

Catalano v Chimborazo

2008 NY Slip Op 32223(U)

August 6, 2008

Supreme Court, Queens County

Docket Number:

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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ALBERT CATALANO,	No. 4456/07
Plaintiff,	Motion
-against-	Date June 10, 2008
SEGUNDO M. CHIMBORAZO AND	Motion
SEGUNDO MANUAL ANGAMARCA	Cal. No. 3
CHIMBORAZO,	Motion
Defendants.	Seq. No. 1

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In this action by plaintiff Albert Catalano to recover for injuries alleged to have been sustained in a motor vehicle accident which took place in Queens County, New York on February 21, 2004, plaintiff moves for judgment by default against defendants Segundo M. Chimborazo and Segundo Manual Angamarca Chimborazo. No opposition has been received by the court.

Defendants are alleged to be residents of the State of North Carolina. Affidavits of service of the summons and complaint have been presented to the court; both defendants are alleged to have been served in accordance with the requirements of Section 253 of the Vehicle and Traffic Law.

As to defendant Segundo M. Chimborazo, the process server asserts that on February 26, 2007 the process server delivered a true copy of the summons and verified complaint to a clerk at the New York Department of State and on February 28, 2007 sent a copy to the said defendant by certified mail return receipt requested to defendant's last known dwelling/business place. A copy of the mailing receipt has been presented to the court.

As to defendant Segundo Manual Angamarca Chimborazo, the process server asserts the same method of service. However, in addition to presenting an affidavit of service and the mailing receipt, a second affidavit of service is presented to the court, in which the process server states: "Attached hereto is the returned envelope recd from post office by deponent showing notice & envelope mailed as aforesaid was returned (unclaimed). Deponent mailed copies of the aforesaid document to defendant at address given by first class mail. Deponent obtained a certificate of mailing from the post office, which is attached hereto."

VTL 253(2) 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."

Initially, the court notes that the affidavits of service do not indicate that the additional mailings included the notice to the defendants required by VTL 253(2), so as to place them on notice that service had been effectuated pursuant to the provisions of that section. This requirement is similar to that contained in Section 306(B) of the Business Corporations Law. It is not enough to merely send a copy of the pleadings; the statute requires that notice to the defendant be given that service has been made pursuant to the Vehicle and Traffic Law.

As to defendant Segundo M. Chimborazo, the affidavit of service is, in any event, insufficient, as VTL 253(2) requires the filing of "...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..." Here, the process server does not provide the return receipt. No information is given with respect to delivery of the mailed copy. There is no indication that acceptance was refused.

As to defendant Segundo Manual Angamarca Chimborazo, a copy of the envelope received back from the post office is provided to the court. It bears a stamp:

"Return to Sender
Unclaimed
Unable to Forward
Return to Sender"

with the handwritten notation, "UTF" (apparently "unable to forward"). A certificate of mailing to the same address is provided to the court. VTL 253(2) provides: "...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."

The Appellate Division Second Department has held as to the service by certified mail: "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. Here, it appears that the envelope was returned "unable to forward."

Accordingly, the motion is denied.

Dated: August 6, 2008

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HON. DAVID ELLIOT