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| Campoverde v Wai Chu Tung |
| 2008 NY Slip Op 31353(U) |
| May 6, 2008 |
| Supreme Court, Queens County |
| Docket Number: 0006751/2007 |
| Judge: David Elliot |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10
Justice

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| JOSE CAMPOVERDE AND | No. 6751/07 |
| LIOVANNA VANEGAS, | |
| | Motion |
| Plaintiffs, | Date April 1, 2008 |
| -against- | |
| | Motion |
| WAI CHU TUNG AND | Cal. No. 3 |
| JIAN LIN, | |
| | Motion |
| Defendants. | Seq. No. 1 |
| ----- | |

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In this action by plaintiffs Jose Campoverde and Liovanna Vanegas to recover for personal injuries alleged to have been sustained in a motor vehicle accident as a result of the negligence of the defendants, plaintiffs move for a default judgment against defendants Wai Chu Tung (Tung) and Jian Lin (Lin). Neither of the defendants have opposed the motion.

Plaintiffs' attorney provides the court with affidavits of service of the summons and complaint upon the defendants "pursuant to provisions of section 253 or 254 of the Vehicle and Traffic Laws of the State of New York." The affidavits of the process server indicate that he served the summons and complaint upon a clerk at the office of The Secretary of State together with the required fee. The affidavits indicate that additional copies were mailed to the defendants at their addresses in Pennsylvania by certified mail, return receipt requested. Although the affidavits state that attachments are made to the affidavits, no such attachments were provided to the court.

With respect to defendant Lin, the process server indicates: "Attached hereto, and made a part hereof, is the envelope returned from the Post Office marked 'unclaimed' remailed with postal receipt herewith attached." Again,

there were no attachments provided to the court and there is no postal receipt provided.

With respect to defendant Tung, the process server indicates: "Attached hereto, and made a part hereof, is the envelope returned from the Post Office marked 'insufficient address unable to forward'". As with the other affidavit, no attachments were provided to the court.

The motion must be denied. Sections 253 and 254 of the Vehicle and Traffic Law permit service of a summons on non-residents in certain situations. However, subdivision 2 of Vehicle Traffic Law section 253 provides as follows:

"A summons in an action described in this section may issue in any court in the state having jurisdiction of the subject matter and be served as hereinafter provided. Service of such summons shall be made by mailing a copy thereof to the secretary of state at his office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of ten dollars, and such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, an affidavit of compliance herewith, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail, in accordance with the rules and customs of the post-office department; or, if acceptance was refused by the defendant or his agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by or on behalf of the plaintiff that notice of such mailing and refusal was forthwith sent to the defendant by ordinary mail; or, if the registered or certified letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail. Where the summons is mailed to a foreign

country, other official proof of the delivery of the mail may be filed in case the post-office department is unable to obtain such a return receipt. The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete when such papers are filed. The return receipt or other official proof of delivery shall constitute presumptive evidence that the summons mailed was received by the defendant or a person qualified to receive his certified mail or registered mail; and the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or his agent. Service of such summons also may be made by mailing a copy thereof to the secretary of state at his office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of ten dollars, and by delivering a duplicate copy thereof with the complaint annexed thereto, to the defendant personally without the state by a resident or citizen of the state of New York or a sheriff, under-sheriff, deputy-sheriff or constable of the county or other political subdivision in which the personal service is made, or an officer authorized by the laws of this state, to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counselor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshall or deputy United States marshall. Proof of personal service without the state shall be filed with the clerk of the court in which the action is pending within thirty days after such service. Personal service without the state is complete when proof thereof is filed. The court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action."

In this case, as to defendant Lin, the process server did not comply with the statute as the original envelope was apparently not annexed to the affidavit of service; nor was the required certificate of mailing provided to the court.

As to defendant Tung, "Where the mailing is returned marked 'address unknown,' 'addressee moved-no forwarding address,' or 'returned to sender-forwarding time expired,'

the requirements of Vehicle and Traffic Law § 253 are not met and jurisdiction is not obtained." [citations omitted] Ross v Hudson, 303 AD2d 393.

Accordingly, the motion is denied.

Dated: May 6, 2008

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HON. DAVID ELLIOT