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

PRESENT: Edmead Justice PART 35

Garcia, P

- v -

Issler, H

INDEX NO. 108654/08

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Harry Issler and Harry Issler, PLLC for an order, pursuant to CPLR §3211(a)(8), dismissing the Complaint of Paul Garcia as against Mr. Issler is granted; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on September 15, 2009 at 2:15 P.M.; and it is further

ORDERED that movant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7/20/09

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

PAUL GARCIA,

Plaintiffs,

-against-

HARRY ISSLER and HARRY ISSLER, PLLC,

Defendants.

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Index No. 108654/2008

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Paul Garcia ("plaintiff") seeks to recover against defendants Harry Issler ("Mr. Issler") and Harry Issler, PLLC (the "Issler Firm") (collectively, "defendants") for legal malpractice.

Defendants now move to dismiss the Complaint as against Mr. Issler, pursuant to CPLR §3211(a)(8), on the ground that the Court lacks jurisdiction over this matter, as service of process on Mr. Issler was improper.

Background[1]

Mr. Issler, a New York attorney, served as counsel for plaintiff in an underlying matter titled *David Ross v the World, Paul Garcia, et al.* (the "Ross litigation") in New York County. Defendants were retained to prepare a Motion to Reargue and to perfect an appeal with the Appellate Division, First Department, on plaintiff's behalf. Defendants represented plaintiff from on or about March 24, 2004 until approximately June 23, 2005, at which time a decision on the appeal in the Ross litigation was rendered.

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[1]Information is taken from defendants' motion ("motion"), which comprises an affirmation by attorney A. Michael Furman, Esq., an affidavit by Mr. Issler ("Issler Aff."), and exhibits.

The instant legal malpractice action was commenced on or about June 23, 2008. The Issler Firm was served with a Complaint through the New York Secretary of State on or about June 27, 2008, with the Affidavit of Service filed with the Court on or about July 8, 2008. Issue was joined by service of a Verified Answer on behalf of defendants on or about September 26, 2008 (see the "Verified Answer").

Defendants' Motion

Defendants argue that plaintiff failed to properly serve Mr. Issler in compliance with the CPLR. They contend that the only copy of the Complaint received by Mr. Issler was a copy left with James McHenry ("Mr. McHenry"), a mailroom employee of Pulvers, Pulvers & Thompson, LLP, a firm with which defendants share office space, on June 25, 2008. Mr. McHenry was "neither employed by, affiliated with, nor associated with" Mr. Issler or the Issler Firm, defendants contend. Further, neither Mr. Issler nor the Issler Firm had deemed Mr. McHenry – or any other employee of Pulvers, Pulvers & Thompson, LLP – as an agent suitable to receive and accept service on behalf of Mr. Issler. Moreover, a separate copy of the Complaint was never forwarded to Mr. Issler's attention *via* first-class mail, in accordance with the mandates of CPLR §308.

Whether the Complaint was served on someone at Mr. Issler's business address is of no consequence for purposes of determining the adequacy of service upon him, defendants argue. Moreover, the 120 days prescribed under CPLR §306(b) expired on October 23, 2008, defendants contend. As plaintiff has not sought leave from the Court to serve the Summons and Complaint on Mr. Issler after the appropriate time frame, this Court lacks personal jurisdiction over Mr. Issler, defendants contend. Thus, plaintiff's purported claims as against Mr. Issler must

be dismissed in their entirety, as a matter of law.

Plaintiff's Opposition

Plaintiff argues that service was made on Mr. Issler pursuant to CPLR §308(2), which requires that the Summons and Complaint be delivered to a person of suitable age and discretion and that a copy of the Summons and Complaint also be mailed to the defendant. Plaintiff contends that a process server's affidavit constitutes *prima facie* evidence of proper service, and Mr. Issler's conclusory denial of receipt of the summons and complaint is insufficient to raise an issue of fact. Further, all that is required of CPLR §308(2) is that process be served upon a person of suitable age and discretion at the actual place of business, regardless of whether that person is an employee or is otherwise officially authorized to accept service on behalf of the defendant, plaintiff contends.

Here, Jonathan Valderrama ("Mr. Valderrama"), plaintiff's process server, served the Summons and Complaint on Mr. McHenry, who is described by Mr. Valderrama in the Affidavit of Service as a white male between the ages of 21 and 35 years old. The fact that Mr. McHenry was not an employee of defendants or otherwise authorized by them to accept service is irrelevant, plaintiff argues. Mr. Issler lists the address of 110 East 59th Street, New York, New York as his business address with the Office of Court Administration (the "Attorney Registration"). Further, a computer printout from the Issler Firm's website indicates that its office address as 110 East 59th Street, New York, New York (the "Issler Firm Web Page"). Lastly, in his affidavit, Mr. Issler admits that Mr. McHenry is employed by a firm with whom defendants share office space. Therefore, there is no question that Mr. McHenry was at Mr. Issler's actual place of business, and service *via* Mr. McHenry was proper, plaintiff argues.

With regard to the mailing requirement, CPLR §308(2) imposes no requirement that a defendant actually receive the mailing, plaintiff contends. Mr. Valderrama averred in the Affidavit of Service that he mailed a copy of the Summons and Complaint on June 25, 2008 to Mr. Issler by first-class mail at Mr. Issler's actual place of business in an envelope that bore the legend "Personal and Confidential" and did not indicate on the outside that the communication was from an attorney or concerned an action against Mr. Issler. Defendants have not presented any evidence to rebut the presumption that service was proper, plaintiff argues. Further, Mr. Issler's mere denial of receipt of the Summons and Complaint is not sufficient to rebut the presumption of proper service created by the affidavit of service, plaintiff argues.

Defendants' Reply

Defendants argue that in serving the Complaint on Mr. McHenry, plaintiff's purported method of service was by "substituted service," defendants contend. As such, plaintiff was not only required to establish that the Summons and Complaint were served upon a person of suitable age and discretion, but also that the Summons and Complaint were mailed either to Mr. Issler's last known residence or actual place of business, pursuant to CPLR §308(2), defendants contend. "Plaintiff, however, *never* mailed a separate copy of the Complaint to Attorney Issler's attention," defendants contend (Issler Aff., ¶ 6). Therefore, plaintiff did not properly serve Mr. Issler.

The statutory requirements relating to personal service are to be strictly followed, defendants contend. Service is only deemed proper, and therefore, effective, when it is made pursuant to one of the methods listed under CPLR §308. As plaintiff failed to follow the appropriate CPLR provisions, personal jurisdiction over Mr. Issler was never obtained, and

plaintiff's Complaint must be dismissed. Alternatively, should the Court believe that there is an issue of fact regarding service, then it is respectfully requested that a traverse hearing be scheduled to determine whether service on Mr. Issler was proper.

Analysis

Pursuant to CPLR §3211(a)(8), a party can move to dismiss a cause of action against a defendant on the ground that the Court lacks personal jurisdiction over the defendant. As relevant herein, CPLR §308(2) provides that service upon a natural person be made:

> by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode 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 in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other. (*Emphasis added*)

If such service is not made within 120 days after the filing of the Summons and Complaint, the Court, upon motion, "shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (McKinney's CPLR §306-b). "Strict compliance with all the service dictates of CPLR 308 . . . is required in order to obtain jurisdiction" (*Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351 [1st Dept 2002], *citing Olsen v Haddad, M.D.*, 187 AD2d 375 [1st Dept 1992], *lv denied*, 81 NY2d 707 [1993]). Further, it is "well settled that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*Persaud* at 351, *citing McCray v Petrini*, 212 AD2d 676 [2d Dept 1995]).

According to the First Department, a "proper affidavit of a process server attesting to

personal delivery upon a defendant constitutes *prima facie* evidence of proper service" (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460, 2004 NY Slip Op 04234 [1st Dept 2004]). To defeat this *prima facie* showing, a defendant must provide a "sworn, nonconclusory denial of service" requiring a traverse hearing (*id.*). An attorney affirmation denying personal service on defendant is insufficient (*Walkes v Benoit*, 257 AD2d 508 [1st Dept 1999]).

Here, plaintiff provides an Affidavit of Service from Mr. Valderrama stating that on June 25, 2008, Mr. Valderrama served the Summons and Complaint on "Harry Issler" by delivering a copy of each to Mr. McHenry (a white male between the ages of 21 and 35 years old) at Mr. Issler's place of business, 110 E. 59th Street, New York, NY 10022. The Affidavit of Service also indicates that Mr. Valderrama mailed a copy of the same to Mr. Issler at Mr. Issler's place of business (*see Engel by Engel v Lichterman*, 62 NY2d 943, 479 NYS2d 188 [1984] ["A properly executed affidavit of service raises a presumption that a proper mailing occurred"]). Therefore, plaintiff has provided *prima facie* evidence of proper service (*Takeuchi v Silberman*, 41 AD3d 336, 839 NYS2d 71 [1st Dept 2007] ["Jurisdiction is demonstrated by plaintiffs' affidavit of service showing delivery to a person of suitable age and discretion at, and a mailing to, a place that defendant, in his cross motion to dismiss, acknowledged was his place of business"]).

Defendants do not provide any evidence that would demonstrate some failure on plaintiff's part to properly serve Mr. Issler personally, or that would raise an issue of fact requiring a traverse hearing. Defendants' argument that service on Mr. Issler was improper because Mr. McHenry was "neither employed by, affiliated with, nor associated with" Mr. Issler or the Issler Firm is insufficient to overcome plaintiff's *prima facie* showing of proper service of process. According to the First Department, "[a]ll that is required under CPLR 308 subdivision

2, with respect to personal service, is that process be served upon "a person of suitable age and discretion at the actual place of business," regardless of whether or not that person is an employee or is otherwise officially authorized to accept service on behalf of the defendant" (*Public Adm'r of the County of New York v Markowitz*, 163 AD2d 100, 101, 557 NYS2d 348, *citing Oxhandler v Sekhar*, 88 AD2d 817 [1st Dept 1982]). In *Oxhandler v Sekhar*, a case where the defendant shared offices with four other doctors, the Court held: "Although we accept that nurses did not regularly work in the doctors' offices, there is nothing in the testimony to exclude the reasonable inference that from time to time nurses would enter one or more of the doctors' offices in connection with hospital business. . . . It is entirely consistent with all of the testimony in the case that [the process server] indeed gave the summons and complaint to a nurse whom he reasonably believed to be associated with the doctor's office" (88 AD2d at 818).

Here, it is uncontested that Mr. McHenry was a mailroom employee at Mr. Issler's place of business. Thus, Mr. Valderrama could have be reasonably inferred that Mr. McHenry was associated with Mr. Issler. In addition, there is nothing in Mr. Issler's affidavit that would exclude such a reasonable inference.

Further, it is well settled that the "mere denial of receipt of service 'is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service'" (*In re de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008], *quoting De La Barrera v Handler*, 290 AD2d 476, 477 [2002]). In his affidavit, Mr. Issler states: "Following the service of the Summons and Complaint on the mailroom employee, and to date, *I have not received an additional copy of the Complaint mailed to my attention via first-class mail*" (Issler Aff., ¶ 6) (*emphasis added*). First, whether Mr. Issler *received* the Summons and Complaint is not dispositive (*Cohen v Shune*, 153

AD2d 35, 38 [1st Dept 1982] ["There is no additional requirement that the defendant actually receive the mailing before jurisdiction is acquired over him"]; *Oxhandler v Sekhar*, 88 AD2d 817, 818 [1st Dept 1982] [holding that a defendant's "testimony that he had not received in the mail a copy of the summons and complaint does not refute the claim of the process server that he had duly mailed a copy of the process"]). Second, Mr. Issler does not dispute that 110 E. 59th St., New York, New York 10022 is the address of his place of business. He does not contend that the Summons and Complaint were addressed to someone other than "Harry Issler." Finally, defendants' conclusory statement that plaintiff never mailed a separate copy of the Complaint to Mr. Issler's attention is insufficient to overcome plaintiff's *prima facie* showing that a copy of the Summons and Complaint was mailed to Mr. Issler's place of business (*Public Adm'r of the County of New York v Markowitz*, 163 AD2d 100, 101 [1st Dept 1990] ["The defendant's mere denial of receipt by mail at his home, without further probative facts, is insufficient to overcome the presumption of delivery which attaches to a properly mailed letter"]). Thus, Mr. Issler's affidavit is insufficient to rebut the presumption of proper service (*see e.g., Ortiz v Santiago*, 303 AD2d 1, 3-4 [1st Dept 2003]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Harry Issler and Harry Issler, PLLC for an order, pursuant to CPLR §3211(a)(8), dismissing the Complaint of Paul Garcia as against Mr. Issler is granted; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary

Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on September 15, 2009 at 2:15 P.M.; and it is further

ORDERED that movant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: July 20, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK