J.S.C.