M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

JP MORGAN CHASE BANK, N.A.,	BY: KELLY, J
Plaintiff,	DATED: APRIL 9, 2008
- against -	INDEX NUMBER: 2000/07
GEORGE PASTRIKOS,	MOTION
Defendant.	DATE: SEPTEMBER 18, 2007
	MOT. SEQ. NUMBER

Pursuant to a decision and order of this court dated September 24, 2007 defendant's motion to dismiss the complaint was set down for a hearing on the traverse and for final disposition. Procedurally, the facts are as follows.

Plaintiff instituted this action setting forth actions sounding in breach of contract, unjust enrichment and conversion alleging the defendant knowingly withdrew the sum of $51,204.69 which plaintiff had erroneously credited to defendant's account in July, 2006 and that he has refused to repay such sum despite requests to do so.

Defendant has moved to dismiss this action asserting plaintiff's alleged service of the summons and complaint by substituted service was insufficient to confer in personam jurisdiction .

After a hearing the court finds as follows.

Plaintiff, through submission of the affidavit of service and the testimony of its witness Harry Bass established that service was made upon defendant pursuant to CPLR §308(4). Mr. Bass' testimony - which the court finds credible - established that after two previous attempts at personal delivery were unsuccessful, and after conversations with

three individuals on or near the premises, he posted the summons and complaint on the door of Apartment 2A at 1523 123rd Street, College Point and mailed a copy of same to defendant at that address.

Specifically, Mr. Bass testified that he spoke to a neighbor in Apartment 2B named Geraldo Vargas and another woman on the premises named Kiki who both stated George Pastrikos resided at the premises. The two prior attempts had been made outside of normal working hours, at 9:45 p.m. and 7:28 a.m., and on different days of the week.

Based on the above, it was incumbent for defendant to come forward with evidence casting doubt as to the validity of the service.

Initially, defendant moved to dismiss plaintiff's complaint at the close of plaintiff's direct case.

Defendant's motion to dismiss was premised upon the fact that Mr. Bass testified he had "posted" the summons and complaint on the door of Apartment 2A. Defendant argued that such testimony was insufficient to satisfy the "affixing" requirement of CPLR §308(4) since the word posting was not specific enough. Although plaintiff's counsel argued to the contrary, he also promptly moved to reopen his direct case. Since defendant had not proceeded to introduce evidence in his case in chief and no prejudice would result, the court, in its discretion, allowed the witness to be recalled (Feldsberg v Nitschke, 49 NY2d 636; Kay Foundation v S & F Towing Service, 31 AD3d 499; Kennedy v Peninsula Hosp. Center, 135 AD2d 788). The witness thereafter averred the summons and complaint was placed in the middle of the door with masking tape, which clearly satisfies the requirement that the papers be securely affixed to the premises.

Counsel for defendant also challenged the fact that no efforts had

been made by the process server to ascertain defendant's place of employment. In effect, defendant's counsel asserts plaintiff did not utilize "due diligence" in attempting personal delivery or suitable age service upon defendant before resorting to "nail and mail" service. This due diligence requirement is strictly enforced given the reduced likelihood that a summons served by "nail and mail" methods will actually be received (Gurevitch v. Goodman, 269 AD2d 355; Walker v Manning, 209 AD2d 691). What constitutes due diligence will, of course, vary from case to case.

Although defense counsel asserts to the contrary, there is no blanket requirement under our law that a plaintiff is required, in every instance, to attempt service at a defendant's actual place of business before nail and mail service is attempted (See e.g. Barnes v New York, 51 NY2d 906; Akler v. Chisena, 40 AD3d 559).

It is apparent to the court, from the papers and testimony provided, that defendant is being evasive concerning his whereabouts. The court notes that defendant's affidavit in support of his motion states that prior attempts of service made by plaintiff at 124-01 9th Avenue in March, 2007 and at 1527 123rd Street in June, 2007 could not confer jurisdiction over him since he had sold both buildings in 2005 and 2003 respectively. While this may be true, it does not address the attempt at service at issue here. More relevant is the fact that the affidavit never denies that defendant lived at 1523 123rd Street on the date service was made at this premises.

Additionally, and most significantly, defendant never saw fit to appear at the hearing to give sworn testimony regarding his residence on the date in question or to produce any documents that would establish

his residence at a different location.

Nor, for that matter has defendant even proffered a sworn statement that he is actually employed or that inquiry at his place of employment would have led to information that would have enabled plaintiff to effect service at such location or pursuant to CPLR §308 (1) or (2). Consequently the court finds defendant's arguments that the process server's attempts of service did not satisfy the due diligence requirement of CPLR §308(4) as a matter of law unpersuasive (Barnes v City of New York, supra; Akler v. Chisena, supra; Lemberger v. Kahn, 18 AD3d 447; Johnson v Waters, 291 AD2d 481).

Defendant's witnesses consisted of Mr. Vargas, who was referred to in the process server's affidavit, and a Bessie DiMatrakos who categorized herself as defendant's "fiancee".

Ms. DiMatrakos, who apparently has been dating defendant for a period of time, actually testified that she did not even know her fiancee's address at the present time. Nor did she establish that defendant had a regular or actual place of employment. The court found most of her testimony not credible. In any event, she only served to establish that defendant, despite his real estate dealings, had no utility, rent or other billable obligations in his name except for a cell phone and that she could recognize defendant's photograph.

While Mr. Vargas, a 15 year old, testified that he did not recall speaking with Mr. Bass and that he never knew a George Pastrikos who lived at the premises, the court finds Mr. Bass' testimony more compelling on these issues.

Accordingly, the motion by defendant is denied.

The parties are directed to appear for depositions in the priority set forth in the court's preliminary conference order within 30 days from the date of service of a copy of this order upon defendant.

This constitutes the decision and order of the court.

Peter J. Kelly, J.S.C.