

Galan v Schlüssel

2008 NY Slip Op 30847(U)

March 18, 2008

Supreme Court, Nassau County

Docket Number: 4414-05/

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

STANISLAV GALAN,

Plaintiff,

- against -

MICHAEL J. SCHLUSSEL,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 4414/05

Motion Sequence No. 004, 005

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5</u>
Briefs: Plaintiff's / Petitioner's	<u>6</u>
Defendant's / Respondent's	<u> </u>

The plaintiff moves for an order pursuant to CPLR 3215 (a) directing a default judgment be entered against the defendant for \$210,415.00 together with interest from March 30, 1999, at 9% per annum, the costs and disbursements of this action. The defendant opposes the plaintiff's motion, and cross moves for an order pursuant to CPLR 3211 (a) (8) upon the ground the Court lacks personal jurisdiction over the defendant, and pursuant to CPLR 3211 (a) (8) upon the ground the summons allegedly served is defective on its face. The plaintiff opposes the defendant's motion. The underlying action seeks to recover money converted by the defendant.

The process server, an investigator with the Law Department of the State of New York states, in an affidavit dated January 2, 2008, to wit the proof of service for the summons and complaint in the underlying action: "Deponent visited the residence of Michael J. Schlusssel located at 2380 Kowal Ct, Merrick NY 11566 to serve a Summons and Verified Complaint (copy attached). Deponent was informed that the defendant is normally home during weekday mornings

until noon, and then returns home by 7:00PM. On the following dates and times service was attempted resulting in no answer at either the front or side doors: 8/23/07 at 9:45AM and 11:15AM, 8/24/07 at 9:30AM, 8/29/07 at 10:00AM, 8/30/07 at 10:30AM, 8/31/07 at 10:20AM, and 9/4/07 at 9:00AM. On 9/5/07 at 7:30PM a white female who identified herself as Sandra Schlusel and defendant's wife, came to the door and stated she did not know where Mr. Schlusel was, nor did she know when he would return, she would not open the door to accept service on his behalf. On 9/10/07 at 7:00PM, Deponent again visited the residence, Mrs. Schlusel again refused to open the door and accept service. On 9/10/07 at 7:45PM Supervising Investigator Georgia Nurse responded to the location and spoke with Mrs. Schlusel through the door, she again refused to open the door. Supervisor Nurse asked her why she would not open the door to accept service and she stated "because I don't know you." Supervisor Nurse asked her if she could leave the papers on the door and she stated yes. The papers were affixed to the side door of the residence at 7:46PM. On 9/12/2007 at 1:00PM, deponent also enclosed a copy of said papers in a postpaid, sealed wrapper properly addressed to Mr. Schlusel's last known residence at 2380 Kowal Court, Merrick, New York 11566, and deposited said wrapper in an official depository under the exclusive care and custody of the U.S. Postal Service."

The Assistant Attorney General of the State of New York states, in detail, in an affirmation dated November 2, 2007, in support of the plaintiff's motion to extend time for the plaintiff's service of process, the procedural history of the underlying matter. The Assistant Attorney General of the State of New York asserts the defendant was duly served with the summons and complaint, but the defendant has not answered the summons and complaint, and the time to do so has passed.

The defendant states, in detail, in an affidavit dated November 14, 2007, in support of the defendant's cross motion, procedural history of the underlying matter, and claims he was never

served with process in this action. The defendant alleges, pointing to the affidavit of service attached to the cross moving papers, service was attempted under CPLR 308 (4), to wit by affixing the papers to the door of the defendant's residence, and mailing him a copy of the papers. The defendant contends the process server did not exercise due diligence within the meaning of the law. The defendant asserts he is entitled to dismissal because the process server failed to make a reasonable attempt to ascertain his place of employment, and to serve him there. The defendant avers, if the Court is not inclined to dismiss the plaintiff's action, as a matter of law, the defendant requests a traverse to determine whether the process server used due diligence as prescribed under CPLR 308 (1) or (2). The defendant points out, even if the alleged service was sufficient, the plaintiff's case would have to be dismissed as the plaintiff's summons is defective on its face. The defendant notes the summons fails to include the requisite statutory notices as a result of the Court's receipt of the index number photocopied on the page covering the necessary statutory notice requirements. The defendant he states he does not address nor needs to address the underlying allegations against him.

The Assistant Attorney General states, in an affirmation dated November 28, 2007, in opposition to the defendant's cross motion to dismiss, the defendant's characterization of the service of process as complying with CPLR 308 (4) is misplaced, rather service was effectuated by CPLR 308 (2), to wit upon a person of suitable age and discretion at the actual dwelling place of the defendant. The Assistant Attorney General points to the process server's affidavit dated January 2, 2008 showing the process was served upon the wife of the defendant on September 10, 2007, after the process server had also spoken to the wife on two other separate occasions. The Assistant Attorney General notes, when the process server initially spoke to the defendant's spouse, the wife identified herself as Sandra Schlusel, and stated she was the defendant's wife, but

claimed she did not know where her husband was nor when the defendant would return. The Assistant Attorney General asserts the wife refused to accept the papers, and, on each of the three conversations, the wife refused to open the door, and accept service of the papers. The Assistant Attorney General avers, after the third refusal by the wife to open the door to accept service of process, the process server then asked the wife if she could leave the papers on the door for the defendant, and the wife stated, "yes." The Assistant Attorney General contends, with the wife's knowledge and approval, the papers were affixed to the door of the couple's residence. The Assistant Attorney General also points out the summons and complaint were mailed and filed with the Nassau County Clerk's office by the process server to the defendant as showed in the process server's affidavit, and as required by CPLR 308 (2). The Assistant Attorney General states, although the copy of the summons contains a receipt showing it was filed on March 23, 2005, the summons is not defective because, as set forth in the accompanying memorandum of law, it complies with the requirements of CPLR 305. The Assistant Attorney General argues, since the defendant raises no factual issues about the effectiveness of the service under CPLR 308 (2), and offers no defense for his default, the plaintiff is entitled to a default judgment without the need of a traverse hearing.

The defendant's spouse states, in a reply affidavit dated January 2, 2008, in further support of the cross motion, a person did appear at her home, and rang the door bell in the evening when the defendant was not yet home. The defendant's spouse insists she did not see who was at the door nor could they see her. The defendant's spouse importunes the person came to the door once not thrice; neither asked my name nor would this affiant tell a stranger here name. The defendant's spouse states at no time did the person state what her business was there, and this affiant never consented for legal papers to be left at her door. The defendant's spouse contends the name,

[* 5]

gender and race descriptions provided by the process server are glaring and made up because you cannot see through the door of the married couple's residence, and the affiant never used the name, "Sandra." The defendant's spouse concedes the individual, whom the wife could not see and could not see her, asked if the defendant's spouse would open the door, but the defendant's spouse responded she does not open the door to strangers. The defendant's spouse opines that behavior is prudent particularly at night with her young children at home. The defendant's spouse points out, if she opened the door to see through it, that act would be a security breach requiring her to turn off the alarm which is something she would never do. The defendant's spouse admits the person at the door when told "no" to the defendant's spouse opening the door then stated this affiant should open the door because the speaker had a badge, but the defendant's spouse responded she did not care, and anybody could buy a badge. The defendant's spouse acknowledges she told the person she would have to come back. The defendant's spouse claims that person never stated what business they had at the couple's home, identify who they were, what type of badge they were purporting to display nor ask the defendant's spouse if they could leave legal papers for her husband. The defendant's spouse states, if someone asked if they could leave legal papers, she would have told them to leave the papers in the mailbox.

This Court has carefully reviewed and considered all of the papers submitted by the parties on the motion and cross motion.

CPLR 308 (2) authorizes service, inter alia, by delivery of the summons and complaint within the State to a person of suitable age and discretion at the defendant's dwelling place and mailing the summons to the defendant's last known residence. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process (*see Frankel v. Schilling*, 149 A.D.2d 657, 659, 540 N.Y.S.2d 469). A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2)

Bankers Trust Co. of California, N.A. v. Tsoukas, 303 A.D.2d 343, 343-344, 756 N.Y.S.2d 92

[* 6]
[2nd Dept., 2003].

A process server may satisfy the delivery requirement “by leaving a copy of the summons outside the door of the person to be served upon refusal of ‘a person of suitable age and discretion’ to open the door to accept it, provided the process server informs the person to whom delivery is being made that this is being done” (*Bossuk v. Steinberg*, 58 N.Y.2d 916, 918, 460 N.Y.S.2d 509, 447 N.E.2d 56, quoting CPLR 308 [2]). A defendant can rebut a process server’s affidavit by a detailed and specific contradiction of the allegations in the process server’s affidavit. Here, a conflict exists as to whether service was properly made, and the appellant is, therefore, entitled to a hearing on this issue (*see Bank of Am. Natl. Trust & Sav. Assn. v. Herrick, supra* at 352, 650 N.Y.S.2d 754; *Frankel v. Schilling, supra*)

Bankers Trust Co. of California, N.A. v. Tsoukas, supra, at 344; *see also McIntyre v. Emanuel Church of God In Christ, Inc.*, 37 A.D.3d 562, 830 N.Y.S.2d 261 [2 Dept., 2007].

The Court finds there was a conversation among the government’s agents and the wife of the defendant, who refused to open the door to accept service of the papers which were left at the defendant’s residence. “[S]ervice by mail is complete regardless of delivery where the mailing itself complies with all requisites” (*14 Second Ave. Realty Corp. v. Szalay*, 16 A.D.2d 919, 229 N.Y.S.2d 722). The Court finds the defense sworn statements and other papers raise no triable issue as to the mailing nor the filing, and the plaintiff has met all the requisites of the mailing requirement. The Court grants the plaintiff’s motion for a default judgment, but only to the extent of the outcome of the traverse. The defendant has not answered the complaint and the time to answer has expired. Moreover, the defendant has not provided any reasonable excuse nor a meritorious defense other than a challenge to the personal jurisdiction of the Court.

Accordingly, the cross motion by the defendant is granted solely to the extent that a traverse is ordered on the issue of service solely on the issue of whether the process server informed the wife of the defendant that service of the papers was being made. The motion by the plaintiff is granted in accord with this decision.


This matter is referred to the Calendar Control Part, for a traverse on the issue of service to

[* 7]
be held on April 10, 2008. 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 15 days of the date of this Order. The directive with respect to a traverse is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as that Justice deems appropriate.

So ordered.

Dated: **March 18, 2008**

ENTER:


J. S. C.
ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XX

ENTERED

MAR 21 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**