SATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE
KEVIN MALDONADO and MELISSA LENNON,

Plaintiffs,

-against-

VALERIE DIDAMO,

Defendant.

DECISION and ORDER
INDEX NO. 08-0815
RJI NO. 19-08-3825

Supreme Court Greene County All Purpose Term, September 10, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On May 20, 2008, plaintiffs' filed their first notice of pendency in this action, along with their summons and complaint. Plaintiffs then filed a second notice of pendency on June 10, 2008. Defendant has not answered the complaint. Rather, defendant moves to cancel plaintiffs' notice of pendency pursuant to CPLR §6514, claiming plaintiffs failed to comply with CPLR §6512's service provision. Plaintiffs oppose defendant's motion, claim that the summons and complaint were duly served and cross move for a default judgment. Because an issue of fact exists relative

to whether plaintiffs duly served their summons and complaint, a hearing must be held.

CPLR §6512, in pertinent part, states: "[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant..." In providing for mandatory cancellation of a notice of pendency, CPLR §6514(a), in pertinent part, states that the court "shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512".

Upon her motion, defendant categorically denied being served with the summons or complaint herein, at any time. Moreover, defendant's attorney affirmed that upon a search of the Greene County Clerk's records, no affidavit of service was on file as of the making of this motion.

Plaintiffs, in opposition, submit an affidavit of service, dated September 3, 2008, alleging service of the summons and complaint upon defendant on May 22, 2008. Plaintiffs acknowledged such affidavit of service was not previously filed. Plaintiffs' affidavit of service alleges service pursuant CPLR §308(1), by stating that the summons and complaint were delivered directly to defendant's "general vicinity" after she refused to personally accept same. (MacDonald v. Ames Supply Co., 22 NY2d 111 [1968]) Unlike CPLR §308 subsections 2 and 4, no affidavit of service needs to be filed for CPLR §308(1) service to be complete. Thus, plaintiffs' affidavit of service "constitutes prima facia evidence of proper service" (US Bank National Association v. Vanvliet, 24 AD3d 906, 908 [3d Dept. 2005]), and alleges that service of the summons was complete within thirty days after plaintiffs filed their notice of pendencies.

Defendant replied to plaintiffs' affidavit of service "with a detailed and specific contradiction of the allegations in the process server's affidavit". (Id. [quoting Bankers Trust Co. of Cal. v. Tsoukas, 303 AD2d 343, 344 [2d Dept. 2003]). She stated that she personally knows

the alleged process server, who is a former business partner of plaintiff Maldonado and a convicted felon, and was not served by him on May 22, 2008. Such allegations successfully rebutted the process server's affidavit, and create issues of fact. Accordingly, a hearing is required where "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." (Bankers Trust Co. of Cal., supra at 343).

Plaintiffs' claim that service was complete pursuant to CPLR §320(b), is incorrect. CPLR §320(b), in pertinent part, states: "...an appearance of the defendant is equivalent to personal service of the summons upon him..." "Appearance" for such subdivision, is defined in CPLR §320(a), which states: "[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." Here, plaintiffs' failed to demonstrate defendant "served an answer or a notice of appearance". Plaintiffs did demonstrate that defendant brought a prior motion (by Order to Show Cause, dated May 21, 2008). However, such prior motion was to cancel the notice of pendency under CPLR §6514(a), which is not "a motion which has the effect of extending the time to answer". As defendant's prior motion does not fit within CPLR §320(a)'s definition of appearance, it cannot constitute "personal service" under CPLR §306(b).

Additionally, plaintiffs claim defendant's conduct constituted an "informal appearance". (Parrotta v. Wolgin, 245 AD2d 872 [3d Dept. 1997]). The conduct plaintiffs allege rises to an "informal appearance" is defendant's counsel's settlement negotiations on the return date of the above motion and his follow up letter subsequent thereto. Just as the prior motion did not constitute an appearance under CPLR §306(a & b), neither do the negotiations and letter rise to

the level of an "informal appearance" sufficient to waive defendant's CPLR §6514(a) objection.

Plaintiffs also erroneously claim proper service was made upon defendant, pursuant to CPLR §2103(b), by their delivering the summons and complaint to defendant's attorney. CPLR §2103(b), in pertinent part, states: "papers to be served upon a party in a pending action shall be served upon the party's attorney." (emphasis added). CPLR §2103 provides no ground for the service of the summons and complaint itself. (Jackson v. State, 85 AD2d 818 [3d Dept. 1981]). Rather, it only provides for service of papers once jurisdiction has been obtained and the action is "pending".

Plaintiffs' default judgment motion is likewise defective as it fails to set forth "proof of the facts constituting the claim" (CPLR §3215[f]) nor does it comply with the additional notice provisions, applicable to default judgments, under CPLR §3215(g)(3)(i).

Accordingly, the plaintiffs' motion for default judgment is denied and a Traverse hearing is scheduled to take place on November 14, 2008, 11:00 AM Greene County Courthouse, 80 Woodland Avenue, Catskill, New York. I am available to accommodate any adjournment.

The parties remaining contentions have been examined and found to be lacking in merit.

All papers are being held by the Court for continued consideration upon conducting the hearing to be held pursuant to this Decision and Order. Defendant shall comply with CPLR §2220 for the filing and service of this Decision and Order. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
October 21, 2008

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, undated; Affidavit of Valerie Didamo, dated August 21, 2008; Affirmation of Ralph Lewis, dated August 12, 2008, with attached exhibits A-B;
2.. Notice of Cross Motion, dated September 3, 2008; Affidavit of Kevin Maldonado, dated September 3, 2008 with attached exhibits 1-6;
3. Affirmation of Ralph Lewis, dated September 8, 2008, Answering Affidavit of Valerie Didamo, dated September 8, 2008 with attached exhibits A-D;
4. Affidavit of Kevin Maldonado, dated September 24, 2008.