

O'Connell v Pardo, Smalberg & Pardo, P.C.

2008 NY Slip Op 31480(U)

May 14, 2008

Supreme Court, Nassau County

Docket Number: 2426-06/

Judge: Kenneth A. Davis

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

MORGAN O'CONNELL and ELEANOR O'CONNELL,

Plaintiff,

SUBMISSION DATE: 4/9/08
INDEX No.: 2426/06

-against-

PARDO, SMALBERG & PARDO, P.C., ALAN
DAVID PARDO, ESQ., RICHARD WOLFSON, ESQ.,
And TONI BONANNO, ESQ.,

MOTION SEQUENCE # 3,4,5

Defendants.

PARDO, SMALBERG & PARDO, P.C. and ALAN DAVID
PARDO, ESQ.,

Third Party Plaintiff,

-against-

INTERBORO ATTORNEY SERVICE CORP. and JOHN
SAVAGE,

Third Party Defendant.

The following papers read on this motion:

Notice of Motion/Cross-Motion.....	XXX
Answering Papers.....	XX
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	XX

This motion by third-party plaintiffs Pardo, Smalberg & Pardo, P.C. and David Pardo, Esq., and this cross-motion by defendant Richard Wolfson, Esq. ("the attorneys") for an order pursuant to CPLR 3212 granting them summary judgment against third-party defendants Interboro Attorney Service Corp. and John Savage ("the

[* 2]
process servers") is denied.

This cross-motion by third-party defendants Interboro Attorney Service Corp. and John Savage ("the process servers") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the attorneys' complaint and cross-claim is denied.

This is an action to recover damages for legal malpractice. The plaintiffs allege that the defendant attorneys' failed to obtain personal jurisdiction over defendant Robert C. Post in O'Connell v Post, and as a result, they lost a good and valuable chose in action against Post. In their third-party action, the attorneys seek indemnification and/or contribution from the process servers. The attorneys maintain that they retained the process servers to serve process and acquire jurisdiction over defendant Post and that the process servers' negligence resulted in the dismissal of O'Connell's action due to a lack of personal jurisdiction over defendant Post and the interim expiration of the Statute of Limitations.

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007), quoting McCoy v Feinman, 99 NY2d 295, 301-302 (2002) (internal quotation marks and citation omitted); see also, Town of North Hempstead v Winston & Strawn, LLP, 28 AD3d 746 (2nd Dept. 2006), lv den., 7 NY3d 715 (2006). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra, at p. 442, citing Davis v Klein, 88 NY2d 1008, 1009-1010 (1996) and Carmel v Lunney, 70 NY2d 169, 173 (1987); see also, AmBase Corp. v Davis, Polk & Wardwell, 8 NY3d 428, 434 (2007); Town of North Hempstead v Winston, supra. The "burden of proving 'a case within a case' is a heavy one." Aquino v Kuczinski, Vila & Associates, P.C., 39 AD3d 216, 219 (1st Dept. 2007), citing Lindenman v Kreitzer, 7 AD3d 30, 34 (1st Dept. 2004). In fact, where a defendant attorney presents evidence in admissible form establishing that the plaintiff client would be unable to prove any one of these elements, the defendant attorney has sustained his *prima facie* burden of demonstrating his entitlement to summary judgment. Town of North Hempstead v Winston & Strawn, LLP, supra, at p. 748, citing Ostriker v Taylor, Atkins & Ostrow, 258 AD2d 572 (2nd Dept. 1999), lv to app den. 93 NY2d 809 (1999).

In the O'Connell v Post action, O'Connell sought to recover damages for personal injuries he allegedly sustained in a motor vehicle accident on April 13, 2000. O'Connell retained Wolfson on March 30, 2001. Wolfson transferred the case to Pardo of Pardo, Smalberg & Pardo in February, 2003 and on February 11, 2003,

O'Connell formally retained Pardo's firm via a written retainer agreement. Pardo filed the Summons and Complaint on March 14, 2003 and accordingly had 120 days to effect service on Post, i.e., until July 12, 2003. CPLR 306-b. It is not disputed that Pardo gave the process servers the Summons and Complaint for service on Post along with Post's home address, 7 Brookfield Road, New Hyde Park, NY 11040, which was listed on the police accident report and recited in the Summons and Complaint. The Affidavit of Service ultimately executed by Savage on July 12, 2003 indicates that service on Post was purportedly accomplished on July 11, 2003 at 7:17 PM at 35 Ely Brook Road in East Hampton, NY 11937 by "nail and mail" pursuant to CPLR 308(4). More specifically, Savage's Affidavit of Service indicates that service on Post had been previously attempted on March 26, 2003 at 6:16 PM and July 10, 2003 at 7:45 AM. It also indicates that Savage spoke with a neighbor at the East Hampton home who told him that defendant Post was not in the military service and that he/she did not know where Post was employed. It indicates that the Summons and Complaint were mailed to the East Hampton address on July 12, 2003.

Post interposed an Answer, an Amended Answer and ultimately moved to dismiss O'Connell's complaint pursuant to CPLR 3211(a)(8), based upon improper service and lack of jurisdiction, and CPLR 3211(a)(5) based on the expiration of the three-year Statute of Limitations. Post maintained that service was not made at his dwelling place or usual place of abode as required by CPLR 308(4) and that since the three-year Statute of Limitations had expired, the Summons and Complaint had to be dismissed. In opposition, O'Connell's attorneys maintained that the East Hampton residence qualified as Post's dwelling place or usual place of abode because it was his summer home where he had mail delivered and a telephone listed. O'Connell's attorneys also noted that Post had acquired actual notice of the action. The attorneys did not seek an extension of time in which to serve Post pursuant to CPLR 306-b in opposition to Post's CPLR 3211(a)(8) motion. By order dated March 8, 2004, this court granted Post's motion to dismiss O'Connell's complaint. This court held that O'Connell's attorneys had not established that service on Post could not be accomplished with due diligence pursuant to CPLR 308(1) or 308(2), as is required before service pursuant to CPLR 308(4) can be used. It additionally held that service was not proper because defendant Post was not served at his actual place of business, dwelling place or usual place of abode, but instead at his vacation home. Because CPLR 306-b mandated that service be made within 120 days of the filing of the complaint and service had not been made within that time period, in light of the interim expiration of the Statute of Limitations, O'Connell's complaint was dismissed.

O'Connell's attorneys filed a Notice of Appeal from that order. In the interim, they sought both reargument and renewal of this Court's order, as well as an extension of time in which to serve Post pursuant to CPLR 306-b. In support of reargument, the

[4]

attorneys maintained that when the process server attempted service at Post's New Hyde Park address, he was misled as to Post's primary residence. That is, he was told by a woman that Post was not known there and that he may have moved to East Hampton. An extension of time in which to serve pursuant to CPLR 306-b was sought on these grounds. In support of renewal, the attorneys explained that the process server's investigation revealed that Post had a residence at 35 Ely Brook Road in East Hampton where he both received mail and had a telephone listed. O'Connell's attorney further alleged that Post in fact did not have a telephone listing in Nassau County. They noted that the process server's subsequent follow-up investigation revealed that Post and his family spent a substantial amount of time at the East Hampton residence and that it appeared that Post himself might have foiled the process server's attempt at service in New Hyde Park. The attorneys requested that a traverse hearing be held to determine whether or not Post's East Hampton residence constituted his usual place of abode when service was made. By order dated January 12, 2005, this court denied the motion for reargument and/or renewal holding that renewal did not lie because it was premised upon facts which were in existence when the original motion was made and should have been proffered then.

The Appellate Division affirmed this court's March 8, 2004 decision which granted defendant Post's motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. O'Connell v Post, 27 AD3d 630 (2nd Dept. 2006). The Appellate Division held that "[e]ven assuming that the East Hampton residence qualified as the defendant's 'usual place of abode' for purposes of CPLR 308(4) service, the process server made no effort to determine the defendant's business address in order to attempt personal service thereat pursuant to CPLR 308(2) before resorting to 'nail and mail' service" (O'Connell v Post, *supra*, at p. 631, citing Gurevitch v Goodman, 269 AD2d 355 [2nd Dept. 2000]; Moran v Harting, 212 AD2d 517 [2nd Dept. 1995]; Walker v Manning, 209 AD2d 691 [2nd Dept. 1994]) and that "two of the attempts at service occurred on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit to and from work" (O'Connell v Post, *supra*, at p. 631, citing Earle v Valente, 302 AD2d 353 [2nd Dept. 2003]; Annis v Long, 298 AD2d 340 [2nd Dept. 2002]). Thus, the Appellate Division held that O'Connell failed to satisfy the due diligence requirement and that the action was properly dismissed for lack of jurisdiction. The Appellate Division also affirmed this court's order dated January 12, 2005, which denied reargument and/or renewal, holding that O'Connell failed to set forth a reasonable justification for his failure to present the alleged new facts on the original motion. O'Connell v Post, 27 AD3d 630 (2nd Dept. 2006).

The process servers' motion to dismiss the third-party complaint in this action pursuant to CPLR 3211(a)(7) was denied by order of this court dated October 18, 2006. This court noted that a party is not generally liable for an independent contractor's

[5]

actions. Metling v Punia & Marx, Inc., 303 AD2d 386 (2nd Dept. 2003). Citing Kleeman v Rheingold, (81 NY2d 270 [1993]), this court held that while "[a] lawyer's responsibility to effect proper service of process is a non-delegable duty and they should not be allowed to evade this responsibility by farming out this task to independent contractors" and "that an attorney can be held liable to the client for negligent service of process, even if the service was handled by an independent contractor," this court noted that the Court of Appeals in Kleeman v Rheingold, supra, made it clear that their holding did not address "the right of an attorney who has been held liable for the negligence of a retained process server to pursue whatever contractual or tort remedies that the attorney may have against that process server." Kleeman v Rheingold, supra, at p. 277; see also, Schleit v Warren, 693 F.Supp. 416 (E.D. Va. 1988). In denying the process server's motion to dismiss, this court further held that "[i]ndemnification is not precluded because a defendant's liability arose from a nondelegable duty," citing Frank v Meadowlakes Development Corp., 6 NY23d 687, 693 (2006); Rangolan v County of Nassau, 96 NY2d 42 (2001).

Presently, the attorneys seek summary judgment on the third-party complaint and cross-claim against the process servers, respectively. The process servers in response seek summary judgment dismissing the attorneys third-party complaint and cross-claim.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The plaintiff Eleanor O'Connell did not retain the attorneys. The attorneys had no duty to her and her complaint is dismissed.

In the motions presently before the court, the attorneys maintain that the process servers alone controlled the chain of events leading up to the service on Post which was found defective. In comparison, the process servers maintain that the attorneys were not only kept apprised of the status of their service attempts but specifically directed them each step of the way on how to attempt

[6]

process. In support of their motion, the process servers maintain that Savage was given the Summons and Complaint as well as Post's New Hyde Park address which was provided by the attorneys and that Savage attempted service there on March 26, 2003. The process servers note that Savage testified at his examination-before-trial that he was approached by a woman who told him that Post did not live there and the woman was otherwise uncooperative and refused to answer his questions. Pursuant to general office policy, Savage returned the papers to the office. While Frank Foti, president of third-party defendant Interboro Attorney Service Corp., attests in support of the process servers' motion that he contacted the attorneys with this information; that Pardo delegated the task of verifying Post's address to the process servers; that "all the subsequent research that was conducted to discover alternative addresses for [Post] and the further attempts that were effectuated was done at the instruction of the responsible attorney, or Pardo;" and, that Pardo was apprised of the status at regular intervals, Foti did not so testify at his examination-before-trial and the attorneys adamantly deny this. The process servers further maintain that their search of the phone books revealed Post's East Hampton address, which was verified both via the telephone book and a telephone call. And, the process servers maintain that their data base search and postal service inquiries further verified Post's East Hampton address, but not until July 8, 2003. Thus, Savage was sent to the East Hampton address on July 10, 2003 at 7:45 AM and on July 11, 2003 at 7:17 PM, at which time nail and mail service was resorted to. The process servers maintain that before resorting to service pursuant to CPLR 308(4), Savage contacted Foti who told him to proceed. They further note that Savage testified at his examination-before-trial that he talked to a neighbor who told him that the Posts were "out there regularly . . . like, every other weekend." The process servers note that Savage followed up with a mailing, executed the Affidavit of Service and sent it to Pardo for his review. The process servers also note that Post's residence in East Hampton was further confirmed when Savage investigated it in April, 2004.

Issues of fact clearly exist regarding who directed and determined the timing and the manner of the process servers' attempts to serve Post and are accordingly responsible for the failure to obtain jurisdiction.

Further grounds exist for denying the process servers' motion for summary judgment. While Pardo's failure to advance all of the pertinent facts in their attempt to establish that Post's East Hampton residence qualified as his dwelling place or usual place of abode on the original 3211 motion was negligent, the failure to meet the due diligence requirement was determinative. Indeed, the Appellate Division ultimately found that even assuming that the East Hampton residence qualified as Post's usual place of abode for purposes of acquiring jurisdiction over him, O'Connell nevertheless failed to satisfy the due diligence requirement, which is required

[* 7]

before "nail and mail service" pursuant to CPLR 308(4) can be resorted to. More specifically, the Appellate Division found and the process servers have still failed to refute that "the process server made no effort to determine [Post's] business address in order to attempt personal service thereat pursuant to CPLR 308(2) . . ." (O'Connell v Post, *supra*, at p. 631, citing Earle v Valente, *supra*; Annis v Long, *supra*), and that "two of the attempts at service occurred on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit to and from work" (O'Connell v Post, *supra*, at p. 631, citing Earle v Valente, *supra*; Annis v Long, *supra*). While the process servers are correct that the Appellate Division's finding of a lack of due diligence is not binding on them here because they were not parties in the O'Connell v Post action and accordingly lacked a full and fair opportunity to litigate that issue (Schwartz v Public Administrator of Bronx County, 24 NY2d 65 [1969]), they have nevertheless failed to establish the existence of a material issue of fact with respect to that issue. Similarly, while the process servers attribute sole responsibility to the attorneys for not ensuring that service was properly made, the Court of Appeals in Kleeman v Rheingold, *supra*, clearly left open the possibility of process servers' liability to attorneys. And again, the respective roles that the process servers and the attorneys played in the attempt to serve Post and obtain jurisdiction over him present issues of fact.

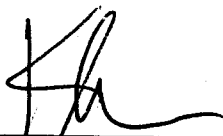
As for the attorneys' summary judgment application, assuming, *arguendo*, that the process servers alone determined the timing and method of service on Post, the attorneys failed to seek an extension of time in which to accomplish proper service over Post pursuant to CPLR 306-b after Post's Amended Answer was served or in response to his CPLR 3211 motion. "In determining whether to grant an extension of time to serve a summons and compliant pursuant to CPLR 306-b, due diligence is only one factor to consider along with expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of the plaintiffs' request for the extension of time, and prejudice to the defendants." Rosenzweig v 600 North Street, LLC, 35 AD3d 705 (2nd Dept. 2006) citing Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106 (2001). Furthermore, "[s]ome factors favoring an extension are timely service within the 120-day period allowed by CPLR 306-b which was later found to be defective and the fact the defendants had actual notice of the claim and/or of the action." Rosenzweig v 600 North Street, LLC, *supra*, at p. 705-706, citing Chiaro v D'Angelo, 7 AD3d 746 (2nd Dept. 2004); Beauge v New York City Tr. Auth. 282 AD2d 416 (2nd Dept. 2001). Clearly, the possibility that an extension of time to serve Post would have been granted exists. It was not until the attorneys sought reargument that they belatedly sought an extension of time to accomplish service by faulting this court for having failed to grant one, *sua sponte*. This court, in fact, did not have jurisdiction to grant an

[8]
extension of time in which to serve Post *sua sponte*. CPLR 306-b sets forth what the court may do "upon motion." See, Machani v Shields, 288 AD2d 194 (2nd Dept. 2001), citing Nixon v Federated Dept. Stores, 170 AD2d 659 (2nd Dept. 1991); see also, Phoenix Ins. Co. v Casteneda, 287 AD2d 507 (2nd Dept. 2001); Brown v Schulman, 245 AD2d 561 (2nd Dept. 1997), lv den., 91 NY2d 814 (1998). Furthermore, the attorneys' request for an extension of time to serve Post via a motion for reargument was inappropriate since it had not been previously sought. Accordingly, an issue of fact as to the attorney's negligence is posed by their failure to seek an extension of time in which to serve Post pursuant to CPLR 306-b in response to Post's Amended Answer and/or his CPLR 3211(a)(8) motion.

In view of the foregoing, the defendant third-party plaintiffs', defendant Wolfson's and the third party defendants' motions for summary judgment are denied.

This decision constitutes the order of the court.

Dated: MAY 14 2008



KENNETH A. DAVIS J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE**