

Yan Zhang v James Guojian Rong, D.D.S., P.C.

2007 NY Slip Op 33684(U)

October 31, 2007

Supreme Court, New York County

Docket Number: 0100594/2007

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART 10

Justice

Index Number : 100594/2007

ZHANG, YAN

VS.

RONG, JAMES GOUJIAN D.D.S.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 100594-01

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

e read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

NOV 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

OCT 31 2007

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X

YAN ZHANG,

Plaintiff,

Index No.100594/07

-against -

Motion Seq. 001

JAMES GUOJIAN RONG, D.D.S., P.C., and
JAMES GUOJIAN RONG, Individually,

Defendants.

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SCHLESINGER, J:

Defendant moves to dismiss this dental malpractice action pursuant to CPLR §3211(a)(8) for lack of personal jurisdiction based on plaintiff's failure to "complete service" by filing proof of service within 120 days of the filing of the summons with notice as required by CPLR §306-b. Plaintiff opposes, asserting that proof of service may be filed after the 120-day period. Plaintiff also cross-moves to excuse any lateness and to have the filing deemed timely nunc pro tunc.

The Time Line of Events

The time line of events is undisputed by the parties and confirmed by the County Clerk Minutes which record the date each document was filed. The action was commenced by the filing of a summons with notice on January 12, 2007 pursuant to CPLR §304. Within 120 days thereafter, on May 8, 2007, plaintiff served defendant James Guojian Rong individually by delivering the papers to a person of suitable age and discretion and by mailing pursuant to CPLR §308(2). (See Exh. A to motion). The defendant P.C. was served on the same date by delivery of the papers to the corporation's managing agent pursuant to CPLR §311(a)1. (See Exh. 1 to plaintiff's Reply Aff.). Plaintiff filed proof of service with the County Clerk on July 19, 2007, about 180 days after the action was commenced.

The Governing Statutes

In urging the dismissal of this action, defendant relies on CPLR §306-b, which provides in relevant part that:

Service of the ... summons with notice ... shall be made within one hundred twenty days after the filing of the ... summons with notice ... If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

According to CPLR §308(2), proof of service on a person of suitable age and discretion, as accomplished here, must be filed within twenty days of the service and "service shall be complete ten days after such filing." Since proof of service was not filed until July 19, defendant argues that the service was not completed on Dr. Rong individually within 120 days of the January 12 commencement of the action as required by §306-b, thereby requiring the dismissal of the action against him.

No such claim is made with respect to the defendant P.C. because the applicable statute, CPLR §311(a)1, does not call for a mailing following delivery to the corporation's managing agent and contains no language as to when service is "complete." However, for the first time in its final set of papers, defendant asserts that the P.C. was never served. However, plaintiff has provided an affidavit of service from a professional process server, and defendant's claim, which consists only of counsel's conclusory denial of receipt of the summons and complaint, is insufficient to raise an issue of fact with respect to the affidavit of service. *See, Fairmount Funding Ltd v Stefansky*, 235 AD2d 213 (1st Dep,t 1997).

Proof of Service Need Not be Filed during the 120-Day Period

As plaintiff correctly asserts, proof of service need not be filed within the 120-day period provided for service of the summons with notice. Defendant's claim to the contrary reflects a misreading of the statute. As aptly explained by David Siegel, the statement that service is not "complete" under CPLR §308(2) until 10 days after the filing of proof of service "means only that the defendant's responding time will not start until then." New York Practice, §72, 4th ed., West 2005. For purposes of satisfying the 120-day period of CPLR 306-b, only the service itself (here, delivery to a person of suitable age and discretion and mailing) need take place within the 120-day period. The filing of the proof of service can take place afterwards.

This interpretation of the statute is consistent with CPLR §320 which requires that a party served pursuant to CPLR §308(2) formally appear "within thirty days after service is complete." It is further supported by appellate authority. Thus, in *Weininger v. Sassower*, 204 AD2d 715, 716 (2nd Dep't 1994), the court rejected defendant's contention that plaintiff's failure to timely file proof of service was a jurisdictional defect which vitiated defendant's obligation to answer. Rather, the court described the late filing as a "mere irregularity" which simply delayed the commencement of defendants's time to answer. Citing *Weininger*, the Third Department reached the same conclusion in *Citicorp Mortgage Inc. v. Strong*, 227 AD2d 818, 821 (1996).

Following the May 8 service in this case, defendants filed their answer on June 27, 2007. Plaintiff filed its affidavits of service on July 19. He asserts that he delayed because he was attempting to resolve the matter with defendants' insurer, and he has provided documents to support the assertion. (See Plaintiff's Aff. in Support of Cross-Motion and

Exhibit B). Defendant does not dispute the assertion. Considering these facts and circumstances, the Court excuses the late filing and deems the proof of service timely filed.

Accordingly, it is hereby

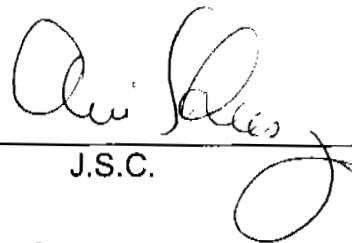
ORDERED that defendant's motion to dismiss is denied and plaintiff's cross-motion to deem the affidavits timely filed is granted.

This constitutes the decision and order of this Court.

Dated: October 31, 2007

OCT 31 2007

ENTER:



J.S.C.

ALICE SCHLESINGER

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