

Samet v Binson

2007 NY Slip Op 34499(U)

September 10, 2007

Supreme Court, Kings County

Docket Number: 15032/98

Judge: Bert A. Bunyan

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This opinion is uncorrected and not selected for official publication.

Exhibit 1 to Affirmation- order of Justice Bunyan dated 9/10/07

At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of September, 2007.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

-----X

ANDREW SAMET,

Plaintiffs,

- against -

Index No. 15032/98

ISAAC I. BINSON,

Defendant.

-----X

The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1,2 3,4 _____
Opposing Affidavits (Affirmations) _____	5 _____
Reply Affidavits (Affirmations) _____	6 _____
Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, the motion by plaintiff Andrew Samet for an order, among other things, rejecting the report of the Referee herein is, in all respects, denied and the cross- motion by defendant Isaac I. Binson for an order confirming the report of the Referee pursuant to CPLR 4403 and, thereupon, for a further order vacating the default judgment entered against said defendant and dismissing the above-entitled action is granted, albeit with leave to plaintiff to re-serve defendant within 120 days of the date hereof.

By order dated December 20, 2006, the parties were directed to appear for a traverse hearing with respect to the issue of service of process upon defendant. On March 18, 2007, a hearing was held at which both sides were represented by counsel. At the hearing, the process server (Ricardo Curo), defendant (Isaac Binson) and defendant's wife (Miriam Binson) testified. In her report dated March 27, 2007, the Referee found from the credible evidence that service of process was defective.

In his motion, plaintiff relies upon the testimony of the process server that "he had absolutely no reason to prepare a false or fraudulent affidavit of service [and] that everything in the subject affidavit of service was true and correct"; namely, that, on May 13, 1998 at 8:50 p.m., he served a copy of the summons and complaint upon defendant's wife, a person of suitable age and discretion at their residence at 1530 48th Street in Brooklyn. In the affidavit, Miriam Binson was described as being approximately 45 years of age, 165 pounds, about 5'6" in height, and with brown hair. The process server also testified that on May 14, 1998, he mailed an additional copy of the summons and complaint to defendant's residence. The process server conceded that he had no independent recollection of the circumstances regarding service and that a logbook which he kept had been disposed of long ago. Plaintiff dismisses the testimony of Miriam Binson that she was not served with process and that she did not receive any mailing as "all very convenient". Plaintiff asserts that the process server was never given a physical description of defendant's wife prior to service and he notes that the process server's description of her "was pretty much on the

mark”. Given that Miriam Binson never testified that the physical description provided by the process server was inaccurate, plaintiff faults the Referee for the statement in the report that Ms. Binson had testified that the description was incorrect. According to plaintiff, “Mr. Curo could not possibly have made up that physical description had he not actually served Ms. Binson” and, therefore, the Referee’s erroneous finding regarding Ms. Binson’s testimony “should, in and of itself, be sufficient to reject the report”. If the report is confirmed, plaintiff requests that the court “condition the vacatur [] of the judgment on terms that are just”, such as a waiver of jurisdictional defenses by defendant.” Plaintiff maintains that, given the finding of the Referee that service was “defective” and the absence of any finding that the mailing was not sent, the court should exercise its discretion and “impose reasonable conditions under which the default judgment can be vacated.”

In his cross-motion, defendant argues that, in contrast to the testimony of the process server who had no recollection of the service in question, he and his wife testified in detail “about their home, their family and their daily routine at the time which made it impossible that service could have been effected on Mrs. Binson”. Miriam Binson testified that there were surveillance cameras and intercom buzzers on the front and side of her house and that, when the doorbell would ring, she would determine whom the caller was and, if it were a stranger, she would not answer the door and would never permit a stranger to ascend to the

* Plaintiff’s suggestion seems to be that, if the judgment were vacated, defendant should be permitted to interpose an answer, rather than that the action should be dismissed, since “plaintiff might not be able to re-file the lawsuit due to the running of the statute of limitations”.

second floor where she and her family lived. Defendant asserts that the Referee “held a full and fair hearing, assessed the credibility of the witnesses and based her findings and recommendation on the credible evidence”. Consequently, according to defendant, the report is “clearly supported by the record” and plaintiff failed to meet his burden of proving that personal jurisdiction was obtained. Since this court never acquired jurisdiction over defendant, he contends that the judgment must be vacated unconditionally.

In opposition to the cross-motion, plaintiff repeats his contention that the process server’s physical description of the person served, which was “very accurate” in describing Miriam Binson, was sufficient to sustain service, notwithstanding her testimony about her “high tech equipment, the staircase in her home” and other “logical” reasons as to why service did not take place. Plaintiff also faults the Referee for allegedly making “no findings of fact” and merely reciting various aspects of each side’s position.

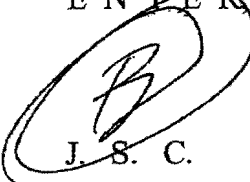
In reply, defendant challenges plaintiff’s reliance upon the description of Miriam Binson, a description which allegedly includes a “glaring discrepancy in her age”. He also emphasizes the process server’s inability to recall the service.

Where as here, the process server was available to testify, defendant’s sworn denial of service rendered the process server’s affidavit nonconclusive and shifted the burden of proof to plaintiff to substantiate the allegation of service therein (*see Anton v Amato*, 101 AD2d 819 [1984]). Under the circumstances, the report of the Referee should be confirmed. The findings contained therein are substantially supported by the record and the Referee

clearly defined the issues and resolved matters of credibility (*see Melnitzky v Uribe*, 33 AD3d 373 [2006]). As the process server had no independent recollection of the service and no longer had his log book, plaintiff's case rested on the process server's affidavit of service in which he averred that the summons and complaint were served on the second floor of 1530 48th Street upon Miriam Binson, a woman of approximately 45 years of age, 165 pounds, 5'6" in height and with brown hair. Although there appears to be no dispute that the description matches Miriam Binson's height and weight, Ms. Binson has previously affirmed (in support of her husband's original motion to vacate the judgment herein) that her hair was black and that she was 38 years of age at the time of service. Contrary to plaintiff's characterization, the process server's description, while similar, was not "right on target". At the hearing, Miriam Binson testified that the entrance to her home was monitored by a surveillance camera, that she would not have answered the bell for a stranger at 8:50 p.m. and that an unknown adult male would not have been permitted to enter her home and ascend to the second floor. Testimony regarding Miriam Binson's routine and the layout of her home (which was supported by photographs), more than her physical characteristics (which included an age difference of eight years) compelled the conclusion that service was invalid. Absent evidence of partiality or other such ground, the Referee's credibility determinations should not be disturbed (*see Rezzadeh v Lucas*, 253 AD2d 698 [1998]). Accordingly, the motion by plaintiff is denied, the cross-motion by defendant is granted, the report is confirmed and the complaint is dismissed (*see Nager v Panadis*, 238 AD2d 135 [1997]).

The court notes that this action was timely commenced in the office of the Clerk of Kings County, that the applicable statute of limitations has expired and that defendant has been aware of plaintiff's claim that a substantial sum of money was due him (*see, e.g., Leader v Maroney, Ponzini & Spencer, 97 NY2d 95 [2001]*). Therefore, despite the dismissal of the complaint on the ground of lack of personal jurisdiction, plaintiff is hereby permitted to re-serve defendant Isaac Binson within 120 days of the date hereof (*see CPLR 306-b; Gurevitch v Goodman, 269 AD2d 355 [2000]*).

The foregoing constitutes the decision and order of this court.

ENTER

J. S. C.

HON. BERT A. BUNYAN