

Rosen v Jacks

2008 NY Slip Op 33624(U)

April 11, 2008

Supreme Court, New York County

Docket Number: 116745/08

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

MELISSA ROSEN,

Plaintiff,

-v-

CALICO JACKS, et al.,

Defendants.

INDEX No. 116745/08

MOTION DATE _____

MOTION SEQ. No. 003 & ~~004~~

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1 to 3

Answering Affidavits- Exhibits 2+3

Replying Affidavits _____

FILED

CROSS-MOTION: _____ YES NO

APR 11 2011

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 4/11/11

[Signature]
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58.

-----X
MELISSA ROSEN,

Plaintiff,

-against-

Index No.: 116745/08

CALICO JACKS, LLC, JOHN CICCIA, EFSTATIOS
KYNALISCIANS, CHRISTOPHER LASH,
STEPHANIE TORRES and JOE HITTI,

Defendants.

-----X

MILLS, J.:

Motion sequence numbers 003 and 004 have been consolidated for disposition. In sequence 003, defendant Stephanie Torres (Torres), moves, pursuant to CPLR 5015 (a) (4), CPLR 3215, and CPLR 3012 (c), to vacate the default judgement and leave to file an answer. In sequence 004, defendants Calico Jacks, LLC (Calico Jacks), John Ciccica, Efstatios Kynaliscians, Christopher Lash, Torres, and Joe Hitti, move, pursuant to CPLR 4404 (a) and CPLR 4404 (b), to set aside the directed verdict which held Calico Jacks and Torres liable for plaintiff's accident, to set aside the jury's award of damages, and order a new trial on liability and damages.

FACTUAL ALLEGATIONS

In this action, plaintiff seeks damages for personal injuries which she sustained on March 29, 2008, after she allegedly slipped and fell off a bar while dancing at Calico Jacks, a restaurant and bar located in Manhattan, New York. On December 16, 2008, plaintiff filed a complaint against Calico Jacks, as well as five individuals who were believed to be employed by, and present at the restaurant on the night of plaintiff's accident. Torres, one of the individuals named as a defendant, was a guest bartender who worked at Calico Jacks between the summer of 2007

and November 21, 2008. According to affidavits signed by Torres and John Ciccio (Ciccio), the general manager of Calico Jacks, Torres did not work at the restaurant in any capacity after November 21, 2008.

On December 22, 2008, plaintiff attempted to personally serve Torres with a summons and complaint at Calico Jacks. Ciccio, who was present at the restaurant when the process server arrived, alleges that he advised the process server that Torres was no longer employed at Calico Jacks. The affidavit of service also states, that on December 24, 2008, Torres was mailed a copy of the summons and complaint, which was addressed in care of Calico Jacks. Although the other defendants filed an answer to the complaint, Torres maintains that she did not answer because she was never served.

On November 17, 2009, plaintiff moved for a default judgment against Torres and mailed a copy of the motion to her attention at Calico Jacks. Torres contends that she did not receive the motion and no opposition was filed on her behalf by the other defendants. On January 5, 2010, the court granted plaintiff's unopposed motion for a default judgment against Torres. The action proceeded to trial and a jury was selected on November 4, 2010. Immediately after the opening instructions for the trial were given by the court, plaintiff's counsel made an oral application for a framed issue hearing and a directed verdict regarding liability. On November 10, 2010, the court held that, based upon a stipulation entered into between the parties and evidence presented during the framed issue hearing, Calico Jacks was absolutely liable in negligence based upon the doctrine of respondent superior. Following the court's ruling, plaintiff's counsel discontinued the action against all of the defendants, except Torres and Calico Jacks. The court ordered that the case proceed to a trial on the issue of damages.

On November 15, 2010, Calico Jacks filed an order to show cause, seeking to vacate the directed verdict on liability and to stay the action, arguing, inter alia, that there was no evidence presented that Torres was acting within the scope of her employment at the time of plaintiff's accident. The court denied this request and proceeded to hold a trial for damages. After hearing testimony from plaintiff as well as various medical experts, the jury granted plaintiff an award of \$200,000 for pain and suffering and \$1,000,080 for future pain and suffering.

DISCUSSION

CPLR 308 (2) provides in part, that personal service may be made upon a natural person, "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business"

Torres argues that she was not employed by Calico Jacks when plaintiff attempted to serve her with the summons and complaint, that she was not properly served with the motion for default judgment, and that she was unaware of the lawsuit or entry of the default judgment until November 30, 2010, which was after the jury had rendered its verdict. Although plaintiff contends that Torres was served by leaving the summons and complaint at the restaurant, there remains an issue of fact as to whether service was properly effectuated on Torres if Calico Jack's was no longer her actual place of employment.

Ciccio states in his affidavit dated December 2, 2010, that on December 22, 2008, when the process server arrived at Calico Jacks to deliver the summons and complaint to Torres, he informed the process server that Torres no longer worked at the restaurant. In response to

Ciccia's allegations, plaintiff submits an affidavit from Kenneth Wissner (Wissner), president of Aetna Central Judicial Services, the process service company responsible for serving Torres.

Wissner states that if Rudolph Wright, the process server, was told that Torres no longer worked at the location, the process server would have informed Wissner and/or plaintiff's counsel so that a new address for Torres could be ascertained. Although plaintiff submits an affidavit from Wissner, the process server who allegedly spoke with Ciccia, does not provide an affidavit to confirm or reject Ciccia's allegations. Therefore, there remains a question of fact as to whether he was notified that Calico Jacks was no longer Torres' actual place of employment.

Torres maintains that plaintiff's counsel also failed to notify her of the motion for default judgment. However, CPLR 3215 (g) (1) maintains that a non-appearing defendant is not entitled to notice of the motion if less than one year has elapsed since the default occurred. Here, Torres failed to answer within 30 days after service was made on December 22, 2008, and the motion for default judgment was made on November 17, 2009. Therefore, as less than one year has passed since Torres defaulted, no actual notice to Torres was necessary regarding the application for default judgment.

Plaintiff's counsel argues that Torres should be estopped from contesting the sufficiency of the service, because defendants' counsel provided discovery responses regarding her employment which were admissions that misled plaintiff's counsel. An August 11, 2008 letter from Thomas M. Reardon, III, Esq., an attorney who represented Calico Jacks, Ciccia, Efstatios Kynaliscians, Christopher Lash, and Joe Hitti, states that as of August 11, 2008, Torres was still

employed at Calico Jacks.¹ The August 11, 2008 letter was also referenced in a September 10, 2009 discovery response to plaintiff, responding to plaintiff's request for information regarding eyewitnesses to plaintiff's accident. Plaintiff's counsel maintains that it relied on this information when it served Torres at the restaurant with the summons, complaint, and the motion for default judgement, and that the information regarding Torres' employment status was never changed, amended or modified in any manner by Calico Jacks.

Although plaintiff's counsel maintains that he was misled by the representations made in the August 11, 2008 letter, the information contained in the letter was over four months old when service was attempted on Torres on December 22, 2008. Ciccio's deposition also questions plaintiff's counsel's reliance on the August 11, 2008 letter regarding Torres' employment at Calico Jacks. On November 10, 2009, Ciccio testified at his deposition that Torres was no longer employed at Calico Jacks. (Ciccio's EBT, at 41). However, even though the testimony disclosed that the restaurant was no longer Torres' actual place of employment, on November 17, 2009, plaintiff's counsel mailed a copy of the motion for a default judgment to Calico Jacks. Therefore, there exists a question as to whether service on Torres at Calico Jacks was made in good faith if plaintiff's counsel was aware from Ciccio's testimony that Torres was no longer employed at the restaurant.

The statements of Bryce Moses, Esq. (Moses), plaintiff's trial counsel, which were made

¹ Although plaintiff contends that the same counsel represents Torres and Calico Jacks and that the parties are united in interest, the court notes that Calico Jacks, Ciccio, Efstatis Kynaliscians, Christopher Lash, and Hitti were originally represented in this litigation by the law firm of Bolan, Jahnsen, and Reardon. There was a consent to change attorney filed on December 17, 2010. As reflected by the motion to set aside the verdict as well as the motion for default, Torres, as well as all of the other defendants, are now represented by the law firm of Camacho, Mauro, Mulholland, LLP.

in court at the November 10, 2010 framed issue hearing, also conflict with plaintiff's counsels argument that it was misled regarding Torres' employment status. At the hearing, Moses specifically stated, "I also want to make a representation that at the time of the lawsuit Ms. Torres was no longer working at Calico Jacks." (Camacho Affirm., ex E). Although plaintiff's counsel argues that Moses' statement was taken out of context and that Moses was only stipulating as to what Ciccia would testify to at trial, the testimony clearly demonstrates that plaintiff's counsel gained knowledge, at some point during the litigation, that Torres was no longer employed at Calico Jacks.

Based upon the affidavits of Torres, Ciccia, and Wissner, and because there exists disputed testimony regarding whether Torres was properly served with the summons and complaint, a traverse hearing must be held to determine if service upon Torres was properly executed. *See Poree v Bynum*, 56 AD3d 261, 261 (1st Dept 2008) (holding that a traverse hearing was necessary because party affidavits conflicted as to whether service had been properly effected); *Anello v Barry*, 149 AD2d 640, 641 (2d Dept 1989) (holding that a hearing was necessary to determine whether service was effectuated on defendant after plaintiff alleged, and defendant denied, that service was made upon plaintiff's residence). Also, because Torres' default impacted the entire outcome of the case, including the liability judgment, the motion to set aside the verdict must be stayed until after a determination is made at the traverse hearing regarding the sufficiency of the service.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that defendant Stephanie Torres' motion to vacate the default judgment is

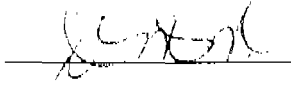
granted to the extent of referring this matter to a Special Referee to hear and report with recommendations on the issue of whether proper service of process was effectuated on December 22, 2008 pursuant to CPLR 308 (2); and it is further

ORDERED that, within 14 days of the entry of this order, defendant Stephanie Torres shall serve a copy of this order, with notice of entry, upon plaintiff Melissa Rosen, and upon the Special Referec Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar; and it is further

ORDERED that the motion of defendants Calico Jacks, LLC, John Ciccica, Estaios Kynaliscians, Christopher Lash, Stephanie Torres and Joe Hitti to set aside the verdict is stayed pending the determination of the Special Referee of whether the service on defendant Stephanie Torres was proper.

Dated: April 11, 2011

ENTER:



J.S.C.

FILED

APR 11 2011

**NEW YORK
COUNTY CLERK'S OFFICE**