

Renda v Funaro

2007 NY Slip Op 34335(U)

December 31, 2007

Supreme Court, Nassau County

Docket Number: 8791-05/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

**IRMA JEAN RENDA, as Administratrix of the Estate of
IRMA LAMITOLA, Deceased,**

Plaintiff(s),

-against-

ANDREW FUNARO,

Defendant(s).

ANDREW FUNARO,

Third-Party Plaintiff(s),

-against-

NICHOLAS J. LAMITOLA,

Third-Party Defendant(s).

NICHOLAS J. LAMITOLA,

Plaintiff(s),

-against-

ANDREW FUNARO,

Defendant(s).

_____x

Action No.: 1

Index No.: 008791/05

Motion Seq. No.: 002

Motion Submitted: 11/16/07

Action No. 2

Index No.: 014437/06

The following papers read on this motion:

Order to Show Cause.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

This motion by third-party defendant Nicholas J. Lamitola for, *inter alia*, an order vacating this court's order dated April 18, 2007 which granted third-party plaintiff Andrew Funaro a default judgment against him is granted as provided herein.

In this action, the plaintiff seeks to recover damages for Irma Lamitola's death. She allegedly died as a result of a motor vehicle accident on July 27, 2004. Her car, which was being operated by her son defendant Nicholas J. Lamitola, was hit by a car being driven by defendant Andrew Funaro. The Lamitolas were traveling eastbound on North Suffolk Avenue and Funaro was traveling southbound on North Broadway in Massapequa. The police report indicates that the Funaro vehicle failed to yield the right of way.

Funaro commenced a third-party action against Nicholas Lamitola on or about December 20, 2006. Nicholas Lamitola commenced a second action against Andrew Funaro.

Via an unopposed motion, the third-party plaintiff Andre Funaro procured a default judgment against third-party defendant Nicholas Lamitola by order dated April 18, 2007.

In support of his motion to vacate his default, Nicholas Lamitola avers that he did not know that his mother's car insurance had lapsed until he was denied a defense and indemnification in this action. He further attests that he was "never personally served" with the

third-party summons and complaint.

The Affidavit of Service of the third-party complaint indicates that service on Nicholas Lamitola was attempted at 167 Hamilton Avenue in Massapequa on December 16, 2006 at 9:30 AM (Saturday); on December 18, 2006 at 7:40 PM (Monday); on December 19, 2006 at 7:40 AM (Tuesday); and on December 20, 2006 at 10:40 AM (Wednesday). The Affidavit of Service further indicates that the process server spoke with a neighbor on December 20, 2006 who told him that Nicholas Lamitola lived there and that a copy of the Summons and Complaint were both affixed to the door and mailed to that address that day.

Affidavits of Service by Mail indicate that Nicholas J. Lamitola was served with the motion to take default judgment by mail at 167 Hamilton Avenue, Massapequa, New York, on March 22, 2007, and that he was served with a copy of this court's April 18, 2007 order by mail at that address on May 2, 2007.

Vacatur of the default judgment pursuant to CPLR 3215(3)(i) is denied. That section does not apply here.

However, a hearing is required as vacatur pursuant to CPLR 5015(a)(4) may be required.

The third-party defendant Lamitola's bare denial of not having been personally served absent a denial that the Summons and Complaint were affixed to the door is inconsequential. "When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents." County of Nassau v Letosky, *supra*, at p. 415, quoting Raschel v Rish, 69 NY2d 694, 697 (1986).

Service pursuant to CPLR 308(4) may only be employed when personal service under CPLR 308(1) and (2) cannot be accomplished with due diligence. Lemberger v Khan, 18 AD3d

447 (2nd Dept 2005); see also, O’Connell v Post, 27 AD3d 630 (2nd Dept. 2006). “ ‘The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that summons served pursuant to that section will be received.’ ” O’Connell v Post, supra, at p. 631, quoting Gurevitch v Goodman, 269 AD2d 355 (2nd Dept. 2000); see also, County of Nassau v Letosky, 34 AD3d 414 (2nd Dept. 2006). In fact, the Appellate Division Second Department recently noted in Estate of Waterman v Jones (__AD3d __, 843 NYS2d 462, 464 [2nd Dept. 2007]), that “[a] mere showing of several attempts at service at either a defendant’s residence or place of business may not satisfy the due diligence requirement before resort to nail and mail service.” See also, County of Nassau v Long, 35 AD3d 787 (2nd Dept. 2006); County of Nassau v Yohannan, 34 AD3d 620 (2nd Dept. 2006). The Second Department held that “[f]or the purpose of satisfying the ‘due diligence requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant’s whereabouts and place of employment.” Estate of Waterman v Jones, supra, at p. 465; see also, County of Nassau v Yohannan, supra; Sanders v Elie, 29 AD3d 773, 774 (2nd Dept. 2006); Kurander v A Big Stam, Corp., 267 AD2d 209, 210 (2nd Dept. 1999); Busler v Corbett, 259 AD2d 13, 15 (4th Dept. 1999). Where the process server fails to make an attempt to determine a defendant’s business address in order to attempt personal service thereat pursuant to CPLR 308(2) before resorting to “nail and mail” service, service fails and jurisdiction is not acquired. O’Connell v Post, supra, at p. 631, citing Gurevitch v Goodman, supra; Moran v Harting, 212 AD2d 517 (2nd Dept. 1995); Walker v Manning, 209 AD2d 691 (2nd Dept. 1994).

A hearing is required to determine whether jurisdiction pursuant to CPLR 308(4) was acquired and whether the default judgment granted against defendant Lamitola in this court’s

order dated April 18, 2007 should be vacated.

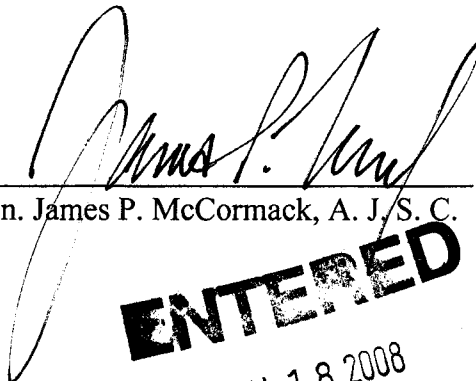
The issue of jurisdiction is referred for a hearing to the Calendar Control Part on February 26, 2008 for assignment, in the discretion of the Justice presiding, to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee.

Movant is directed to file a Note of Issue no later than ten (10) days prior to such date accompanied by a copy of this Order. A copy of the Note of Issue and this Order shall be served on the Clerk of the Calendar Control Part when the Note of Issue is filed.

If the reference is assigned to a Judicial Hearing Officer or a Court Attorney/Referee, it shall be to hear and report unless the parties agree otherwise. In that connection counsel's attention is directed to the transcript requirements of 22 NYCRR §202.44. The cost of such transcript shall be borne equally by the parties with the right of the prevailing party to seek to recover the expense as a disbursement.

This constitutes the Decision and Order of the Court.

Dated: December 31, 2007
Mineola, N.Y.


Hon. James P. McCormack, A. J., S. C.

ENTERED

JAN 18 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**